



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW SCHOOL
LIBRARY

HARVARD LAW LIBRARY

1268 United States
[Laws, etc.]
THE
63
c.1

FEDERAL STATUTES

ANNOTATED

SUPPLEMENT, 1912

Containing all the Laws of a Permanent and General Nature enacted
by the second and third sessions of the Sixty-first Congress
and by the Sixty-second Congress prior to Jan. 1, 1912

WITH

Supplemental Notes continuing the Annotation in the prior volumes

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. MCKINNEY

0

VOL. I

EDWARD THOMPSON COMPANY
NORTHPORT, LONG ISLAND, NEW YORK

1912

K1
65
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200

WS
132
903.12

**COPYRIGHT, 1912,
BY
EDWARD THOMPSON COMPANY.**

APR 25 1912

PREFACE.

THE statutes collected in this Supplement connect, without break or duplication, with those contained in the 1909 Supplement to **FEDERAL STATUTES, ANNOTATED**. They are the general, permanent, and public acts passed at the second and third sessions of the Sixty-first Congress, and all such acts passed at the first and second sessions of the Sixty-second Congress down to January 1, 1912. As in the 1909 Supplement, these acts are classified according to the scheme of titles in the main work, and in using this Supplement the reader should examine the corresponding title to locate the late, amendatory, or repealing legislation upon the topic under consideration. The cross-references are unusually abundant, and pains have been taken to prepare an index which is both exhaustive and usable. The notes of cases decided under these recent acts are necessarily few. Under the various sections of the new Judicial Code will be found full historical and explanatory notes which are intended to lighten the practitioner's labor in working under this important statute. The usual tables of titles, Revised Statutes sections, and statutes chronologically arranged are given at the beginning of the first volume.

The last half of the first volume and all of volume two are devoted to the supplemental notes. These connect with the notes in the original work and annotate the acts found in the 1909 Supplement. The aim has been to present all the decisions construing any federal statute which have appeared since the editorial work on the earlier volumes of the set was completed. The arrangement is by title, volume, page, and section as the statutes are found in preceding volumes, and the investigator has merely to turn to the corresponding title, volume, page, and section as shown by the captions in this Supplement to find the late cases. The omission of a title or of page and section captions implies that no new cases have been found.

The fresh notes on the Bankruptcy Act are specially voluminous. For this reason, and because the amendments to the original act are numerous, an exception has been made as to this title, and the entire act as amended is given in connection with the supplemental notes. Special mention should be made of the excellent work by the editor of this title, Mr. Edward M. Thornton.

TABLE OF TITLES AND CROSS-REFERENCES

UNDER WHICH THE STATUTES CONTAINED
IN THIS VOLUME ARE CLASSIFIED.

[*Italics indicate cross-references.*]

- | | |
|---|---|
| <i>Accidents</i> , 1. | CENSUS, 29. |
| <i>Accounts</i> , 1. | <i>Certificates of Indebtedness</i> , 31. |
| <i>Adulteration</i> , 1. | CHARITIES, 32. |
| AGRICULTURE, 2. | <i>Chinese Exclusion</i> , 33. |
| ALASKA, 10. | <i>Circuit Court of Appeals</i> , 33. |
| <i>Aliens</i> , 18. | <i>Circuit Courts</i> , 33. |
| <i>American International Red Cross</i> , 19. | <i>Citizenship</i> , 33. |
| <i>Appeal and Error</i> , 19. | CIVIL SERVICE, 34. |
| <i>Apportionment</i> , 19. | CLAIMS, 35. |
| <i>Appropriations</i> , 19. | <i>Clerks of Court</i> , 35. |
| <i>Arizona</i> , 19. | <i>Coal Lands</i> , 35. |
| <i>Army</i> , 19. | COINAGE, MINTS, AND ASSAY OFFICES, |
| <i>Art</i> , 19. | 36. |
| ARTICLES OF WAR, 20. | <i>Collection Districts</i> , 38. |
| <i>Asylums</i> , 20. | COLLISIONS, 39. |
| <i>Badges</i> , 20. | COMMERCE AND LABOR, 42. |
| BANKRUPTCY, 21. | <i>Commerce Court</i> , 42. |
| <i>Banks</i> , 26. | <i>Commissioner of Indian Affairs</i> , 42. |
| <i>Bonds</i> , 26. | <i>Commissioner of Lighthouses</i> , 42. |
| <i>Brokers</i> , 26. | <i>Commissioners</i> , 43. |
| <i>Buildings</i> , 26. | <i>Commission of Fine Arts</i> , 43. |
| <i>Bullion</i> , 26. | <i>Common Carriers</i> , 43. |
| <i>Bureau of Immigration and Naturaliza-</i> | CONGRESS, 43. |
| <i>tion</i> , 27. | <i>Conservation</i> , 44. |
| <i>Bureau of Lighthouses</i> , 27. | <i>Consuls</i> , 44. |
| <i>Bureau of Mines</i> , 27. | <i>Contracts</i> , 44. |
| <i>Bureau of Standards</i> , 27. | <i>Convict Labor</i> , 45. |
| <i>Campaign Contributions</i> , 27. | <i>Corporations</i> , 45. |
| <i>Canadian Reciprocity</i> , 27. | <i>Corrupt Practices</i> , 45. |
| <i>Canals</i> , 27. | COSTS, 45. |
| <i>Candidates for Congress</i> , 27. | <i>Courts</i> , 46. |
| <i>Capitol</i> , 28. | <i>Courts-martial</i> , 46. |
| <i>Carriers</i> , 28. | CRIMES AND OFFENSES, 46. |
| <i>Caveat</i> , 28. | CUSTOMS DUTIES, 47. |
| CEMETERIES, 28. | <i>Dams</i> , 65. |

TABLE OF TITLES AND CROSS-REFERENCES.

- Debts*, 65.
- Dental Corps*, 65.
- Departments*, 65.
- Desert Lands*, 65.
- DIPLOMATIC AND CONSULAR OFFICERS, 65.
- Discrimination*, 66.
- Disorderly Houses*, 66.
- District Attorneys*, 67.
- District Courts*, 67.
- Documents*, 67.
- EDUCATION, 67.
- ELECTIONS, 69.
- Electric Lines*, 75.
- Employers' Liability*, 76.
- Entry of Vessels*, 76.
- ESTIMATES, APPROPRIATIONS, AND REPORTS, 76.
- EVIDENCE, 78.
- Executive Departments*, 78.
- Executive Mansion*, 78.
- Express Companies*, 78.
- FALSE ACCOUNTS AND REPORTS, 79.
- FINE ARTS COMMISSION, 80.
- Fisheries*, 80.
- Forest Reserves*, 80.
- Forest Service*, 81.
- Fortifications*, 81.
- Freight Charges*, 81.
- Fungicide*, 81.
- Game*, 81.
- Gas Lands*, 81.
- Gas Pipe Lines*, 81.
- Glacier National Parks*, 81.
- Gold Coin*, 82.
- Grand Jury*, 82.
- Harbors*, 82.
- HAWAIIAN ISLANDS, 82.
- Hazing*, 88.
- Homestead*, 88.
- HOSPITALS AND ASYLUMS, 88.
- House of Representatives*, 89.
- IMMIGRATION, 89.
- Immunity*, 92.
- Imports and Exports*, 92.
- INDIANS, 93.
- Insane Persons*, 106.
- Insecticide Act*, 106.
- Interior Department*, 106.
- INTERNAL REVENUE, 107.
- INTERSTATE COMMERCE, 111.
- Irrigation*, 127.
- Isthmian Canal*, 127.
- Judges*, 127.
- JUDICIAL OFFICERS, 128.
- JUDICIARY, 131.
- Juries*, 259.
- LABOR, 260.
- Lading and Unlading*, 260.
- Lake Michigan*, 260.
- Land Districts and Offices*, 260.
- Letter Carriers*, 260.
- Library*, 261.
- Licenses*, 261.
- Liens*, 261.
- Light-Houses*, 261.
- LIGHTS AND BUOYS, 261.
- Locomotives*, 264.
- Long and Short Haul*, 265.
- Mail*, 265.
- Marine Corps*, 265.
- Marine Schools*, 265.
- Maritime Liens*, 265.
- Marshals*, 265.
- Master and Servant*, 265.
- MILITARY ACADEMY, 266.
- Military Secrets*, 267.
- MILITIA, 268.
- MINERAL LANDS, MINES, AND MINING, 270.
- Mints*, 272.
- Misbranding*, 272.
- Money*, 272.
- Money Orders*, 272.
- MONEY PAID INTO COURT, 273.
- Motor Boats*, 273.
- NATIONAL DEFENSE SECRETS, 274.
- National Forests*, 275.
- NATURALIZATION, 276.
- NAVAL ACADEMY, 279.
- Navigable Waters*, 279.
- Navigation*, 279.
- NAVY, 280.
- New Mexico*, 283.
- Nominations*, 284.
- Nurses*, 284.

TABLE OF TITLES AND CROSS-REFERENCES.

- Oaths*, 284.
Officers, 284.
Oil and Oil Lands, 284.
Oil Pipe Lines, 284.
Panama Canal, 284.
Pardon, 284.
Paris Green, 285.
Parks, 285.
Parole, 285.
 PATENTS, 285.
 PENSIONS, 287.
 PHILIPPINE ISLANDS, 288.
Photographs, 289.
Pictures, 289.
Pipe Lines, 289.
Political Contributions, 289.
Poor Persons, 289.
 PORTO RICO, 290.
Ports of Entry, 290.
 POSTAL SERVICE — POST-OFFICE DE-
 PARTMENT, 291.
Principal and Surety, 303.
Printing, 303.
 PRISONS AND PRISONERS, 304.
Prostitution, 307.
 PUBLIC CONTRACTS, 307.
 PUBLIC DEBT, 309.
 PUBLIC DOCUMENTS, 310.
 PUBLIC LANDS, 311.
 PUBLIC MONEY, 326.
 PUBLIC OFFICERS, 327.
 PUBLIC PARKS, 328.
 PUBLIC PRINTING, 330.
 PUBLIC PROPERTY, BUILDINGS, AND
 GROUNDS, 331.
 RAILROADS, 334.
Rates, 343.
Reciprocity with Canada, 343.
Reclamation Act, 343.
Red Cross, 343.
Reformatory, 343.
Reports, 343.
Reservoirs, 343.
 REVENUE MARINE — REVENUE CUTTER
 SERVICE, 344.
 RIVERS, HARBORS, AND CANALS, 345.
Rural Delivery, 351.
Safety Appliance Act, 351.
Sandwich Islands, 351.
Savings Depositories, 351
Schools, 352.
Seal Fisheries, 352.
Secrets of National Defense, 352.
 SHIPPING AND NAVIGATION, 352.
Silver Coin, 354.
Sleeping-car Companies, 354.
Soldiers' Homes, 355.
Special Agents, 355.
Spies, 355.
State Department, 355.
 STATES, 355.
Statistics, 383.
 STEAM VESSELS, 384.
Supervising Architect, 386.
Supplies, 386.
Supreme Court, 386.
 SURETY COMPANIES, 386.
Tariff, 387.
Taxes, 387.
 TELEGRAPH, TELEPHONE, CABLE, AND
 ELECTRIC LINES, 388.
 TERRITORIES, 389.
 TIMBER LANDS AND FOREST RESERVES,
 390.
 TONNAGE DUTIES, 395.
Town Sites, 395.
 TRADEMARKS, 396.
Transportation, 397.
 TREASURY DEPARTMENT, 398.
Trust Money, 399.
 UNIFORMS, 400.
United States Attorneys, 400.
United States Bonds, 400.
United States Commissioners, 400.
United States Courts, 400.
United States Prisons, 401.
Vessels, 401.
 WAR DEPARTMENT AND MILITARY ES-
 TABLISHMENT, 401.
Warrants, 412.
 WATERS, 413.
Watersheds, 419.
 WHITE SLAVE TRAFFIC, 419.
Wireless Telegraphy, 422.
Witnesses, 422.
Writs of Error, 422.

TABLE OF THE REVISED STATUTES SECTIONS

EXPRESSLY REPEALED, AMENDED, APPLIED, OR MENTIONED
IN THE ACTS COLLECTED IN THIS SUPPLEMENT.

| | | PAGE | | | PAGE |
|------------|-----|------|------------|-----|------|
| R. S. sec. | 1-5 | 250 | R. S. sec. | 676 | 252 |
| | 183 | 327 | | 677 | 252 |
| | 240 | 399 | | 678 | 252 |
| | 241 | 399 | | 679 | 252 |
| | 246 | 398 | | 680 | 252 |
| | 247 | 398 | | 681 | 252 |
| | 429 | 76 | | 682 | 252 |
| | 468 | 102 | | 683 | 252 |
| | 469 | 102 | | 684 | 252 |
| | 530 | 252 | | 685 | 253 |
| | 531 | 252 | | 686 | 253 |
| | 532 | 252 | | 687 | 253 |
| | 533 | 252 | | 688 | 253 |
| | 534 | 252 | | 689 | 253 |
| | 535 | 252 | | 690 | 253 |
| | 536 | 252 | | 691 | 253 |
| | 537 | 252 | | 692 | 253 |
| | 538 | 252 | | 693 | 253 |
| | 539 | 252 | | 694 | 253 |
| | 540 | 252 | | 695 | 253 |
| | 541 | 252 | | 696 | 253 |
| | 542 | 252 | | 697 | 253 |
| | 543 | 252 | | 698 | 253 |
| | 544 | 252 | | 699 | 253 |
| | 545 | 252 | | 700 | 253 |
| | 546 | 252 | | 701 | 253 |
| | 547 | 252 | | 702 | 253 |
| | 548 | 252 | | 703 | 253 |
| | 549 | 252 | | 704 | 253 |
| | 550 | 252 | | 705 | 253 |
| | 551 | 252 | | 706 | 253 |
| | 552 | 252 | | 707 | 253 |
| | 553 | 252 | | 708 | 253 |
| | 554 | 252 | | 709 | 253 |
| | 555 | 252 | | 710 | 253 |
| | 556 | 252 | | 711 | 253 |
| | 557 | 252 | | 712 | 253 |
| | 558 | 252 | | 713 | 253 |
| | 559 | 252 | | 714 | 253 |
| | 560 | 252 | | 715 | 253 |
| | 562 | 252 | | 716 | 253 |
| | 563 | 252 | | 717 | 253 |
| | 564 | 252 | | 718 | 253 |
| | 567 | 252 | | 719 | 253 |
| | 568 | 252 | | 720 | 253 |
| | 569 | 252 | | 721 | 253 |
| | 570 | 252 | | 722 | 253 |
| | 571 | 252 | | 723 | 253 |
| | 572 | 252 | | 724 | 253 |
| | 573 | 252 | | 725 | 253 |
| | 574 | 252 | | 726 | 253 |
| | 575 | 252 | | 727 | 253 |

TABLE OF REVISED STATUTES SECTIONS.

| R. S. sec. | PAGE | R. S. sec. | PAGE |
|------------|------|------------|------|
| 629..... | 253 | 705..... | 253 |
| 630..... | 253 | 706..... | 253 |
| 631..... | 253 | 707..... | 253 |
| 632..... | 253 | 708..... | 253 |
| 633..... | 253 | 709..... | 253 |
| 634..... | 253 | 710..... | 253 |
| 635..... | 253 | 711..... | 253 |
| 636..... | 253 | 712..... | 253 |
| 637..... | 253 | 713..... | 253 |
| 638..... | 253 | 714..... | 253 |
| 639..... | 253 | 716..... | 253 |
| 640..... | 253 | 717..... | 253 |
| 641..... | 253 | 718..... | 253 |
| 642..... | 253 | 719..... | 253 |
| 643..... | 253 | 720..... | 253 |
| 644..... | 253 | 723..... | 253 |
| 645..... | 253 | 725..... | 253 |
| 646..... | 253 | 726..... | 253 |
| 647..... | 253 | 727..... | 253 |
| 650..... | 253 | 728..... | 253 |
| 651..... | 253 | 729..... | 253 |
| 652..... | 253 | 730..... | 253 |
| 653..... | 253 | 731..... | 253 |
| 654..... | 253 | 732..... | 253 |
| 655..... | 253 | 733..... | 254 |
| 656..... | 253 | 734..... | 254 |
| 657..... | 253 | 735..... | 254 |
| 658..... | 253 | 736..... | 254 |
| 659..... | 253 | 737..... | 254 |
| 660..... | 253 | 738..... | 254 |
| 661..... | 253 | 739..... | 254 |
| 662..... | 253 | 740..... | 254 |
| 663..... | 253 | 741..... | 254 |
| 664..... | 253 | 742..... | 254 |
| 665..... | 253 | 743..... | 254 |
| 666..... | 253 | 744..... | 254 |
| 667..... | 253 | 745..... | 254 |
| 668..... | 253 | 746..... | 254 |
| 669..... | 253 | 747..... | 254 |
| 670..... | 253 | 748..... | 254 |
| 671..... | 253 | 749..... | 254 |
| 672..... | 253 | 773..... | 128 |
| 673..... | 253 | 800..... | 254 |
| 674..... | 253 | 801..... | 254 |
| 675..... | 253 | 802..... | 254 |
| 676..... | 253 | 803..... | 254 |
| 677..... | 253 | 804..... | 254 |
| 678..... | 253 | 805..... | 254 |
| 679..... | 253 | 806..... | 254 |
| 680..... | 253 | 807..... | 254 |
| 681..... | 253 | 808..... | 254 |
| 682..... | 253 | 809..... | 254 |
| 683..... | 253 | 810..... | 254 |
| 684..... | 253 | 811..... | 254 |
| 685..... | 253 | 812..... | 254 |
| 686..... | 253 | 813..... | 254 |
| 687..... | 253 | 814..... | 254 |
| 688..... | 253 | 815..... | 254 |
| 689..... | 253 | 816..... | 254 |
| 690..... | 253 | 817..... | 254 |
| 691..... | 253 | 818..... | 254 |
| 692..... | 253 | 819..... | 254 |
| 693..... | 253 | 820..... | 254 |
| 694..... | 253 | 821..... | 254 |
| 695..... | 253 | 922..... | 254 |
| 696..... | 253 | 860..... | 78 |
| 697..... | 253 | 996..... | 273 |
| 699..... | 253 | 1049..... | 254 |
| 702..... | 253 | 1050..... | 254 |
| 703..... | 253 | 1051..... | 254 |
| 704..... | 253, | 1052..... | 254 |

TABLE OF REVISED STATUTES SECTIONS.

| R. S. sec. | PAGE | R. S. sec. | PAGE |
|----------------|----------------|-----------------------|----------|
| 1053..... | 254 | 1972..... | 13 |
| 1054..... | 254 | 1972 | 140 |
| 1055..... | 254 | 2091..... | 102 |
| 1056..... | 254 | 2275..... | 361, 372 |
| 1057..... | 254 | 2276..... | 361, 372 |
| 1058..... | 254 | 2289..... | 317 |
| 1059..... | 254 | 2290..... | 316 |
| 1060..... | 254 | 2291..... | 317 |
| 1061..... | 254 | 2325..... | 13 |
| 1062..... | 254 | 2326..... | 13 |
| 1063..... | 254 | 2479..... | 361, 373 |
| 1064..... | 254 | 2586..... | 50 |
| 1065..... | 254 | 2587..... | 50 |
| 1066..... | 254 | 2649..... | 54 |
| 1067..... | 254 | 2776..... | 53 |
| 1068..... | 254 | 2871..... | 53 |
| 1069..... | 254 | 3255..... | 109 |
| 1070..... | 254 | 3284..... | 108 |
| 1071..... | 254 | 3285..... | 108 |
| 1072..... | 254 | 3287..... | 110 |
| 1073..... | 254 | 3484..... | 110 |
| 1074..... | 254 | 3536..... | 37 |
| 1075..... | 254 | 3548..... | 38 |
| 1076..... | 254 | 3549..... | 38 |
| 1077..... | 254 | 3618..... | 102 |
| 1078..... | 254 | 3709..... | 102, 307 |
| 1079..... | 254 | 3720..... | 76 |
| 1080..... | 254 | 3734..... | 331 |
| 1081..... | 254 | 3744..... | 349 |
| 1082..... | 254 | 3928..... | 294 |
| 1083..... | 254 | 3939..... | 294 |
| 1084..... | 254 | 4035..... | 293 |
| 1085..... | 254 | 4405..... | 385 |
| 1086..... | 254 | 4421..... | 384 |
| 1087..... | 254 | 4423..... | 385 |
| 1088..... | 254 | 4424..... | 385 |
| 1091..... | 254 | 4426..... | 385 |
| 1092..... | 254 | 4453..... | 385 |
| 1093..... | 254 | 4498..... | 385 |
| 1330..... | 402 | 4653..... | 264 |
| 1342..... | 20 | 4654..... | 264 |
| 1661..... | 268, 269, 410 | 4655..... | 264 |
| 1709..... | 66 | 4656..... | 264 |
| 1765..... | 326 | 4657..... | 264 |
| 1841-1891..... | 82 | 4658..... | 264 |
| 1910..... | 82 | 4659..... | 264 |
| 1912..... | 82 | 4660..... | 264 |
| 1956..... | 11 | 4663..... | 264 |
| 1959..... | 11 | 4664..... | 264 |
| 1960..... | 12 | 4665..... | 264 |
| 1961..... | 12 | 4666..... | 264 |
| 1962..... | 13 | 4667..... | 264 |
| 1963..... | 13 | 4669..... | 264 |
| 1964..... | 13 | 4670..... | 264 |
| 1965..... | 13 | 4671..... | 264 |
| 1966..... | 13 | 4902..... | 285 |
| 1967..... | 13 | 4934..... | 285 |
| 1968..... | 13 | 5193..... | 37 |
| 1969..... | 13 | 5352..... | 248, 251 |
| 1970..... | 13 | 5548..... | 306 |
| 1971..... | 13 | | |

TABLE OF STATUTES.

SHOWING WHERE THE ACTS EMBRACED IN THIS SUPPLEMENT
ARE TO BE FOUND, CHRONOLOGICALLY ARRANGED.

| Act of | PAGE | Act of | PAGE |
|--|----------|---|------|
| 1910 Jan. 28, c. 14, § 1-2..... | 312 | 1910 June 17, c. 297, § 4-5..... | 307 |
| Feb. 4, c. 25, § 1-3..... | 309 | June 17, c. 298, § 1-6..... | 316 |
| Feb. 15, c. 27, § 1..... | 313 | June 17, c. 301, § 1-14..... | 262 |
| Feb. 15, c. 28, § 1..... | 313 | June 18, c. 309, § 1-5 (and part of § 6)..... | 215 |
| Feb. 15, Res. No. 9..... | 29 | June 18, c. 309, § 6-16, 18..... | 111 |
| Feb. 25, c. 63, § 1..... | 29 | June 18, c. 309, § 17..... | 242 |
| Mar. 2, c. 71, § 1-2..... | 398 | June 20, c. 310, § 1-35..... | 356 |
| Mar. 5, c. 82, § 1..... | 257 | June 22, c. 311, § 1-2..... | 49 |
| Mar. 8, c. 86, § 1..... | 395 | June 22, c. 318, § 1-3..... | 317 |
| Mar. 8, c. 88, § 1-2..... | 20 | June 22, c. 320, § 1-3..... | 319 |
| Mar. 12, c. 93, § 1..... | 389 | June 22, c. 329, § 1-2..... | 108 |
| Mar. 15, c. 96, § 1..... | 314 | June 22, c. 331, § 1..... | 76 |
| Mar. 15, c. 97, § 1-3..... | 314 | June 22, Res. No. 34..... | 46 |
| Mar. 23, c. 109, § 1..... | 386 | June 23, c. 355, § 1..... | 51 |
| Mar. 23, c. 115, § 1..... | 402 | June 23, c. 356, § 1..... | 109 |
| Mar. 24, Res. No. 17..... | 31 | June 23, c. 357, § 1..... | 319 |
| Mar. 26, c. 128, § 1-2..... | 89 | June 23, c. 359, § 1..... | 413 |
| April 4, c. 140, § 1..... | 94 | June 23, c. 360, § 1..... | 345 |
| April 5, c. 143, § 1-2..... | 335 | June 23, c. 372, § 1-2..... | 32 |
| April 9, c. 152, § 1..... | 128 | June 23, c. 373, § 1-5..... | 352 |
| April 9, Res. No. 19..... | 288 | June 24, c. 378, § 1..... | 280 |
| April 12, c. 155, § 1-5..... | 315 | June 24, c. 379, § 1-4..... | 353 |
| April 12, c. 157, § 1-2..... | 279 | June 24, c. 380, § 1..... | 294 |
| April 14, c. 160, § 1-6..... | 335 | June 25, c. 382, § 2-5..... | 349 |
| April 19, c. 174, § 1..... | 266, 405 | June 25, c. 383, § 1-35..... | 331 |
| April 21, c. 182, § 1-3..... | 344 | June 25, c. 384, § 1..... 28, 88, 310, 330, 399, 405 | |
| April 21, c. 183, § 1-10..... | 10 | June 25, c. 384, § 1-2, 5..... | 349 |
| April 21, c. 184, § 1..... | 268 | June 25, c. 384, § 1, 6..... | 77 |
| April 21, c. 185, § 1..... | 268 | June 25, c. 384, § 7..... | 354 |
| April 26, c. 191, § 1-14..... | 2 | June 25, c. 384, § 8..... | 384 |
| April 27, c. 193, § 1-2..... | 48 | June 25, c. 384, § 9..... | 332 |
| May 6, c. 199, § 1..... | 257 | June 25, c. 385, § 1..... | 399 |
| May 6, c. 200, § 1..... | 405 | June 25, c. 386, § 1-17..... | 294 |
| May 6, c. 204, § 1..... | 96 | June 25, c. 387, § 1-10..... | 304 |
| May 6, c. 208, § 1-8..... | 337 | June 25, c. 388, § 1-2..... | 65 |
| May 7, c. 216, § 1..... | 78 | June 25, c. 392, § 1-10..... | 69 |
| May 11, c. 226, § 1-2..... | 328 | June 25, c. 393, § 1-2..... | 405 |
| May 12, c. 230, § 1..... | 292 | June 25, c. 395, § 1-8..... | 419 |
| May 13, c. 236, § 1..... | 107 | June 25, c. 397, § 1..... | 128 |
| May 16, c. 240, § 1-6..... | 270 | June 25, c. 398, § 1..... | 51 |
| May 17, c. 243, § 1-2..... | 80 | June 25, c. 401, § 1-3..... | 276 |
| May 23, c. 254, § 1..... | 293 | June 25, c. 402, § 1..... | 384 |
| May 23, c. 255, § 1..... | 293 | June 25, c. 406, § 1-4..... | 320 |
| May 26, c. 256, § 1..... | 7 | June 25, c. 407, § 1-6..... | 414 |
| May 27, c. 258, § 1-9..... | 82 | June 25, c. 409, § 1..... | 203 |
| June 7, c. 265, § 1..... | 13 | June 25, c. 411, § 1..... | 129 |
| June 9, c. 268, § 1-10..... | 39 | June 25, c. 412, § 1-14..... | 21 |
| June 10, c. 283, § 1-5..... | 48 | June 25, c. 413, § 2..... | 287 |
| June 11, c. 284, § 1-2..... | 316 | June 25, c. 414, § 1-3..... | 285 |
| June 13, c. 289, § 1..... | 49 | June 25, c. 421, § 1-3..... | 321 |
| June 14, c. 290, § 1..... | 290 | June 25, c. 422, § 1-11..... | 14 |
| June 17, c. 297, § 1..... 34, 42, 87, 107, 287, 394 | | | |

TABLE OF STATUTES.

| Act of | PAGE | Act of | PAGE |
|----------------------------------|------|---|---------|
| 1910 June 25, c. 423, § 1..... | 286 | 1911 Mar. 2, c. 201, § 1..... | 271 |
| June 25, c. 424, § 1-2..... | 18 | Mar. 3, c. 207, § 1..... | 267 |
| June 25, c. 428, § 1..... | 256 | Mar. 3, c. 209, § 1..... | 407 |
| June 25, c. 431, § 1-33..... | 96 | Mar. 3, c. 210, § 1, 27-28..... | 103 |
| June 25, c. 432, § 1..... | 322 | Mar. 3, c. 217, § 1..... | 54 |
| June 25, c. 434, § 1..... | 300 | Mar. 3, c. 223, § 1..... | 66 |
| June 25, c. 435, § 1..... | 45 | Mar. 3, c. 224, § 1..... | 273 |
| June 25, c. 439, § 1..... | 310 | Mar. 3, c. 225, § 1-2..... | 324 |
| June 25, Res. No. 36, § 1-2..... | 271 | Mar. 3, c. 226, § 1-3..... | 274 |
| June 25, Res. No. 38..... | 35 | Mar. 3, c. 228, § 1..... | 54 |
| June 25, Res. No. 40..... | 322 | Mar. 3, c. 230, § 1..... | 129 |
| Dec. 23, c. 7, § 1..... | 323 | Mar. 3, c. 231, § 1-301..... | 132-252 |
| 1911 Jan. 19, c. 22, § 1..... | 406 | Mar. 4, c. 237, § 1....42, 77, 110, 385 | 385 |
| Jan. 23, c. 25, § 1-2..... | 51 | Mar. 4, c. 238, § 1.....8, 388, 393 | 393 |
| Feb. 2, c. 32, § 1-3..... | 416 | Mar. 4, c. 239, § 1..... | 282 |
| Feb. 3, c. 33, § 1..... | 129 | Mar. 4, c. 240, § 1..... | 37 |
| Feb. 3, c. 34, § 1..... | 323 | Mar. 4, c. 241, § 1-8..... | 300 |
| Feb. 7, c. 39, § 1..... | 259 | Mar. 4, c. 242, § 1..... | 411 |
| Feb. 13, c. 43, § 1..... | 327 | Mar. 4, c. 252, § 1..... | 411 |
| Feb. 13, c. 46, § 1-6..... | 51 | Mar. 4, c. 261, § 1-2..... | 324 |
| Feb. 13, c. 47, § 1-2..... | 255 | Mar. 4, c. 265, § 1-4..... | 67 |
| Feb. 13, c. 49, § 1..... | 417 | Mar. 4, c. 266, § 1..... | 412 |
| Feb. 13, c. 53, § 1-2..... | 323 | Mar. 4, c. 267, § 1..... | 37 |
| Feb. 15, c. 81, § 1-3..... | 288 | Mar. 4, c. 268, § 1-2..... | 37 |
| Feb. 16, c. 87, § 1..... | 300 | Mar. 4, c. 269, § 1..... | 130 |
| Feb. 17, c. 103, § 1-10..... | 339 | Mar. 4, c. 270, § 1..... | 79 |
| Feb. 18, c. 113, § 1..... | 396 | Mar. 4, c. 280, § 1..... | 18 |
| Feb. 21, c. 141, § 1-3..... | 417 | Mar. 4, c. 285, § 1....55, 92, 130, | |
| Feb. 21, c. 144, § 1..... | 129 | 260, 325, 326, 333, 344 | 344 |
| Feb. 23, c. 148, § 1-2..... | 258 | Mar. 4, c. 285, § 1-2, 5-6..... | 350 |
| Feb. 24, c. 149, § 1..... | 109 | July 26, c. 3, § 1-3..... | 55 |
| Feb. 24, c. 151, § 1..... | 278 | July 27, c. 4, § 1..... | 63 |
| Feb. 24, c. 155, § 1..... | 418 | Aug. 8, c. 5, § 1-5..... | 43 |
| Feb. 27, c. 166, § 5..... | 406 | Aug. 17, c. 22, § 1-3..... | 325 |
| Feb. 27, Res. No. 13..... | 287 | Aug. 17, c. 23, § 1..... | 64 |
| Mar. 1, c. 186, § 1-14..... | 390 | Aug. 19, c. 33, § 1-2..... | 71 |
| Mar. 1, c. 187, § 1..... | 400 | Aug. 21, Res. No. 7..... | 325 |
| Mar. 2, c. 190, § 1..... | 36 | Aug. 21, Res. No. 8, § 1-7..... | 379 |
| Mar. 2, c. 191, § 1-2..... | 53 | Aug. 22, c. 42, § 1..... | 283 |
| Mar. 2, c. 192, § 9..... | 332 | Aug. 22, c. 43, § 1..... | 389 |
| Mar. 2, c. 195, § 1..... | 350 | Dec. 21, c. —, § 1..... | 141 |
| Mar. 2, c. 198, § 1..... | 109 | Dec. 21, c. —, § 1..... | 159 |
| Mar. 2, c. 199, § 1..... | 110 | Dec. 22, c. —, § 1 (two acts).175, 412 | 412 |

FEDERAL STATUTES, ANNOTATED.

SUPPLEMENT.

ACCIDENTS.

See RAILROADS.

ACCOUNTS.

See FALSE ACCOUNTS AND REPORTS.

ADULTERATION.

Of insecticides, see AGRICULTURE.

AGRICULTURE.

Act of April 26, 1910, Ch. 191, 2.

- Sec. 1. Insecticide Act—Manufacture of Adulterated or Misbranded Articles Unlawful—Punishment for, 2.*
- 2. Shipment in Interstate or Foreign Commerce Prohibited—Punishment for Shipping, Delivery, etc.—Articles Made for Foreign Purchasers, 3.*
 - 3. Uniform Regulations to Be Made for Examinations, etc., 3.*
 - 4. Examination by Department of Agriculture—Notice if Adulterated, etc.—Hearings, etc.—Publication. 4.*
 - 5. Prosecutions for Violations, 4.*
 - 6. Definitions, 4.*
 - 7. Adulterated Articles, 4.*
 - 8. Misbranded Articles—Application of Term—Misleading Statements—Statements Required—Inert Ingredients, 5.*
 - 9. Dealer's—Protection of Guaranty by Manufacturer, etc.—Liability of Guarantor, 6.*
 - 10. Original Packages—Seizure for Transporting, etc., in Interstate and Foreign Commerce—Disposal of Seized Articles—Conditional Delivery to Owner—Procedure, 6.*
 - 11. Imported Articles—Examination of Samples—Exclusion if Adulterated, etc.—Destruction, etc.—Provisional Delivery to Consignee, 6.*
 - 12. Construction of Terms, etc., Used, 7.*
 - 13. Title, 7.*
 - 14. Effect, 7.*

Act of May 26, 1910, Ch. 256, 7.

- Sec. 1. Scientific Work—Maximum Salary for, 7.*
Diseased Cattle—Fences on International Boundary, to Keep Out, 7.
Detailed Estimates Required for All Employees, 7.

Act of March 4, 1911, Ch. 238, 8.

- Sec. 1. Deputy Disbursing Clerk—Authority, Bond, etc., 8.*
Details to and from Other Bureaus, 8.
Expenses of Administration, etc.—Statements, 8.
Detailed Statements, etc., of Lump-sum Appropriations, Repealed, 8.
Forest Service—Statement of Expenditures, 1900 to 1910—Details Required, 8.
Employees Allowed Expense of Transferring Property When Stations Changed, 9.

CROSS-REFERENCES.

Agricultural Entries on Coal Lands, see PUBLIC LANDS.
National Forests, Allotments to Indians, see INDIANS.
And see generally, TIMBER LANDS AND FOREST RESERVES.

An Act For preventing the manufacture, sale, or transportation of adulterated or misbranded Paris greens, lead arsenates, and other insecticides, and also fungicides, and for regulating traffic therein, and for other purposes.

[Act of April 26, 1910, ch. 191.]

[SEC. 1.] [Insecticide act—manufacture of adulterated or misbranded articles unlawful—punishment for.] That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any insecti-

cide, Paris green, lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not to exceed two hundred dollars for the first offense, and upon conviction for each subsequent offense be fined not to exceed three hundred dollars, or sentenced to imprisonment for not to exceed one year, or both such fine and imprisonment, in the discretion of the court. [36 Stat. L. 331.]

SEC. 2. [*Shipment in interstate or foreign commerce prohibited — punishment for shipping, delivery, etc. — articles made for foreign purchasers.*] That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any insecticide, or Paris green, or lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver, to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or any Territory of the United States any such adulterated or misbranded insecticide, or Paris green, or lead arsenate, or fungicide, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars, or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser; but if said articles shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act. [36 Stat. L. 331.]

SEC. 3. [*Uniform regulations to be made for examinations, etc.*] That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides manufactured or offered for sale in the District of Columbia or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country or intended for shipment to any foreign country, or which may be submitted for examination by the director of the experiment station of any State, Territory, or the District of Columbia (acting under the direction of the Secretary of Agriculture), or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country. [36 Stat. L. 331.]

SEC. 4. [*Examination by Department of Agriculture — notice if adulterated, etc. — hearings, etc. — publication.*] That the examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides shall be made in the Department of Agriculture, by such existing bureau or bureaus as may be directed by the Secretary, for the purpose of determining from such examination whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens are adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid. [36 Stat. L. 332.]

SEC. 5. [*Prosecutions for violations.*] That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any director of experiment station or agent of any State, Territory, or the District of Columbia, under authority of the Secretary of Agriculture, shall present satisfactory evidences of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided. [36 Stat. L. 332.]

SEC. 6. [*Definitions.*] That the term "insecticide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects which may infest vegetation, man or other animals, or households, or be present in any environment whatsoever. The term "Paris green" as used in this Act shall include the product sold in commerce as Paris green and chemically known as the acetoarsenite of copper. The term "lead arsenate" as used in this Act shall include the product or products sold in commerce as lead arsenate and consisting chemically of products derived from arsenic acid (H_3AsO_4) by replacing one or more hydrogen atoms by lead. That the term "fungicide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all fungi that may infest vegetation or be present in any environment whatsoever. [36 Stat. L. 332.]

SEC. 7. [*Adulterated articles.*] That for the purpose of this Act an article shall be deemed to be adulterated —

In the case of Paris green: First, if it does not contain at least fifty per centum of arsenious oxide; second, if it contains arsenic in water-soluble forms equivalent to more than three and one-half per centum of arsenious oxide; third, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

In the case of lead arsenate: First, if it contains more than fifty per centum of water; second, if it contains total arsenic equivalent to less than twelve and

one-half per centum of arsenic oxid (As_2O_3); third, if it contains arsenic in water-soluble forms equivalent to more than seventy-five one-hundredths per centum of arsenic oxid (As_2O_3); fourth, if any substances have been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength: *Provided, however,* That extra water may be added to lead arsenate (as described in this paragraph) if the resulting mixture is labeled lead arsenate and water, the percentage of extra water being plainly and correctly stated on the label.

In the case of insecticides or fungicides, other than Paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it is intended for use on vegetation and shall contain any substance or substances which, although preventing, destroying, repelling, or mitigating insects, shall be injurious to such vegetation when used. [36 Stat. L. 332.]

SEC. 8. [*Misbranded articles — application of term — misleading statements — statements required — inert ingredients.*] That the term "misbranded" as used herein shall apply to all insecticides, Paris greens, lead arsenates, or fungicides, or articles which enter into the composition of insecticides or fungicides, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to all insecticides, Paris greens, lead arsenates, or fungicides which are falsely branded as to the State, Territory, or country in which they are manufactured or produced.

That for the purpose of this Act an article shall be deemed to be misbranded —

In the case of insecticides, Paris greens, lead arsenates, and fungicides: First, if it be an imitation or offered for sale under the name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package; third, if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

In the case of insecticides (other than Paris greens and lead arsenates) and fungicides: First, if it contains arsenic in any of its combinations or in the elemental form and the total amount of arsenic present (expressed as per centum of metallic arsenic) is not stated on the label; second, if it contains arsenic in any of its combinations or in the elemental form and the amount of arsenic in water-soluble forms (expressed as per centum of metallic arsenic) is not stated on the label; third, if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: *Provided, however,* That in lieu of naming and stating the percentage amount of each and every inert ingredient the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present. [36 Stat. L. 333.]

SEC. 9. [*Dealers — protection of guaranty by manufacturer, etc. — liability of guarantor.*] That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer under the provisions of this Act. [36 Stat. L. 334.]

SEC. 10. [*Original packages. — seizure for transporting, etc., in interstate and foreign commerce — disposal of seized articles — conditional delivery to owner — procedure.*] That any insecticide, Paris green, lead arsenate, or fungicide that is adulterated or misbranded within the meaning of this Act and is being transported from one State, Territory, or District, to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or any Territory of the United States, or if it be imported from a foreign country for sale, shall be liable to be proceeded against in any district court of the United States within the district wherein the same is found and seized for confiscation by a process of libel for condemnation.

And if such article is condemned as being adulterated or misbranded, within the meaning of this Act, the same shall be disposed of by destruction or sale as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act or the laws of any State, Territory, or District, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. [36 Stat. L. 334.]

SEC. 11. [*Imported articles — examination of samples — exclusion if adulterated, etc. — destruction, etc. — provisional delivery to consignee.*] That the Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, from time to time, samples of insecticides, Paris greens, lead arsenates, and fungicides which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony; and if it appear from the examination of such samples that any insecticide, or Paris green, or lead arsenate, or fungicide offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be

refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction or [of] any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee. [36 Stat. L. 334.]

SEC. 12. [*Construction of terms, etc., used.*] That the term "Territory," as used in this Act, shall include the District of Alaska and the insular possessions of the United States. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the other person. [36 Stat. L. 335.]

SEC. 13. [*Title.*] That this Act shall be known and referred to as "The insecticide Act of 1910." [36 Stat. L. 335.]

SEC. 14. [*Effect.*] That this Act shall be in force and effect from and after the first day of January, nineteen hundred and eleven. [36 Stat. L. 335.]

An Act Making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eleven.

[Act of May 28, 1910, ch. 256.]

[SEC. 1.] [*Scientific work — maximum salary for.*] * * * That hereafter the maximum salary of any scientific investigator in the city of Washington, or other employee engaged in scientific work, paid from the general appropriation, shall not exceed four thousand dollars per annum. [36 Stat. L. 440.]

[*Diseased cattle — fences on international boundary, to keep out.*] Hereafter the Secretary of Agriculture may permit the erection of fences along international boundary lines, but entirely within the territory of the United States, for the purpose of keeping out diseased animals. [36 Stat. L. 440.]

[*Detailed estimates required for all employees.*] The Secretary of Agriculture for the fiscal year nineteen hundred and twelve, and annually thereafter, shall transmit to the Secretary of the Treasury for submission to Congress in the Book of Estimates detailed estimates for all executive officers, clerks, and

employees below the grade of clerk, indicating the salary or compensation of each, necessary to be employed by the various bureaus, offices, and divisions of the Department of Agriculture. [36 Stat. L. 440.]

An Act Making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and twelve.

[Act of March 4, 1911, ch. 238.]

[SEC. 1.] [*Deputy disbursing clerk — authority, bond, etc.*] * * * The deputy disbursing clerk herein provided for shall hereafter have authority to sign checks in the name of the disbursing clerk; he shall give bond to the United States in such sum as the Secretary of the Treasury may require, and when so acting for the disbursing clerk shall be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases of the disbursing clerk for whom he acts, and the official bond of the disbursing clerk executed shall also be made to cover and apply to the acts of the deputy disbursing clerk. [36 Stat. L. 1259.]

[*Details to and from other bureaus.*] * * * That hereafter employees of the Library may be temporarily detailed by the Secretary of Agriculture for library service in the bureaus and offices of the department, and employees of the bureaus and offices of the department engaged in library work may also be temporarily detailed to the Library. [36 Stat. L. 1261.]

[*Expenses of administration, etc. — statements.*] * * * To enable the Secretary of Agriculture to enforce the provisions of the above Acts, relative to their administration, including rent and the employment of clerks, assistants, and other persons in the city of Washington and elsewhere, freight and express charges, official traveling expenses, office fixtures, supplies, apparatus, telegraph and telephone service, gas, and electric current, thirty-seven thousand five hundred dollars; and the Secretary of Agriculture shall prescribe the form of the annual financial statement required under the above acts, ascertain whether the expenditures are in accordance with their provisions, and make report thereon to Congress; [36 Stat. L. 1262.]

[*Detailed statements, etc., of lump-sum appropriations, repealed.*] * * * That the provisions of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight," requiring the Secretary of Agriculture to submit to Congress classified and detailed reports of receipts and classified and detailed estimates and reports of expenditures by the Forest Service, and classified and detailed estimates and reports of every subject of expenditure by the Agricultural Department; statements showing all appointments, promotions, or other changes made in the salaries paid from lump funds, are hereby repealed. [36 Stat. L. 1264.]

[*Forest Service — statement of expenditures, 1900 to 1910 — details required.*] * * * That the Secretary of Agriculture shall prepare or cause to be prepared a statement showing all expenditures made each fiscal year by, through, or on account of the Forest Service from the year nineteen hundred to the year nineteen hundred and ten, both inclusive, stated as follows:

For permanent forest improvements in each State and Territory; for salaries and other compensation of inspectors, forest supervisors, forest rangers,

deputy forest rangers, assistant forest rangers, stating the number of each class; for part time force to meet emergencies in extinguishing forest fires; for railroad fares, automobile hire, carriage and horse hire; for hotel bills; for freight and express; for telephone and telegraph; for statutory and lump-fund salaries of officers and clerks and the number thereof in the city of Washington, and all other expenditures made for the conduct of the bureau in the city of Washington, including rent, fuel, stationery, furniture, furnishings, typewriters, giving number purchased, miscellaneous supplies, giving classification of same; for salaries, clerk hire, hotel bills, automobile, carriage and horse hire, miscellaneous supplies, giving classification thereof, office supplies, and all other expenditures made in connection with the conduct of the Forest Service outside of the city of Washington; for compensation of persons engaged in writing descriptive or other matter for publication, giving names of persons so employed and amount paid to each therefor, and names of publications accepting such matter for publication and amount paid to each therefor; for photographs, lantern slides, lecture equipment and lecturers; for printing and binding; said statement to show also for the same period of time the amounts collected by the Forest Service for timber and the use of the forests. [36 Stat. L. 1265.]

[*Employees allowed expense of transferring property when stations changed.*] That hereafter officers and employees of the Department of Agriculture transferred from one official station to another for permanent duty, when authorized by the Secretary of Agriculture, may be allowed actual traveling expenses, including charges for the transfer of their effects and personal property used in official work, under such rules and regulations as may be prescribed by the Secretary of Agriculture. [36 Stat. L. 1265.]

ALASKA.

Act of April 21, 1910, Ch. 183, 10.

Sec. 1. Alaska Seal Fisheries, etc.—Secretary of Commerce and Labor to Make Regulations, 10.

2. *Sales, 11.*
3. *Employment of Pribilof Natives, 11.*
4. *Killing Seals and Other Fur-bearing Animals in Alaska Forbidden, 11.*
5. *Pribilof Islands Made a Special Reservation—Landing, etc., on, Unlawful, 11.*
6. *Restriction on Killing Seals, 12.*
7. *Restriction on Female or Young Seals, etc., 12.*
8. *Fur Seals—Killing, etc., in Pacific Ocean Prohibited, 12.*
9. *Additional Officers, etc., Authorized—Purchase of Right of Present Lessee, etc.—Maintenance of Depots, etc.—Food, etc., to Natives, 13.*
10. *Law Repealed—Effect—Appropriation, 13.*

Act of June 7, 1910, Ch. 265, 13.

Public Lands—Time Extended for Filing Adverse Mineral Claims, etc., in Alaska, 13.

Act of June 25, 1910, Ch. 422, 14.

Sec. 1. Miner's Labor Lien—Persons Entitled, 14.

2. *Notice to Be Filed, 14.*
3. *Recording, etc., 15.*
4. *Time to Bring Actions, 15.*
5. *Jurisdiction, 15.*
6. *Amendments Allowed before Action, 15.*
7. *Procedure—Service of Process—Appearance, etc.—Posting Notice on Dump—Rights of Adverse Claimants—Lien Not Affected, 15.*
8. *Joining of Parties, etc.—Court Allowances—Waiver of Right to Lien Void, 16.*
9. *Execution of Judgment—Sales—Extracting Minerals—Disposal of Proceeds, 16.*
10. *Appeals to District Court, 17.*
11. *Liability for Buying Minerals, etc., Posted, 17.*

Act of June 25, 1910, Ch. 424, 18.

Sec. 1. Temporary Detention Hospitals for Insane, 18.

2. *Board on Construction—Contracts, etc.—Expenditures, Report, etc.—Care and Maintenance, 18.*

Act of March 4, 1911, Ch. 280, 18.

Open Season for Game Birds Extended, 18.

An Act To protect the seal fisheries of Alaska, and for other purposes.

[Act of April 21, 1910, ch. 183.]

[**Sec. 1.**] [*Alaska seal fisheries, etc.—Secretary of Commerce and Labor to make regulations.*] That the Secretary of Commerce and Labor shall have power to authorize the killing of fur seals and the taking of sealskins on the Pribilof Islands, in Alaska, under regulations established by him prescribing the manner in which such killing shall be done and limiting the number of seals to be killed, whenever he shall determine that such killing is necessary or desirable and not inconsistent with the preservation of the seal herd: *Provided, however,* That under such authority the right of killing fur seals and taking

sealskins shall be exercised by officers, agents, or employees of the United States appointed by the Secretary of Commerce and Labor, and by the natives of the Pribilof Islands under the direction and supervision of such officers, agents, or employees, and by no other person: *And provided further*, That male seals only shall be killed and that not more than ninety-five per centum of three-year-old male seals shall be killed in any one year. [36 Stat. L. 326.]

SEC. 2. [*Sales.*] That any and all sealskins taken under the authority conferred by the preceding section shall be sold by the Secretary of Commerce and Labor in such market, at such times, and in such manner as he may deem most advantageous; and the proceeds of such sale or sales shall be paid into the Treasury of the United States: *Provided*, That the directions of this section, relating to the disposition of seal skins and the proceeds thereof, shall be subject to the provisions of any treaty hereafter made by the United States for the protection of seal life. [36 Stat. L. 326.]

SEC. 3. [*Employment of Pribilof natives.*] That whenever seals are killed and sealskins taken on any of the Pribilof Islands the native inhabitants of said islands shall be employed in such killing and in curing the skins taken, and shall receive for their labor fair compensation, to be fixed from time to time by the Secretary of Commerce and Labor, who shall have the authority to prescribe by regulation the manner in which such compensation shall be paid to the said natives or expended or otherwise used in their behalf and for their benefit. [36 Stat. L. 327.]

SEC. 4. [*Killing seals and other fur-bearing animals in Alaska forbidden.*] That section nineteen hundred and fifty-six of the Revised Statutes of the United States and section one hundred and seventy-three of the Act of March third, eighteen hundred and ninety-nine, be amended to read as follows:

"No person shall kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animal, within the limits of Alaska Territory or in the waters thereof; and every person guilty thereof shall, for each offense, be fined not less than two hundred nor more than one thousand dollars or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture, and cargo found engaged in violation of this section shall be forfeited; but the Secretary of Commerce and Labor shall have power to authorize the killing of any such mink, marten, sable, fur seal, or other fur-bearing animal under such regulations as he may prescribe; and it shall be the duty of the Secretary of Commerce and Labor to prevent the killing of any fur seal except as authorized by law and to provide for the execution of the provisions of this section until it is otherwise provided by law." [36 Stat. L. 327.]

R. S. sec. 1956 is set forth in 1 Fed. Stat. Annot. 426. The Act of March 3, 1899, sec. 173, is given in 1 Fed. Stat. Annot. 334.

SEC. 5. [*Pribilof Islands made a special reservation — landing, etc., on, unlawful.*] That section nineteen hundred and fifty-nine of the Revised Statutes of the United States and section one hundred and seventy-six of the Act of March third, eighteen hundred and ninety-nine, be amended to read as follows:

"The Pribilof Islands, including the islands of Saint Paul and Saint George, Walrus and Otter Islands, and Sea Lion Rock, in Alaska, are declared a special reservation for government purposes; and until otherwise provided by law it shall be unlawful for any person to land or remain on any of those islands, except through stress of weather or like unavoidable cause or by the

authority of the Secretary of Commerce and Labor; and any person found on any of those islands contrary to the provisions hereof shall be summarily removed and shall be deemed guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both fine and imprisonment; and it shall be the duty of the Secretary of Commerce and Labor to carry this section into effect." [36 Stat. L. 327.]

See 1 Fed. Stat. Annot. 335, 427, for these provisions as they read prior to this amendment.

SEC. 6. [*Restriction on killing seals.*] That section nineteen hundred and sixty of the Revised Statutes of the United States and section one hundred and seventy-seven of the Act of March third, eighteen hundred and ninety-nine be amended to read as follows:

"It shall be unlawful to kill any fur seal upon the Pribilof Islands, or in the waters adjacent thereto, except under the authority of the Secretary of Commerce and Labor, and it shall be unlawful to kill such seals by the use of firearms or by other means tending to drive the seals away from those islands; but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of Commerce and Labor." [36 Stat. L. 327.]

See 1 Fed. Stat. Annot. 335, 427, for these provisions as they read prior to this amendment.

SEC. 7. [*Restriction on female or young seals, etc.*] That section nineteen hundred and sixty-one of the Revised Statutes of the United States and section one hundred and seventy-eight of the Act of March third, eighteen hundred and ninety-nine, be amended to read as follows:

"It shall be unlawful to kill any female seal or any seal less than one year old at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to the Pribilof Islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment not more than six months, or by both such fine and imprisonment; and all vessels, their tackle, apparel, and furniture, whose crews are found engaged in the violation of either this or the preceding section shall be forfeited to the United States." [36 Stat. L. 328.]

See 1 Fed. Stat. Annot. 336, 427, for these provisions as they read prior to this amendment.

SEC. 8. [*Fur seals — killing, etc., in Pacific ocean prohibited.*] That section one of the Act of December twenty-ninth, eighteen hundred and ninety-seven, be amended to read as follows:

"No citizen of the United States, nor person owing duty of obedience to the laws or the treaties of the United States, nor any person belonging to or on board of a vessel of the United States, shall kill, capture, or hunt, at any time or in any manner whatever, any fur seal in the waters of the Pacific Ocean, including Bering Sea and the sea of Okhotsk, whether in the territorial waters of the United States or in the open sea." [36 Stat. L. 328.]

See 1 Fed. Stat. Annot. 423.

SEC. 9. [*Additional officers, etc., authorized — purchase of right of present lessee, etc. — maintenance of depots, etc. — food, etc., to natives.*] That the Secretary of Commerce and Labor shall have authority to appoint such additional officers, agents, and employees as may be necessary to carry out the provisions of this Act and the laws of the United States relating to the seal fisheries of Alaska, to prescribe their duties and to fix their compensation; he shall likewise have authority to purchase from the present lessee of the right to take seals on the islands of Saint Paul and Saint George, at a fair valuation to be agreed upon, the warehouses, salt houses, boats, launches, lighters, horses, mules, wagons, and other property of the said lessee on the islands of Saint Paul and Saint George, including the dwellings of the natives of said islands; he shall likewise have authority to establish and maintain depots for provisions and supplies on the Pribilof Islands and to provide for the transportation of such provisions and supplies from the mainland of the United States to the said islands by the charter of private vessels or by the use of public vessels of the United States which may be placed at his disposal by the President; and he shall likewise have authority to furnish food, shelter, fuel, clothing, and other necessities of life to the native inhabitants of the Pribilof Islands and to provide for their comfort, maintenance, education, and protection. [36 Stat. L. 328.]

SEC. 10. [*Laws repealed — effect — appropriation.*] That sections nineteen hundred and sixty-two, nineteen hundred and sixty-three, nineteen hundred and sixty-four, nineteen hundred and sixty-five, nineteen hundred and sixty-six, nineteen hundred and sixty-seven, nineteen hundred and sixty-eight, nineteen hundred and sixty-nine, nineteen hundred and seventy, nineteen hundred and seventy-one, and nineteen hundred and seventy-two of the Revised Statutes of the United States, and all Acts and parts of Acts inconsistent with this Act are hereby repealed. The provisions of this Act shall take effect from and after the first day of May, nineteen hundred and ten; and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and fifty thousand dollars for carrying into effect the provisions of this Act. [36 Stat. L. 328.]

See 1 Fed. Stat. Annot. 427-429, for the Revised Statutes sections here repealed.

An Act Extending the time in which to file adverse claims and institute adverse suits against mineral entries in the district of Alaska.

[Act of June 7, 1910, ch. 265.]

[*Public lands — time extended for filing adverse mineral claims, etc., in Alaska.*] That in the district of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. [36 Stat. L. 459.]

For R. S. secs. 2325 and 2326, see 5 Fed. Stat. Annot. 31, 35.

An Act To create, establish, and enforce a miner's labor lien in the Territory of Alaska, and for other purposes.

[Act of June 25, 1910, ch. 422.]

[SEC. 1.] [*Miner's labor lien — persons entitled.*] That every miner or other laborer who shall labor in or upon any mine or mining ground for another in the Territory of Alaska in digging, thawing, conveying, hoisting, piling, cleaning up, or any other kind of work in producing any mineral-bearing sands, gravels, earth, or rock, gold or gold dust, or other minerals, or shall aid or assist therein by his labor as cook, engineer, fireman, or in cutting and delivering wood used in said work, or in work in any like capacity in producing the dump, shall, where his labor directly aided in such production, have a lien upon the dump or mass of mineral-bearing sands, gravels, earth, or rocks, and all gold and gold dust, or other minerals therein, and all gold and gold dust extracted therefrom, for the full amount of wages for all the time which he was so employed as such laborer in producing the said dump, within one year next preceding his ceasing to labor thereon; and to the extent of the labor of the said miner or other laborer actually employed or expended thereon, within one year next prior to ceasing to labor thereon, the said lien shall be prior to and preferred over any deed, mortgage, bill of sale, attachment, conveyance, or other claim, whether the same was made or given prior to such labor or not: *Provided*, That this preference shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this Act. [36 Stat. L. 848.]

SEC. 2. [*Notice to be filed.*] That every laborer, within ninety days after the completion of the performance of the work or labor mentioned in the foregoing section who shall claim the benefit thereof, must, personally or by some other person for him, file for record in the recording precinct where the labor was performed a claim of lien containing a statement of his demand under oath, substantially in the following form:

NOTICE OF LABORER'S LIEN.

Territory of Alaska, ——— precinct, ss:

———, claimant, against ———, defendant.

Notice is hereby given that ———, claimant, claims a lien upon (describing the dump or mass of mineral-bearing sands, gravels, earth, or rock, and its location with reasonable certainty) in the ——— precinct, in the Territory of Alaska, for labor performed in (digging, and so forth; describe the work). That the name of the owner or reputed owner of the said property is ———, and that ——— is the owner or reputed owner of the mine or mining ground from which the dump or mass of mineral-bearing sands, gravels, earth, or rock and the minerals therein were extracted, and that ——— employed claimant to perform such work and labor upon the following terms and conditions (state substance of contract, if any, or reasonable value); that said contract has been faithfully performed and fully complied with on the part of the claimant, who performed labor thereunder aforesaid for the period of ——— days; that said labor was performed between the ——— day of ——— and the ——— day of ———, and the rendition of said service was closed on the ——— day of ———, and ninety days have not elapsed since that time; that the amount of claimant's demand for said service is ———; that no part thereof has been paid (except the sum of ———

dollars), and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of _____ dollars, in which amount he claims a lien upon said property.

_____,
Claimant.

Territory of Alaska, _____ precinct, ss:

_____, being first duly sworn, on oath deposes and says, that I am the claimant (or if by some other person state the fact) named in the foregoing claim; that I have heard the same read, know the contents thereof, and believe the same to be true.

Subscribed and sworn to before me this _____ day of _____.

[Officer's title.]
[36 Stat. L. 848.]

SEC. 3. [*Recording, etc.*] That the recorder must record every claim filed under the provisions of this Act in books kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the following fees and none other: For filing, ten cents; for recording, one dollar; for indexing, fifteen cents for each name. [36 Stat. L. 849.]

SEC. 4. [*Time to bring actions.*] That no lien provided for in this Act shall bind any property for a longer period than ninety days after the claim has been filed, unless an action be commenced within that time to enforce the same. [36 Stat. L. 849.]

SEC. 5. [*Jurisdiction.*] That the action for the foreclosure of the lien provided for in this Act shall be begun either in the district court or in the justice's court in the precinct where the lien was filed and the justices of the peace in Alaska are hereby given full jurisdiction in the foreclosure of such liens under the provisions of this Act, and shall also have such other jurisdiction and power as is now conferred on them by law in aid of the enforcement of this Act, and the provisions of section seven hundred and twenty-three of chapter seventy-one of the Code of Civil Procedure now in force in Alaska shall be applicable to the jurisdiction intended to be conferred by this Act. [36 Stat. L. 849.]

For sec. 723 of the Alaska Code of Civil Procedure, see 1 Fed. Stat. Annot. 183.

SEC. 6. [*Amendments allowed before action.*] That no mistake, informality, or mere matter of form or lack of statement, either in the lien notice or pleadings, shall be ground for dismissal or unnecessary delay in the action to foreclose the lien, but the lien notice and pleadings may be amended at any time before judgment, and section ninety-two of chapter eleven of the Code of Civil Procedure now in force in Alaska shall apply to such amendments: *Provided*, That if it be shown that a material statement or averment has been omitted or misstated, it shall be ground for a reasonable delay or continuance to give the defendant a reasonable opportunity to meet it upon amendment. [36 Stat. L. 849.]

For sec. 92 of ch. 11 of the Alaska Code of Civil Procedure, see 1 Fed. Stat. Annot. 69.

SEC. 7. [*Procedure — service of process — appearance, etc. — posting notice on dump — rights of adverse claimants — lien not affected.*] That the claimant may file the original or a certified copy of the notice of lien in the

district or justice's court as the statement of his case, and thereupon the court or justice shall issue the usual summons directed to the defendant or defendants, which summons, together with a copy of the lien notice, shall, by any officer authorized to serve process, be served upon the defendant or defendants, as provided in sections nine hundred and fifty and nine hundred and fifty-one of chapter ninety-two of the Code of Civil Procedure now in force in Alaska. The summons shall require the defendant or defendants to appear before such court or justice at a time and a place to be named therein, not less than six nor more than twenty days from the date thereof, to answer the demand of the claimant in the said lien notice, or judgment for want of an answer will be taken against them. Service by publication may be had pursuant to sections forty-seven and forty-eight of chapter four of said Code of Civil Procedure. The officer serving the summons shall also immediately post a copy of said lien notice in a conspicuous place on the dump or mass of mineral-bearing sands, gravels, earth, or rock, and gold and gold dust, and other minerals therein upon which the lien is filed, and from the moment of posting the lien notice the dump or mass of mineral-bearing sands, gravels, earth, and rock, and gold and gold dust, and other minerals therein shall be in the custody and under the control of the officer. All persons who claim any interest therein in opposition to the lien claimant may come in and answer and set up and defend their said claims, but no claim or claims of any owner, lessee, or other adverse defendant shall bar the lien claimant from recovering the sum due him for actual labor in producing the said dump or mass of mineral-bearing sands, gravels, earth, or rock, or gold and gold dust, or other minerals. [36 Stat. L. 850.]

For secs. 47, 48 of Alaska Code of Civ. Proc., see 1 Fed. Stat. Annot. 62.

SEC. 8. [*Joining of parties, etc. — court allowances — waiver of right to lien void.*] That any number of persons claiming liens under this Act may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow, as a part of the costs, the moneys paid for filing, recording, and indexing the notice of lien, the sum of five dollars for drawing the same, and a reasonable attorney's fee for each person claiming a lien, not to exceed ten per centum of the amount of the lien established on judgment. Any contract or agreement or any waiver of any kind made or signed by any minor [*sic*] or laborer whereby it is sought to waive or abandon his right to file a lien under this Act, or any agreement for an extended time of payment whereby the same end is sought, shall to that extent be null and void as against public policy. [36 Stat. L. 850.]

SEC. 9. [*Execution of judgment — sales — extracting minerals — disposal of proceeds.*] That in such action judgment must be rendered in favor of each person having a laborer's lien for the amount due him, and the court shall order the dump or mass of mineral-bearing sands, gravels, earth, or rock, and the gold and gold dust, and other minerals therein subject to the lien to be sold by the marshal in the same manner that personal property is sold on execution; or the court may, upon a showing that it is necessary to do so to preserve the property from loss or waste, by order require the marshal to wash up or extract the gold and gold dust or other mineral from the said mineral-bearing sands, gravels, earth, or rock; or the court may, by order, allow the defendant or defendants or any party interested to wash up and extract the said mineral, in the presence of the marshal or deputy marshal or special officer, who shall take the gold or gold dust or other minerals as it is washed up and extracted

and return the same into court, and it shall be immediately paid out as follows: First, the cost of cleaning up or extracting the gold or gold dust or other minerals shall be paid; second, the court costs shall be paid; and, third, the judgment or judgments so rendered in favor of the lien claimants shall be paid; and if there is not sufficient gold or gold dust, or other minerals, or sufficient moneys obtained from the sale of the property to pay all claims in full, the court shall apportion the proceeds to the payment of such judgments pro rata: *Provided*, That no part of any such proceeds shall be paid upon any claim or judgment to any person who did not actually perform labor in producing the dump or the proceeds thereof until all such preferred claims are paid in full. [36 Stat. L. 850.]

SEC. 10. [*Appeals to district court.*] That an appeal may be taken from a final judgment of a justice of the peace in actions instituted under this Act to the district court, in the manner provided in chapter ninety-seven of the Code of Civil Procedure now in force in Alaska, and upon such appeal being perfected the dump or mass of mineral-bearing sands, gravels, earth and rock, gold and gold dust, or other minerals shall be washed up by the marshal or any party mentioned in section nine of this Act as the district court may direct, and all the gold or gold dust or other mineral so washed up shall be paid into the registry of the district court there to await the final judgment on appeal: *Provided*, That the gold or gold dust or other mineral in excess of the amount of the judgment, including an additional amount equal to the probable accruing costs on appeal and two years' interest at the legal rate, shall after the expiration of ninety days from the time it was paid into the registry of the district court, be released to the owners upon a showing that no liens have been filed against it. The defendant or defendants, or any one or more of them, may deposit cash in lieu of the gold or gold dust on the dump, which shall remain in the custody of the law until the final judgment, and shall then be applied in payment of the judgment or judgments rendered on each lien claims, and costs, and interest. [36 Stat. L. 851.]

For ch. 97 of Alaska Code Civ. Proc., see 1 Fed. Stat. Annot. 229.

SEC. 11. [*Liability for buying minerals, etc., posted.*] That any person or persons who shall, after the copy of the notice of lien is posted upon any dump or mass of mineral-bearing sands, gravels, earth or rock, gold and gold dust, or other mineral, as provided in this Act, and with knowledge of such notice of lien, buy, purchase, wash up, remove, destroy, or carry away all or any part or portion of the same, or the gold or gold dust therein, or who shall render it difficult, uncertain, or impossible to identify the gold or gold dust or other mineral obtained therefrom, shall be liable to the lien holder for the full amount of his judgment and costs; and any person who shall take and carry away all or any part or portion of said dump of mineral-bearing sands, gravels, earth or rock, or the gold or gold dust or other minerals therefrom, after the same shall come into the custody of the officer, shall be guilty of a crime and shall be punished as for the larceny of a like amount; and any district attorney in Alaska is specially required to immediately cause a warrant to be issued for the arrest of any such person or persons and to prosecute them according to law. [36 Stat. L. 851.]

An Act To provide for the care and support of insane persons in the Territory of Alaska.

[Act of June 25, 1910, ch. 424.]

[SEC. 1.] [*Temporary detention hospitals for insane.*] That there is hereby established at Fairbanks, in the Territory of Alaska, and at Nome, in the Territory of Alaska, respectively, a detention hospital for the temporary care and detention of the insane, wherein all insane and other patients in charge of the United States marshal shall be detained until transported to the asylum provided by law for their permanent care and cure, or otherwise disposed of as provided by the laws of the United States; and the sum of twenty-five thousand dollars is hereby appropriated out of any moneys in the United States Treasury not otherwise appropriated, not exceeding one-half thereof to be expended in the erection and equipment of the hospital at Fairbanks, and not exceeding one-half thereof to be expended in the erection and equipment of the hospital at Nome. [36 Stat. L. 852.]

SEC. 2. [*Board on construction — contracts, etc. — expenditures, report, etc. — care and maintenance.*] That the governor of Alaska and the judge of the district court and the United States marshal of the judicial division in which the said detention hospital, respectively, is to be erected and equipped, shall constitute in each division a board whose duty it shall be to cause the said detention hospital to be erected and equipped; that public bids for the erection of the same shall be called for, and the said board shall let the contract for the erection of the buildings, respectively, to the lowest and best bidder, but the said board may reject any or all bids and call for new bids in their discretion; that the moneys hereby appropriated, or so much thereof as shall be necessary, shall be expended by the said board upon the approval of the governor; and the said board in each division shall make a detailed report of the expenditures of the said funds to the Attorney-General of the United States; that the said hospitals, after their erection and equipment, shall be under the charge and control of the United States marshal in the division where situated, and the maintenance thereof shall be paid in the same manner and from the same fund as the expense of the United States jails under the same marshal is paid. [36 Stat. L. 852.]

An Act For the protection of game in the Territory of Alaska.

[Act of March 4, 1911, ch. 280.]

[*Open season for game birds extended.*] That from and after the passage of this Act it shall be lawful to kill grouse, ptarmigan, shore birds, and waterfowl from September first to March first, both inclusive, anywhere in the Territory of Alaska. [36 Stat. L. 1360.]

See 1909 Supp. Fed. Stat. Annot., p. 26.

ALIENS.

See IMMIGRATION; NATURALIZATION; WHITE SLAVE TRAFFIC.

AMERICAN INTERNATIONAL RED CROSS.

See CHARITIES.

APPEAL AND ERROR.

See JUDICIARY.

APPORTIONMENT.

See CONGRESS.

APPROPRIATIONS.

See ESTIMATES, APPROPRIATIONS, AND REPORTS.

ARIZONA.

See STATES.

ARMY.

Discrimination against United States Uniform, see UNIFORMS.
And see generally, ARTICLES OF WAR; MILITIA; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

ART.

See FINE ARTS COMMISSION.

ARTICLES OF WAR.

Act of March 8, 1910, Ch. 88, 20.

Sec. 1. Command, When Different Corps Happen to Join — Position of Organized Militia, 20.

Rank of Organized Militia Officers on Duty with Other Forces, 20.

2. Repeal, 20.

An Act To modify the one hundred and twenty-second and one hundred and twenty-fourth articles of war, and to repeal the one hundred and twenty-third article of war.

[Act of March 8, 1910, ch. 88.]

[SEC. 1.] That the one hundred and twenty-second and one hundred and twenty-fourth articles of war be, and hereby are, modified to read as follows:

See 1 Fed. Stat. Annot. 508, 509.

[*Command, when different corps happen to join — position of organized militia.*] "ART. 122. If, upon marches, guards, or in quarters, different corps of the army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, organized militia, or volunteers, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful in the service, unless otherwise specially directed by the President, according to the nature of the case."

* * * * *

[*Rank of organized militia officers on duty with other forces.*] "ART. 124. Officers of the organized militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty, wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular forces, and shall take precedence of all officers of volunteers of equal or inferior rank, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular forces of the United States." [36 Stat. L. 234.]

SEC. 2. [*Repeal.*] That the one hundred and twenty-third article of war be, and hereby is, repealed. [36 Stat. L. 235.]

The repealed article is given in 1 Fed. Stat. Annot. 509.

ASYLUMS.

See HOSPITALS AND ASYLUMS.

BADGES.

Insignia of Red Cross, see CHARITIES.

BANKRUPTCY.

Act of June 25, 1910, Ch. 412, 21.

Sec. 1. Bankruptcy Act Amendments—Receivers, etc.—Extra Allowance for Continuing Business, 21.

2. Powers of Court Extended—Ancillary Jurisdiction to Other Courts, 21.

3. Voluntary Bankrupts—Corporations Excepted, 22.

4. Involuntary Bankrupts—Corporations Excepted—Liability of Corporation Officers, etc., 22.

5. Compositions—Time When Terms May Be Offered—Meeting of Creditors—Action to Await Determination, 22.

6. Discharges—Action on Applications—Trustee to Be Heard—Grounds for Refusal, 22.

7. Jurisdiction of Federal and State Courts—Limitation of Suits for Recovery of Property, 23.

8. Duties of Trustees—Closing up Estate—Vested with All Creditors' Rights, etc., 23.

9. Compensation of Trustees, Receivers, and Marshals, 23.

9½. Notices to Creditors, 25.

10. Dismissal of Petitions—Notice to Creditors before Granting, 25.

11. Preferred Creditors—Voidable Preferences—Concurrent Jurisdiction with State Courts, 25.

12. Liens—Effect of Liens for Present Consideration, 25.

13. Compensation—Limit to Referees, Receivers, Marshals, and Trustees, 26.

14. Disposition of Pending Cases, 26.

An Act To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, as amended by an Act approved February fifth, nineteen hundred and three, and as further amended by an Act approved June fifteenth, nineteen hundred and six.

[Act of June 25, 1910, ch. 412.]

[**Sec. 1.**] [*Bankruptcy act amendments—receivers, etc.—extra allowance for continuing business.*] That clause five of section two of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, as amended by an Act approved February fifth, nineteen hundred and three, and as further amended by an Act approved June fifteenth, nineteen hundred and six, be, and the same hereby is, amended so as to read as follows:

"Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act." [*36 Stat. L. 838.*]

This clause as originally enacted is set out in 1 Fed. Stat. Annot. 533. For the amendments of 1903 and 1906, see 10 Fed. Stat. Annot. 38, and the 1909 Supp. 55.

Sec. 2. [*Powers of court extended—ancillary jurisdiction to other courts.*] That section two of said Act as so amended be, and the same hereby is, amended by striking from clause nineteen thereof the word "and" and adding a new clause, to be known as clause twenty, so that said clauses shall read as follows:

"(19) Transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." [36 Stat. L. 839.]

See 1 Fed. Stat. Annot. 538.

SEC. 3. [*Voluntary bankrupts — corporations excepted.*] That section four, clause a, of said Act, as so amended, be, and the same hereby is, amended so as to read as follows:

"SEC. 4. WHO MAY BECOME BANKRUPTS. — a. Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt." [36 Stat. L. 839.]

See 1 Fed. Stat. Annot. 546.

SEC. 4. [*Involuntary bankrupts — corporations excepted — liability of corporation officers, etc.*] That section four, clause b, of said Act, as so amended, be, and the same hereby is, amended so as to read as follows:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

"The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States." [36 Stat. L. 839.]

See 1 Fed. Stat. Annot. 546; 10 Fed. Stat. Annot. 39.

SEC. 5. [*Compositions — time when terms may be offered — meeting of creditors — action to await determination.*] That section twelve, subdivision a, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed." [36 Stat. L. 839.]

See 1 Fed. Stat. Annot. 565.

SEC. 6. [*Discharges — action on applications — trustee to be heard — grounds for refusal.*] That section fourteen, subdivision b, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable

by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose." [36 Stat. L. 839.]

See 1 Fed. Stat. Annot. 568; 10 Fed. Stat. Annot. 40.

SEC. 7. [*Jurisdiction of federal and state courts — limitation of suits for recovery of property.*] That section twenty-three, subdivision b, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e." [36 Stat. L. 840.]

See 1 Fed. Stat. Annot. 590; 10 Fed. Stat. Annot. 43.

SEC. 8. [*Duties of trustees — closing up estate — vested with all creditors' rights, etc.*] That section forty-seven, clause two, of subdivision a, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." [36 Stat. L. 840.]

See 1 Fed. Stat. Annot. 654.

SEC. 9. [*Compensation of trustees, receivers, and marshals.*] That section forty-eight of said Act as so amended be, and the same hereby is, amended, so as to read as follows:

"SEC. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS:

"(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars,

two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

"(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

"(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

"(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

"(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act." [36 Stat. L. 840.]

SEC. 9½. [*Notices to creditors.*] That section fifty-eight, subdivision a, of said Act as so amended be, and the same is hereby, amended so as to read as follows:

SEC. 58. NOTICES TO CREDITORS. (a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts. [36 Stat. L. 841.]

See 1 Fed. Stat. Annot. 668.

SEC. 10. [*Dismissal of petitions — notice to creditors before granting.*] That section fifty-nine, subdivision g, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard." [36 Stat. L. 841.]

See 1 Fed. Stat. Annot. 672.

SEC. 11. [*Preferred creditors — voidable preferences — concurrent jurisdiction with state courts.*] That section sixty, subdivision b, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." [36 Stat. L. 842.]

See 1 Fed. Stat. Annot. 674; 10 Fed. Stat. Annot. 45.

SEC. 12. [*Liens — effect of liens for present consideration.*] That section sixty-seven, subdivision d, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Liens given or accepted in good faith and not in contemplation of or in

fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act." [36 Stat. L. 842.]

See 1 Fed. Stat. Annot. 691.

SEC. 13. [*Compensation — limit to referees, receivers, marshals, and trustees.*] That section seventy-two of said Act amended as aforesaid is hereby amended to read as follows:

"SEC. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act." [36 Stat. L. 842.]

See 10 Fed. Stat. Annot. 48.

SEC. 14. [*Disposition of pending cases.*] That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. [36 Stat. L. 842.]

For the Acts above mentioned, see vol. 1, p. 525; vol. 10, p. 38; 1909 Supp., p. 55.

BANKS.

Savings Depositories, see POSTAL SERVICE.

BONDS.

Money for Panama Canal, see RIVERS, HARBORS, AND CANALS.
And see generally, *PUBLIC DEBT; SURETY COMPANIES.*

BROKERS.

Custom-house Brokers, see CUSTOMS DUTIES.

BUILDINGS.

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.*

BULLION.

See *COINAGE, MINTS, AND ASSAY OFFICES.*

BUREAU OF IMMIGRATION AND NATURALIZATION.

See NATURALIZATION.

BUREAU OF LIGHTHOUSES.

See LIGHTS AND BUOYS.

BUREAU OF MINES.

See MINERAL LANDS, MINES, AND MINING.

BUREAU OF STANDARDS.

See COMMERCE AND LABOR.

CAMPAIGN CONTRIBUTIONS.

See ELECTIONS.

CANADIAN RECIPROCITY.

See CUSTOMS DUTIES.

CANALS.

See RIVERS, HARBORS, AND CANALS; WATERS.

CANDIDATES FOR CONGRESS.

See ELECTIONS.

CAPITOL.

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.*

CARRIERS.

Agent in Washington for Service of Process, see *INTERSTATE COMMERCE.*
Liability to Employees, see *RAILROADS.*
Railway Accidents, Reports of, see *RAILROADS.*
Transporting Females for Immoral Purposes, see *WHITE SLAVE TRAFFIC.*
And see generally, *INTERSTATE COMMERCE.*

CAVEAT.

See *PATENTS.*

CEMETERIES.

Act of June 25, 1910, Ch. 384, 28.

Sec. 1. Encroachments by Railroads Forbidden, 28.

CROSS-REFERENCES.

Burial of Officers and Men of Revenue Cutter Service, see *REVENUE MARINE.*
Interment of Army Officers and Men, see *WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

[SEC. 1.] [*Encroachments by railroads forbidden.*] * * * That no railroad shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States: [*36 Stat. L. 723.*]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384. See 1909 Supp. Fed. Stat. Annot. 61.

CENSUS.

Joint Resolution of Feb. 15, 1910, No. 9, 29.

Thirteenth Census — Special Agents — Basis of Compensation, 29.

Act of Feb. 25, 1910, Ch. 63, 29.

Thirteenth Census — Inquiries and Statistics, 29.

Joint Resolution of March 24, 1910, No. 17, 31.

Thirteenth Census — Schedules to Show Nationality or Mother Tongue of Foreign-born Persons, 31.

Joint Resolution Amending Section Eighteen, of the Act of July second, nineteen hundred and nine, entitled "An Act to provide for the Thirteenth and subsequent decennial censuses."

[Joint Resolution of Feb. 15, 1910, No. 9.]

[Thirteenth census — special agents — basis of compensation.] That Section Eighteen, of the Act of Congress approved July second, nineteen hundred and nine, providing for the Thirteenth and subsequent decennial censuses (Thirty-sixth Statutes at Large, page seven), be amended by adding at the end of the section the words: "which may include a minimum and maximum rate of per diem compensation to be fixed by him, the maximum rate in such cases not to exceed an average of six dollars per diem for the period of employment, and actual necessary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per diem during necessary absence from their usual place of residence." [*36 Stat. L. 874.*]

See 1909 Supp. Fed. Stat. Annot. 716.

An Act to amend section eight of an Act to provide for the Thirteenth and subsequent decennial censuses, approved July second, nineteen hundred and nine.

[Act of Feb. 25, 1910, ch. 63.]

[Thirteenth census — inquiries and statistics.] That section eight of an Act entitled "An Act to provide for the Thirteenth and subsequent decennial censuses," approved July second, nineteen hundred and nine, be amended to read as follows:

"SEC. 8. That the Thirteenth Census shall be restricted to inquiries relating to population, to agriculture, to manufactures, and to mines and quarries. The schedules relating to population shall include for each inhabitant the name, relationship to head of family, color, sex, age, conjugal condition, place of birth, place of birth of parents, number of years in the United States, citizenship, occupation, whether or not employer or employee, and, if employee, whether or not employed at the date of enumeration and the number of months unemployed during the preceding calendar year, whether or not engaged in agriculture, school attendance, literacy, and tenure of home and whether or not a survivor of the Union or Confederate army or navy; and the name and address of each blind or deaf and dumb person; and for the enumeration of institutions, shall include paupers, prisoners, juvenile delinquents, insane, feeble-minded, blind, deaf and dumb, and inmates of benevolent institutions.

"The schedules relating to agriculture shall include name, color, and country of birth of occupant of each farm, tenure, acreage of farm, acreage of land under irrigation, acreage of woodland, and character of timber thereon, value of farm and improvements, value of farm implements, number and value of live stock on farms and ranges, number and value of domestic animals not on farms and ranges, and the acreage of crops planted and to be planted during the year of enumeration, and the acreage of crops and the quantity and value of crops and other farm products for the year ending December thirty-first next preceding the enumeration.

"The schedules of inquiries relating to manufactures and to mines and quarries shall include the name and location of each establishment; character of organization, whether individual, cooperative, or other form; character of business or kind of goods manufactured; amount of capital actually invested; number of proprietors, firm members, copartners, stockholders, and officers, and the amount of their salaries; number of employees and the amount of their wages; quantity and cost of materials used in manufactures; amount of miscellaneous expenses; quantity and value of products; time in operation during the census year; character and quantity of power used, and character and number of machines employed. Inquiries shall also be made as to the location and character of irrigation enterprises; quantity of land irrigated in the arid region of the United States and in each State and county in that section under state and federal laws; the price at which these lands, including water right, are obtainable; the character and value of crops produced on irrigated lands, the amount of water used per acre for said irrigation and whether it was obtainable from national, state, or private works; the location of the various projects and method of construction with facts as to their physical condition; the amount of capital invested in such irrigation works.

"The census of manufactures and of mines and quarries shall relate to the year ending December thirty-first next preceding the enumeration of population and shall be confined to mines and quarries and manufacturing establishments which were in active operation during all or a portion of that year. The census of manufactures shall furthermore be confined to manufacturing establishments conducted under what is known as the factory system, exclusive of the so-called neighborhood household and hand industries: *Provided*, That the census shall also include an enumeration of the number of cattle, calves, sheep, lambs, hogs, goats, and kids slaughtered for food purposes, and all hides produced, whether taken from animals slaughtered for food purposes or otherwise, during the year next preceding the year of the enumeration of population, irrespective of the character of the establishment in which slaughtered or produced.

"The inquiry concerning manufactures shall cover the production of turpentine and rosin, and the report concerning this industry shall show, in addition to the other facts covered by the regular schedule of manufactures, the quantity and quality of turpentine and rosin manufactured and marketed, the sources, methods, and extent of the industry.

"Whenever he shall deem it expedient, the Director of the Census may charge the collection of these statistics upon special agents or upon detailed employees, to be employed without respect to locality.

"The form and subdivision of inquiries necessary to secure the information under the foregoing topics shall be determined by the Director of the Census." [36 Stat. L. 227.]

Section 8 of the Act of July 2, 1909, as originally enacted, is given in 1909 Supp. Fed. Stat. Annot. 717.

Joint Resolution Enlarging the scope of inquiry of the schedules relating to population for the Thirteenth Decennial Census.

[Joint Resolution of March 24, 1910, No. 17.]

[*Thirteenth census — schedules to show nationality or mother tongue of foreign-born persons.*] That the schedules relating to population for the Thirteenth Decennial Census, in addition to the inquiries required by the Act entitled "An Act to amend section eight of an Act to provide for the Thirteenth and subsequent decennial censuses, approved July second, nineteen hundred and nine," approved February twenty-fifth, nineteen hundred and ten, shall provide inquiries respecting the nationality or mother tongue of all persons born in foreign countries, and of the nationality or mother tongue of parents of foreign birth of persons enumerated. [36 Stat. L. 877.]

For the Act of Feb. 25, 1910, see *ante*, p. 29, for the Act of July 2, 1909, see 1909 Supp. Fed. Stat. Annot. 717.

CERTIFICATES OF INDEBTEDNESS.

See *PUBLIC DEBT*.

CHARITIES.

Act of June 23, 1910, Ch. 372, 32.

Sec. 1. American National Red Cross — Unauthorized Use of Insignia, etc., 32.

2. Endowment Fund — Control, etc., of, 32.

CROSS-REFERENCE.

Army Officer Detailed to First Aid Department of Red Cross, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

An Act To amend an Act entitled "An Act to incorporate the American National Red Cross," approved January fifth, nineteen hundred and five.

[Act of June 23, 1910, ch. 372.]

[SEC. 1.] [*American National Red Cross — unauthorized use of insignia, etc.*] That section four of the Act entitled "An Act to incorporate the American National Red Cross," approved January fifth, nineteen hundred and five, is hereby amended to read as follows:

"SEC. 4. That from and after the passage of this Act it shall be unlawful for any person within the jurisdiction of the United States to falsely or fraudulently hold himself out as or represent or pretend himself to be a member of or an agent for the American National Red Cross for the purpose of soliciting, collecting, or receiving money or material; or for any person to wear or display the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross. It shall be unlawful for any person, corporation, or association other than the American National Red Cross and its duly authorized employees and agents and the army and navy sanitary and hospital authorities of the United States for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words 'Red Cross' or 'Geneva Cross' or any combination of these words: *Provided, however,* That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods. If any person violates the provision of this section he shall be deemed guilty of a misdemeanor, and upon conviction in any federal court shall be liable to a fine of not less than one or more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense." [36 Stat. L. 604.]

See 1909 Supp. Fed. Stat. Annot. 66.

SEC. 2. [*Endowment fund — control, etc., of.*] That the following section is hereby added to said Act:

"SEC. 8. That the endowment fund of the American National Red Cross shall be kept and invested under the management and control of a board of nine trustees, who shall be elected from time to time by the incorporators and their successors under such regulations regarding terms and tenure of office, accountability, and expense as said incorporators and successors shall prescribe."
[36 Stat. L. 604.]

See 1909 Supp. Fed. Stat. Annot. 64.

CHINESE EXCLUSION.

Appellate Jurisdiction under Laws, see JUDICIARY.

CIRCUIT COURT OF APPEALS.

See *JUDICIARY.*

CIRCUIT COURTS.

See *JUDICIARY.*

CITIZENSHIP.

See *NATURALIZATION.*

CIVIL SERVICE.

Act of June 17, 1910, Ch. 297, 34.

Sec. I. Commissioners Authorized to Administer Oaths, 34.

[Sec. 1.] [*Commissioners authorized to administer oaths.*] * * *
Members of the Civil Service Commission are hereafter authorized to administer oaths to witnesses in any matter depending before the Civil Service Commission. [*36 Stat. L. 483.*]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

CLAIMS.

Joint Resolution of June 25, 1910, No. 38, 35.

Property of Confederate Soldiers — Time for Filing Claims for, Extended,
35.

CROSS-REFERENCE.

Court of Claims, see JUDICIARY.

Joint Resolution Extending the time for the filing of claims under the provisions of the Act of February twenty-seventh, nineteen hundred and two.

[Joint Resolution of June 25, 1910, No. 38.]

[Property of Confederate soldiers — time for filing claims for, extended.]
That the time for filing claims under the provisions of the Act of February twenty-seventh, nineteen hundred and two, and amendments thereto, for horses, saddles, and bridles taken from confederate soldiers in violation of terms of surrender and for the payment thereof, is extended for two years from the passage of this joint resolution; and all claims not presented within this time shall be forever barred. *[36 Stat. L. 883.]*

For the Act of Feb. 27, 1902, see 2 Fed. Stat. Annot. 26.

CLERKS OF COURT.

See *JUDICIAL OFFICERS; JUDICIARY.*

COAL LANDS.

See *PUBLIC LANDS.*

COINAGE, MINTS, AND ASSAY OFFICES.

Act of March 2, 1911, Ch. 190, 36.

Gold Coin and Bullion—Gold and Silver Certificates, 36.

Act of March 4, 1911, Ch. 240, 37.

*Parting and Refining Bullion—Indefinite Appropriation for, Repealed—
Balance to Be Covered into the Treasury, 37.*

Act of March 4, 1911, Ch. 267, 37.

Coinage—Deviation in Silver Coins Permitted, 37.

Act of March 4, 1911, Ch. 268, 37.

Sec. 1. Coinage, 37.

2. Weights at Mints, 38.

An Act To amend section six of the currency Act of March fourteenth, nineteen hundred, as amended by the Act approved March fourth, nineteen hundred and seven.

[Act of March 2, 1911, ch. 190.]

[*Gold coin and bullion—gold and silver certificates.*] That section six of an Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes, approved March fourteenth, nineteen hundred, as amended by the Act approved March fourth, nineteen hundred and seven, be, and the same is hereby, further amended so as to read as follows:

“SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any assistant treasurer of the United States, in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: *Provided*, That whenever and so long as the gold coin and bullion held in the reserve fund in the Treasury for the redemption of United States notes and Treasury notes shall fall and remain below one hundred million dollars the authority to issue certificates as herein provided shall be suspended: *And provided further*, That whenever and so long as the aggregate amount of United States notes and silver certificates in the general fund of the Treasury shall exceed sixty million dollars the Secretary of the Treasury may, in his discretion, suspend the issue of the certificates herein provided for: *And provided further*, That of the amount of such outstanding certificates one-fourth at least shall be in denominations of fifty dollars or less: *And provided further*, That the Secretary of the Treasury may, in his discretion, issue such certificates in denominations of ten thousand dollars, payable to order: *And provided further*, That the Secretary of the Treasury may, in his discretion, receive, with the assistant treasurer in New York and the assistant treasurer in San Francisco, deposits of foreign gold coin at their bullion value in amounts of not less than one thousand dollars in value and

issue gold certificates therefor of the description herein authorized: *And provided further*, That the Secretary of the Treasury may, in his discretion, receive, with the Treasurer or any assistant treasurer of the United States, deposits of gold bullion bearing the stamp of the coinage mints of the United States, or the assay office in New York, certifying their weight, fineness, and value, in amounts of not less than one thousand dollars in value, and issue gold certificates therefor of the description herein authorized. But the amount of gold bullion and foreign coin so held shall not at any time exceed one-third of the total amount of gold certificates at such time outstanding. And section fifty-one hundred and ninety-three of the Revised Statutes of the United States is hereby repealed." [36 Stat. L. 964.]

See 2 Fed. Stat. Annot. 132; 1909 Supp. Fed. Stat. Annot. 354. For R. S. sec. 5193, see 5 Fed. Stat. Annot. 125.

[*Parting and refining bullion — indefinite appropriation for, repealed — balance to be covered into the Treasury.*] * * * All laws and parts of laws, to the extent that they make a permanent indefinite appropriation for the expenses of parting and refining bullion, are repealed to take effect from and after June thirtieth, nineteen hundred and twelve, and the Secretary of the Treasury shall, for the fiscal year nineteen hundred and thirteen, and annually thereafter, submit to Congress, in the regular Book of Estimates, detailed estimates for the expenses of this service.

The unexpended balance, after meeting all obligations, of the permanent indefinite appropriation for parting and refining bullion remaining on the books of the Treasury two years after the close of the fiscal year nineteen hundred and twelve shall be covered into the Treasury as a miscellaneous receipt. [36 Stat. L. 1292.]

The above is from the Deficiencies Appropriation Act of March 4, 1911, ch. 240, sec. 1.

An Act To amend section thirty-five hundred and thirty-six of the Revised Statutes of the United States, relating to the weighing of silver coins.

[Act of March 4, 1911, ch. 267.]

[*Coinage — deviation in silver coins permitted.*] That section thirty-five hundred and thirty-six of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 3536. In adjusting the weight of the silver coins the following deviations shall not be exceeded in any single piece: In the dollar, the half and quarter dollar, and in the dime, one and one-half grains." [36 Stat. L. 1354.]

For R. S. sec. 3536, as originally enacted, see 2 Fed. Stat. Annot. 123.

An Act To amend sections thirty-five hundred and forty-eight and thirty-five hundred and forty-nine of the Revised Statutes of the United States, relative to the standards for coinage.

[Act of March 4, 1911, ch. 268.]

[SEC. 1.] [*Coinage.*] That section thirty-five hundred and forty-eight of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

“**Sec. 3548.** For the purpose of securing a due conformity in weight of the coins of the United States to the provisions of the laws relating to coinage, the standard troy pound of the Bureau of Standards of the United States shall be the standard troy pound of the Mint of the United States, conformably to which the coinage thereof shall be regulated.” [36 Stat. L. 1354.]

SEC. 2. [*Weights at mints.*] That section thirty-five hundred and forty-nine of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

“**Sec. 3549.** It shall be the duty of the Director of the Mint to procure for each mint and assay office, to be kept safely thereat, a series of standard weights corresponding to the standard troy pound of the Bureau of Standards of the United States, consisting of a one-pound weight and the requisite subdivisions and multiples thereof, from the hundredths part of a grain to twenty-five pounds. The troy weight ordinarily employed in the transactions of such mints and assay offices shall be regulated according to the above standards at least once in every year, under the inspection of the superintendent and assayer; and the accuracy of those used at the Mint at Philadelphia shall be tested annually, in the presence of the assay commissioners, at the time of the annual examination and test of coins.” [36 Stat. L. 1354.]

R. S. secs. 3548 and 3549 are given in 2 Fed. Stat. Annot. 136.

COLLECTION DISTRICTS.

See *CUSTOMS DUTIES*.

COLLISIONS.

Act of June 9, 1910, Ch. 268, 39.

Sec. 1. Motor Boats — Vessels Included — Inspection, 39.

2. Classification, 39.

3. Lights Required, 39.

4. Sound Signals, 40.

5. Life-preservers — Boats Carrying Passengers for Hire — Licensed Navigator — Other Officers, 40.

6. Extinguishing Gasoline, 41.

7. Penalty, 41.

8. Regulations, 41.

9. Conflicting Laws Repealed — International Rules Not Affected, 41.

10. Effect, 41.

CROSS-REFERENCE.

Claims for Damages for Collision with Naval Vessel, see NAVY.

An Act To amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States.

[Act of June 9, 1910, ch. 268.]

[SEC. 1.] [*Motor boats — vessels included — inspection.*] That the words "motor boat" where used in this Act shall include every vessel propelled by machinery and not more than sixty-five feet in length except tug boats and tow boats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: *Provided*, That the engine, boiler, or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam. [36 Stat. L. 462.]

SEC. 2. [*Classification.*] That motor boats subject to the provisions of this Act shall be divided into classes as follows:

Class one. Less than twenty-six feet in length.

Class two. Twenty-six feet or over and less than forty feet in length.

Class three. Forty feet or over and not more than sixty-five feet in length.

[36 Stat. L. 462.]

SEC. 3. [*Lights required.*] That every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class one shall carry the following lights:

First: A white light aft to show all around the horizon.

Second. A combined lantern in the fore part of the vessel and lower than the white light aft showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

(b) Every motor boat of classes two and three shall carry the following lights:

First. A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:

Class two. Nineteen square inches.

Class three. Thirty-one square inches.

Second. A white light aft to show all around the horizon.

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The glasses or lenses in the said side lights shall be of not less than the following dimensions on motor boats of —

Class two. Sixteen square inches.

Class three. Twenty-five square inches.

On and after July first, nineteen hundred and eleven, all glasses or lenses prescribed by paragraph (b) of section three shall be fresnel or fluted. The said lights shall be fitted with inboard screens of sufficient height and so set as to prevent these lights from being seen across the bow and shall be of not less than the following dimensions on motor boats of —

Class two. Eighteen inches long.

Class three. Twenty-four inches long: *Provided*, That motor boats as defined in this Act, when propelled by sail and machinery or under sail alone, shall carry the colored lights suitably screened but not the white lights prescribed by this section. [36 Stat. L. 462.]

SEC. 4. [Sound signals.] (a) Every motor boat under the provisions of this Act shall be provided with a whistle or other sound-producing mechanical appliance capable of producing a blast of two seconds or more in duration, and in the case of such boats so provided a blast of at least two seconds shall be deemed a prolonged blast within the meaning of the law.

(b) Every motor boat of class two or three shall carry an efficient fog horn.

(c) Every motor boat of class two or three shall be provided with an efficient bell, which shall be not less than eight inches across the mouth on board of vessels of class three. [36 Stat. L. 463.]

SEC. 5. [Life-preservers — boats carrying passengers for hire — licensed navigator — other officers.] That every motor boat subject to any of the provisions of this Act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life-preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce and Labor, sufficient to sustain afloat every person on board and so placed as to be readily accessible. All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the

local board of inspectors. No examination shall be required as the condition of obtaining such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation: *Provided*, That motor boats shall not be required to carry licensed officers, except as required in this Act. [36 Stat. L. 463.]

SEC. 6. [*Extinguishing gasoline.*] That every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline. [36 Stat. L. 463.]

SEC. 7. [*Penalty.*] That a fine not exceeding one hundred dollars may be imposed for any violation of this Act. The motor boat shall be liable for the said penalty and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found. [36 Stat. L. 463.]

SEC. 8. [*Regulations.*] That the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this Act by collectors of customs and other officers of the Government. And the Secretary of the Department of Commerce and Labor may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture relating to motor boats except for failure to observe the provisions of section six of this Act. [36 Stat. L. 463.]

SEC. 9. [*Conflicting laws repealed — international rules not affected.*] That all laws and parts of laws only in so far as they are in conflict herewith are hereby repealed: *Provided*, That nothing in this Act shall be deemed to alter or amend Acts of Congress embodying or revising international rules for preventing collisions at sea. [36 Stat. L. 463.]

SEC. 10. [*Effect.*] That this Act shall take effect on and after thirty days after its approval. [36 Stat. L. 463.]

COMMERCE AND LABOR.

Act of June 17, 1910, Ch. 297, 42.

Assignment of Pay by Officers and Employees Permitted, 42.

Act of March 4, 1911, Ch. 237, 42.

Bureau of Standards — Designation of Acting Director, 42.

CROSS-REFERENCES.

Bureau of Immigration and Naturalization, see *NATURALIZATION*.

Lighthouse Establishment, see *LIGHTS AND BUOYS*.

Regulations Concerning Insecticides, see *AGRICULTURE*.

Seal Fisheries in Alaska, see *ALASKA*.

[*Assignment of pay by officers and employees permitted.*] * * * That the Secretary of Commerce and Labor is hereby authorized, under such regulations as he may prescribe, to permit officers and employees of the several bureaus and divisions of the Department of Commerce and Labor to assign their salaries while absent from Washington, District of Columbia, and employed in the field. [36 Stat. L. 524.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

[*Bureau of Standards — designation of acting director.*] * * * Hereafter in the case of the absence of the Director of the Bureau of Standards the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the director during his absence. [36 Stat. L. 1231.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1911, ch. 237.

COMMERCE COURT.

See *JUDICIARY*.

COMMISSIONER OF INDIAN AFFAIRS.

See *INDIANS*.

COMMISSIONER OF LIGHTHOUSES.

See *LIGHTS AND BUOYS*.

COMMISSIONERS.

See *JUDICIAL OFFICERS*.

COMMISSION OF FINE ARTS.

See *FINE ARTS COMMISSION*.

COMMON CARRIERS.

INTERSTATE COMMERCE; RAILROADS.

CONGRESS.

Act of Aug. 8, 1911, Ch. 5, 43.

- Sec. 1. Apportionment among States of Representatives in Congress, 43.*
- 2. Representatives from Arizona and New Mexico, 44.*
- 3. Election by Districts, 44.*
- 4. Redistricting States — Representatives at Large, 44.*
- 5. Candidates — How Nominated, 44.*

CROSS-REFERENCES.

Campaign and Election Expenses of Candidates, see ELECTIONS.
Political Contributions, Publicity to, see ELECTIONS.

An Act For the apportionment of Representatives in Congress among the several States under the Thirteenth Census.

[Act of Aug. 8, 1911, ch. 5.]

[SEC. 1.] [Apportionment among states of representatives in Congress.]

That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows:

Alabama, ten. Arkansas, seven. California, eleven. Colorado, four. Connecticut, five. Delaware, one. Florida, four. Georgia, twelve. Idaho, two. Illinois, twenty-seven. Indiana, thirteen. Iowa, eleven. Kansas, eight. Kentucky, eleven. Louisiana, eight. Maine, four. Maryland, six. Massachusetts, sixteen. Michigan, thirteen. Minnesota, ten. Mississippi, eight. Missouri, sixteen. Montana, two. Nebraska, six. Nevada, one. New Hampshire, two. New Jersey, twelve. New York, forty-three. North Carolina, ten. North Dakota, three. Ohio, twenty-two. Oklahoma, eight. Oregon,

three. Pennsylvania, thirty-six. Rhode Island, three. South Carolina, seven. South Dakota, three. Tennessee, ten. Texas, eighteen. Utah, two. Vermont, two. Virginia, ten. Washington, five. West Virginia, six. Wisconsin, eleven. Wyoming, one. [37 Stat. L. 13.]

SEC. 2. [*Representatives from Arizona and New Mexico.*] That if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each, and if one of such Territories shall so become a State, such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed. [37 Stat. L. 14.]

SEC. 3. [*Election by districts.*] That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative. [37 Stat. L. 14.]

SEC. 4. [*Redistricting states — representatives at large.*] That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed. [37 Stat. L. 14.]

SEC. 5. [*Candidates — how nominated.*] That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State. [37 Stat. L. 14.]

CONSERVATION.

See *TIMBER LANDS AND FOREST RESERVES.*

CONSULS.

See *DIPLOMATIC AND CONSULAR OFFICERS.*

CONTRACTS.

See *PUBLIC CONTRACTS.*

CONVICT LABOR.

See *IMMIGRATION*.

CORPORATIONS.

Inspection of Corporation Returns, see INTERNAL REVENUE.
And see generally, *SURETY COMPANIES*.

CORRUPT PRACTICES.

See *ELECTIONS*.

COSTS.

Act of June 25, 1910, Ch. 435, 45.

United States Courts — Entering or Defending Suits without Paying Costs, 45.

An Act To amend section one, chapter two hundred and nine, of the United States Statutes at Large, volume twenty-seven, entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," and to provide for the prosecution of writs of error and appeals in forma pauperis, and for other purposes.

[Act of June 25, 1910, ch. 435.]

[*United States courts — entering or defending suits without paying costs.*] That section one of an Act entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," approved July twentieth, eighteen hundred and ninety-two, be, and the same is hereby, amended so as to read as follows:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal." [36 Stat. L. 866.]

See 2 Fed. Stat. Annot. 294, for the provision above amended.

COURTS.

In Philippine Islands, see PHILIPPINE ISLANDS.

Territorial Courts, see TERRITORIES.

And see generally, *JUDICIARY; JURIES; MONEY PAID INTO COURT.*

COURTS-MARTIAL.

See *MILITARY ACADEMY.*

CRIMES AND OFFENSES.

Joint Resolution of June 22, 1910, No. 34, 46.

Lake Michigan — Wisconsin, Illinois, Indiana, and Michigan May Settle Jurisdiction of Crimes Committed on, 46.

CROSS-REFERENCES.

Adulterated or Misbranded Insecticides, see AGRICULTURE.

Falsification of Accounts and Making of False Reports, see FALSE ACCOUNTS AND REPORTS.

Jurisdiction of, see JUDICIARY.

Joint Resolution To enable the States of Wisconsin, Illinois, Indiana, and Michigan to determine the jurisdiction of crimes committed on Lake Michigan.

[Joint Resolution of June 22, 1910, No. 34.]

[*Lake Michigan — Wisconsin, Illinois, Indiana, and Michigan may settle jurisdiction of crimes committed on.*] That the consent of the Congress of the United States is hereby given to the States of Wisconsin, Illinois, Indiana, and Michigan, or any two or more of them, by such agreement or compact as they may deem desirable or necessary or otherwise, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon the waters of Lake Michigan. [36 Stat. L. 882.]

CUSTOMS DUTIES.

Act of April 27, 1910, Ch. 193, 48.

Sec. 1. New Orleans, La., Customs District—Baton Rouge Made Subport of Entry, 48.

2. Territory Included, 48.

Act of June 10, 1910, Ch. 283, 48.

Sec. 1. Custom-house Brokers—Licenses Required, 48.

2. Revocation of License, 48.

3. Review by Court, 49.

4. Regulations, 49.

5. "Person" Defined, 49.

Act of June 13, 1910, Ch. 289, 49.

Eastport, Idaho—Made Subport of Entry, 49.

Act of June 22, 1910, Ch. 311, 49.

Sec. 1. Customs—Oregon Collection Districts, 49.

2. Officers, 50.

Act of June 23, 1910, Ch. 355, 51.

Saint Johns, Fla., District Changed to Jacksonville, 51.

Act of June 25, 1910, Ch. 398, 51.

New London, Conn., Granted Immediate Transportation Privileges, 51.

Act of Jan. 23, 1911, Ch. 25, 51.

Sec. 1. San Francisco, Cal.—Appraiser's Salary Increased, 51.

2. Inconsistent Laws Repealed, 51.

Act of Feb. 13, 1911, Ch. 46, 51.

Sec. 1. Customs—Lading and Unlading Vessels, etc., at Night, 51.

2. Preliminary Entry to Boarding Officer—Oath, Manifest, etc.—Discharge of Cargo on Arrival, 52.

3. Bond Required for Immediate Lading or Unlading—Continuing Bond for Special Licenses and Permits, 52.

4. Issue of Licenses and Permits—Formal Entry Required, 52.

5. Inspectors, etc.—Extra Pay for Night Service—Payment to Collector by Master, etc.—Rates to Employees—Boarding Officers, etc., May Administer Oaths—Payment for Services at Night, etc., 53.

6. Laws Repealed, 53.

Act of March 2, 1911, Ch. 191, 53.

Sec. 1. Certified Checks—Accepted for Customs Duties and Internal Revenue, 53.

2. Effect, 54.

Act of March 3, 1911, Ch. 217, 54.

Pensacola Customs District, Fla.—Saint Andrews Made Subport of Entry,

Act of March 3, 1911, Ch. 228, 54.

Mobile, Ala., Customs District—Birmingham Made Subport of Entry,

Act of March 4, 1911, Ch. 285, 54.

Special Agents of Treasury Department—Appointment and Salaries, 54.

Act of July 26, 1911, Ch. 3, 55.

Sec. 1. Duties on Canadian Products, 55.

2. Pulp and Paper, 63.

3. Trade Agreements with Canada, 63.

Act of July 27, 1911, Ch. 4, 63.

Customs Duties—Free List, 63.

Act of Aug. 17, 1911, Ch. 23, 64.

Brownsville, Tex., Granted Immediate Transportation Facilities, 64.

CROSS-REFERENCE.

Court of Customs Appeals, see JUDICIARY.

An Act To make Baton Rouge, in the State of Louisiana, a subport of entry, and for other purposes.

[Act of April 27, 1910, ch. 193.]

[SEC. 1.] [*New Orleans, La., customs district — Baton Rouge made subport of entry.*] That Baton Rouge, in the State of Louisiana, is hereby made a subport of entry in the district of New Orleans, and the necessary customs officers stationed at said port may, in the discretion of the Secretary of the Treasury, enter and clear vessels, receive duties, fees, and other moneys, and perform such other service as, in his judgment, the interest of commerce may require. [36 Stat. L. 335.]

SEC. 2. [*Territory included.*] That the limits of the subport of Baton Rouge, as herein created, shall be as follows: Both sides of the Mississippi River, extending from Conrads Point on the south to Scotts Bluff on the north at the point where the west line of section sixty-seven, township six, south of range one west, Greensburg land district, intersects the left bank of the Mississippi River, including all territory comprised within the following boundaries, to wit: North by a due east and west line drawn through said last-named point and extending four miles east and three miles west therefrom; on the south by a due east and west line, drawn through the extreme western point of Conrads Point and extending four miles east and three miles west therefrom; on the east by a straight line connecting the eastern termini of said north and south boundary lines and west by a straight line connecting the western termini of said north and south boundary lines. [36 Stat. L. 335.]

An Act To license custom-house brokers.

[Act of June 10, 1910, ch. 283.]

[SEC. 1.] [*Custom-house brokers — licenses required.*] That the collector or chief officer of the customs at any port of entry or delivery shall, upon application, issue to any person of good moral character, being a citizen of the United States a license to transact business as a custom-house broker in the collection district in which such license is issued, and on and after sixty days from the approval of this Act no person shall transact business as a custom-house broker without a license granted in accordance with this provision; but this Act shall not be so construed as to prohibit any person from transacting business at a custom-house pertaining to his own importations. [36 Stat. L. 464.]

SEC. 2. [*Revocation of license.*] That the collector or chief officer of the customs may at any time, for good and sufficient reasons, serve notice in writing upon any custom-house broker so licensed to show cause why said license shall not be revoked, which notice shall be in the form of a statement specifically setting forth the grounds of complaint. The collector or chief officer of customs shall within ten days thereafter notify the custom-house broker in writing of a hearing to be held before him within five days upon said charges. At such hearing the custom-house broker may be represented by counsel, and all proceedings, including the proof of the charges and the answer thereto, shall be presented, with right of cross-examination to both parties, and a stenographic record of the same shall be made and a copy thereof shall be delivered to the custom-house broker. At the conclusion of such hearing the collector or chief officer of customs shall forthwith transmit all papers and the stenographic report of the hearing, which shall constitute the record in the case, to the

Secretary of the Treasury for his action. Thereupon the said Secretary of the Treasury shall have the right to revoke the license of any custom-house broker, in which case formal notice shall be given such custom-house broker within ten days. [36 Stat. L. 464.]

SEC. 3. [*Review by court.*] That any licensed custom-house broker aggrieved by the decision of the Secretary of the Treasury may, within thirty days thereafter, and not afterwards, apply to the United States circuit court for the circuit in which the collection district is situated for a review of such decision. Such application shall be made by filing in the office of the clerk of said court a petition praying relief in the premises. Thereupon the court shall immediately give notice in writing of such application to the Secretary of the Treasury, who shall forthwith transmit to said court the record and evidence taken in the case, together with a statement of his decision therein. The filing of such application shall operate as a stay of the revocation of the license. The matter may be brought on to be heard before the said court in the same manner as a motion, by either the United States district attorney or the attorney for the custom-house broker, and the decision of said United States circuit court for the circuit in which the collection district is situated shall be upon the merits as disclosed by the record and be final, and the proceedings remanded to the Secretary of the Treasury for further action to be taken in accordance with the terms of the decree. [36 Stat. L. 465.]

SEC. 4. [*Regulations.*] That the Secretary of the Treasury shall prescribe regulations necessary or convenient for carrying this Act into effect. [36 Stat. L. 465.]

SEC. 5. [*"Person" defined.*] That the word person wherever used in this Act shall include persons, copartnerships, associations, joint stock associations and corporations. [36 Stat. L. 465.]

An Act Establishing Eastport, Idaho, a subport of entry in the customs-collection district of Montana and Idaho, and for other purposes.

[Act of June 13, 1910, ch. 289.]

[*Eastport, Idaho — made subport of entry.*] That Eastport, Idaho, be, and the same is hereby, established a subport of entry in the customs-collection district of Montana and Idaho, and that the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the said subport of Eastport, Idaho. [36 Stat. L. 467.]

For sec. 1 of Act of June 10, 1880, see 2 Fed. Stat. Annot. 712.

An Act To amend sections twenty-five hundred and eighty-six and twenty-five hundred and eighty-seven of the Revised Statutes of the United States, as amended by the Acts of April twenty-fifth, eighteen hundred and eighty-two, and August twenty-eighth, eighteen hundred and ninety, relating to collection districts in Oregon.

[Act of June 22, 1910, ch. 311.]

[SEC. 1.] [*Customs — Oregon collection districts.*] That section twenty-five hundred and eighty-six of the Revised Statutes of the United States be amended so as to read as follows:

"Sec. 2586. There shall be in the State of Oregon four collection districts, as follows:

"First. The district of Coos Bay, to comprise all of the waters and shores of that part of the State of Oregon lying south and east of the north bank of the Siuslaw River and west of the summit of the Coast Range of mountains; in which Coos Bay, in Coos County, shall be the port of entry, and Ellensburg, at the mouth of the Rogue River; Port Orford and Gardiner, on the Umpqua River, ports of delivery.

"Second. The district of Yaquina, to comprise all the waters and shores lying north and east of the north bank of the Siuslaw River to the forty-fifth degree of north latitude and west of the summit of the Coast Range of mountains; in which Yaquina shall be the port of entry and Newport a port of delivery.

"Third. The district of Astoria, to comprise all the waters and shores lying within the territory described as follows: Beginning at the summit of the Coast Mountains, on the forty-fifth degree north latitude, running thence west to the Pacific Ocean, thence north to where the north bank of the Columbia River intersects the Pacific Ocean, thence easterly and southerly along but excluding the north bank of the Columbia River to where one hundred and twenty-two degrees forty-six minutes fifty-five seconds west longitude intersects forty-five degrees fifty-one minutes north latitude, thence westerly to the summit of the Coast Mountains, thence southerly along the summit of said Coast Mountains to the place of beginning; in which Astoria shall be the port of entry.

"Fourth. The district of Portland, to comprise all the waters and shores in the State of Oregon, excluding the north bank of the Columbia River between the States of Oregon and Washington, not described in the collection districts of Coos Bay, Yaquina, and Astoria; in which Portland shall be the port of entry." [36 Stat. L. 579.]

For R. S. sec. 2586, see 2 Fed. Stat. Annot. 563.

SEC. 2. [Officers.] That section twenty-five hundred and eighty-seven of the Revised Statutes of the United States be amended so as to read as follows:

"Sec. 2587. There shall be in the collection districts in the State of Oregon the following officers:

"First. In the district of Coos Bay a collector, who shall reside at Empire City, and three deputy collectors, who may be appointed by the collector, with the approval of the Secretary of the Treasury, and of whom one shall reside at Ellensburg, one at Port Orford, and one at Gardiner.

"Second. In the district of Yaquina a collector, who shall reside at Yaquina, and who shall receive a salary of one thousand dollars a year, with the fees allowed by law and a commission on all customs moneys collected and accounted for by him, such salary, fees, and commissions not to exceed the sum of two thousand five hundred dollars per year.

"Third. In the district of Astoria a collector, who shall reside at Astoria, and who shall receive a salary of three thousand dollars a year, and storage charges not exceeding three hundred dollars per annum in lieu of all compensation now allowed by law.

"Fourth. In the district of Portland a collector, who shall receive a salary of six thousand dollars a year, in lieu of present salary, fees, commissions, storage, and all perquisites of every name and nature; and an appraiser, who shall receive a salary of three thousand dollars a year, both of whom shall

reside at Portland, Oregon: *Provided, however,* That nothing in this Act shall be construed as in any way affecting the action heretofore taken by the Secretary of the Treasury under the provisions of section two hundred and fifty-three of the Revised Statutes in discontinuing Port Orford, Gardiner, Ellensburg, and Newport as ports of delivery, nor as requiring customs officers to be stationed at such places." [36 Stat. L. 579.]

See 2 Fed. Stat. Annot. 566.

An Act Changing the name of the Saint Johns collection district, in the State of Florida, to the Jacksonville collection district.

[Act of June 23, 1910, ch. 355.]

[*Saint Johns, Fla., district changed to Jacksonville.*] That the name of the collection district in the State of Florida now known as the Saint Johns collection district be, and the same is hereby, changed to the Jacksonville collection district. [36 Stat. L. 592.]

An Act Amending the statutes in relation to the immediate transportation of dutiable goods and merchandise.

[Act of June 25, 1910, ch. 393.]

[*New London, Conn., granted immediate transportation privileges.*] That the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, entitled "An Act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," be, and the same are hereby, extended to the port of New London, in the customs collection district of New London, Connecticut. [36 Stat. L. 828.]

See 2 Fed. Stat. Annot. 712.

An Act To limit and fix the compensation of the appraiser of merchandise at the port of San Francisco.

[Act of Jan. 23, 1911, ch. 25.]

[SEC. 1.] [*San Francisco, Cal. — appraiser's salary increased.*] That the appraiser of merchandise at San Francisco shall receive a salary of four thousand dollars per annum. [36 Stat. L. 894.]

SEC. 2. [*Inconsistent laws repealed.*] That all laws and parts of laws inconsistent herewith are repealed. [36 Stat. L. 894.]

An Act To provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes.

[Act of Feb. 13, 1911, ch. 46.]

SECTION 1. [*Customs — lading and unlading vessels, etc., at night.*] That upon arrival at any port in the United States of any vessel or other conveyance from a foreign port or place, either directly or by way of another port in the United States, or upon such arrival from another port in the United States of any vessel or other conveyance belonging to a line designated by the Secretary of the Treasury as a common carrier of bonded merchandise, and, after

due report and entry of such vessel in accordance with existing law or due report, under such regulations as the Secretary of the Treasury may prescribe, of the arrival of such other conveyances, the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant; upon proper application therefor, a special license to lade or unlade the cargo of any such vessel or other conveyance at night; that is to say, between sunset and sunrise. [36 Stat. L. 899.]

SEC. 2. [*Preliminary entry to boarding officer — oath, manifest, etc. — discharge of cargo on arrival.*] That the master of any vessel from a foreign port or place, upon arrival within a customs collection district of the United States, bound to a port of entry in such district, may make preliminary entry of the vessel by making oath or affirmation to the truth of the statements contained in his original manifest and delivering his said original manifest to the customs officer who shall board such vessel within such district, with a copy of said original manifest for the use of the naval officer at ports where there is a naval officer; whereupon, upon arrival at the wharf or place of discharge, the lading or unlading of the cargo of such vessel may proceed, by both day and night, under such regulations as the Secretary of the Treasury may prescribe. [36 Stat. L. 900.]

SEC. 3. [*Bond required for immediate lading or unlading — continuing bond for special licenses and permits.*] That before any such special license to lade or unlade at night shall be granted and before any permit shall be issued for the immediate lading or unlading of any such vessel after preliminary entry, as hereinbefore provided, either by day or by night the master, owner, agent, or consignee of such vessel or other conveyance shall make proper application therefor and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; or the master, owner, agent, consignee, or probable consignee, as aforesaid, may execute and deliver to the United States, in like manner and form, a good and sufficient bond, in the penal sum of fifty thousand dollars, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special licenses and the issuing or granting of such permits for immediate lading or unlading by day and night during a period of six months. [36 Stat. L. 900.]

SEC. 4. [*Issue of licenses and permits — formal entry required.*] Such application having been duly made and the required bond having been duly executed and delivered, special license or licenses to lade or unlade at night after regular entry of vessels, and due report of other conveyances, may be granted, and a permit or permits may be issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made: *Provided*, That the provisions of this Act shall extend and be applicable to any vessels or other conveyances bound to a port of entry in the United States to be unladen at a port of delivery or to be unladen at a place of discharge designated by the Secretary of the Treasury under the provisions of section twenty-seven hundred and seventy-six of the Revised Statutes as amended: *Provided further*, That when preliminary entry of a vessel shall be made by the master as herein

provided he shall not be relieved from making due report and entry of his vessel at the custom-house in accordance with existing law, and any liability of the master or owner of any such vessel to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed. [36 Stat. L. 900.]

For R. S. sec. 2726, see 2 Fed. Stat. Annot. 604.

SEC. 5. [*Inspectors, etc. — extra pay for night service — payment to collector by master, etc. — rates to employees — boarding officers, etc., may administer oaths — payment for services at night, etc.*] That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for night services of inspectors, storekeepers, weighers, and other customs officers and employees in connection with the lading or unlading of cargo at night, or the lading at night of cargo or merchandise for transportation in bond or for exportation in bond, or for the exportation with benefit of drawback, but such rate of compensation shall not exceed an amount equal to double the rate of compensation allowed to each such officer or employee for like services rendered by day, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel or other conveyance, whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted, to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury. Customs officers acting as boarding officers, and any customs officer who may be designated for that purpose by the collector of customs, are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays — at the rate prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessels. [36 Stat. L. 901.]

SEC. 6. [*Laws repealed.*] That section twenty-eight hundred and seventy-one of the Revised Statutes, the Act approved June thirtieth, nineteen hundred and six, entitled "An Act to amend section twenty-eight hundred and seventy-one of the Revised Statutes," and section one of the Act approved June fifth, eighteen hundred and ninety-four, entitled "An Act to facilitate the entry of steamships," and all Acts or parts of Acts inconsistent herewith are hereby repealed. [36 Stat. L. 901.]

For the Act of June 30, 1906, see 1909 Supp. Fed. Stat. Annot. 103; for the Act of June 5, 1894, see 2 Fed. Stat. Annot. 666.

An Act To authorize the receipt of certified checks drawn on national and State banks for duties on imports and internal taxes, and for other purposes.

[Act of March 2, 1911, ch. 191.]

[SEC. 1.] [*Certified checks — accepted for customs duties and internal revenue.*] That it shall be lawful for collectors of customs and of internal revenue to receive for duties on imports and internal taxes certified checks drawn on national and State banks, and trust companies during such time and under such regulations as the Secretary of the Treasury may prescribe. No

person, however, who may be indebted to the United States on account of duties on imports or internal taxes who shall have tendered a certified check or checks as provisional payment for such duties or taxes, in accordance with the terms of this Act, shall be released from the obligation to make ultimate payment thereof until such certified check so received has been duly paid; and if any such check so received is not duly paid by the bank on which it is drawn and so certifying, the United States shall, in addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of such bank; and such amount shall be paid out of its assets in preference to any or all other claims whatsoever against said bank, except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank. [36 Stat. L. 965.]

SEC. 2. [Effect.] That this Act shall be effective on and after June first, nineteen hundred and eleven. [36 Stat. L. 966.]

An Act To designate Saint Andrews, Florida, as a subport of entry.

[Act of March 3, 1911, ch. 317.]

[Pensacola customs district, Fla. — Saint Andrews made subport of entry.] That Saint Andrews, in the State of Florida, is hereby made a subport of entry in the district of Pensacola, and the necessary customs officers may, in the discretion of the Secretary of the Treasury, be stationed at said subport with authority to enter and clear vessels, receive duties, fees, and other moneys, and perform such other services as, in his judgment, the interest of commerce may require, and said officers shall receive such compensation as he may allow. [36 Stat. L. 1080.]

An Act To constitute Birmingham, in the State of Alabama, a subport of entry.

[Act of March 3, 1911, ch. 228.]

[Mobile, Ala., customs district — Birmingham made subport of entry.] That Birmingham, in the State of Alabama, be, and the same is hereby, constituted a subport of entry in the customs collection district of Mobile, and that the privileges of section seven of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the said subport of Birmingham, Alabama. [36 Stat. L. 1086.]

See 2 Fed. Stat. Annot. 715.

[Special agents of Treasury Department — appointment and salaries.] * * * Hereafter the number and compensation of special agents to be appointed by the Secretary of the Treasury under section twenty-six hundred and forty-nine of the Revised Statutes of the United States, shall be as follows: One supervising agent who shall supervise and direct the special agents of the Treasury Department and who shall receive, in addition to the necessary traveling expenses actually incurred by him, a compensation of four thousand five hundred dollars per annum;

Ten special agents who shall each receive, in addition to the necessary traveling expenses actually incurred by him, a compensation to be fixed by the Secretary of the Treasury, not to exceed twelve dollars per day;

Ten special agents who shall each receive, in addition to the necessary traveling expenses actually incurred by him, a compensation to be fixed by the Secretary of the Treasury, not to exceed ten dollars per day; and

Ten special agents who shall each receive, in addition to the necessary traveling expenses actually incurred by him, a compensation to be fixed by the Secretary of the Treasury not to exceed eight dollars per day. [36 Stat. L. 1893.]

For R. S. sec. 2649, see 2 Fed. Stat. Annot. 590.

The above is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

An Act To promote reciprocal trade relations with the Dominion of Canada, and for other purposes.

[Act of July 26, 1911, ch. 3.]

[SEC. 1.] [*Duties on Canadian products.*] That there shall be levied, collected, and paid upon the articles hereinafter enumerated, the growth, product or manufacture of the Dominion of Canada, when imported therefrom into the United States or any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), in lieu of the duties now levied, collected, and paid, the following duties, namely:

Fresh meats: Beef, veal, mutton, lamb, pork, and all other fresh or refrigerated meats excepting game, one and one-fourth cents per pound.

Bacon and hams, not in tins or jars, one and one-fourth cents per pound.

Meats of all kinds, dried, smoked, salted, in brine, or prepared or preserved in any manner, not otherwise herein provided for, one and one-fourth cents per pound.

Canned meats and canned poultry, twenty per centum ad valorem.

Extract of meat, fluid or not, twenty per centum ad valorem.

Lard and compounds thereof, cottolene and cotton stearine, and animal stearine, one and one-fourth cents per pound.

Tallow, forty cents per one hundred pounds.

Egg yolk, egg albumen, and blood albumen, seven and one-half per centum ad valorem.

Fish (except shellfish) by whatever name known, packed in oil, in tin boxes or cans, including the weight of the package: (a) when weighing over twenty ounces and not over thirty-six ounces each, five cents per package; (b) when weighing over twelve ounces and not over twenty ounces each, four cents per package; (c) when weighing twelve ounces each or less, two cents per package; (d) when weighing thirty-six ounces each or more, or when packed in oil, in bottles, jars, or kegs, thirty per centum ad valorem.

Tomatoes and other vegetables, including corn, in cans or other air-tight packages, and including the weight of the package, one and one-fourth cents per pound.

Wheat flour and semolina, and rye flour, fifty cents per barrel of one hundred and ninety-six pounds.

Oatmeal and rolled oats, including the weight of paper covering, fifty cents per one hundred pounds.

Corn meal, twelve and one-half cents per one hundred pounds.

Barley malt, forty-five cents per one hundred pounds.

Barley, pot, pearled, or patent, one-half cent per pound.

Buckwheat flour or meal, one-half cent per pound.

Split peas, dried, seven and one-half cents per bushel of sixty pounds.

Prepared cereal foods, not otherwise provided for herein, seventeen and one-half per centum ad valorem.

Bran, middlings, and other offals of grain used for animal food, twelve and one-half cents per one hundred pounds.

Macaroni and vermicelli, one cent per pound.

Biscuits, wafers, and cakes, when sweetened with sugar, honey, molasses, or other material, twenty-five per centum ad valorem.

Biscuits, wafers, cakes, and other baked articles, composed in whole or in part of eggs or any kind of flour or meal, when combined with chocolate, nuts, fruits, or confectionery; also candied peel, candied popcorn, candied nuts, candied fruits, sugar candy, and confectionery of all kinds, thirty-two and one-half per centum ad valorem.

Maple sugar and maple sirup, one cent per pound.

Pickles, included pickled nuts, sauces of all kinds, and fish paste or sauce, thirty-two and one-half per centum ad valorem.

Cherry juice and prune juice, or prune wine, and other fruit juices and fruit sirup, nonalcoholic, seventeen and one-half per centum ad valorem.

Mineral waters and imitations of natural mineral waters, in bottles or jugs, seventeen and one-half per centum ad valorem.

Essential oils, seven and one-half per centum ad valorem.

Grapevines; gooseberry, raspberry, and current [*sic*] bushes, seventeen and one-half per centum ad valorem.

Farm wagons and finished parts thereof, twenty-two and one-half per centum ad valorem.

Plows, tooth and disk harrows, harvesters, reapers, agricultural drills and planters, mowers, horserakes, cultivators; threshing machines, including wind-stackers, baggers, weighers, and self-feeders therefor and finished parts thereof imported for repair of the foregoing, fifteen per centum ad valorem.

Portable engines with boilers, in combination, horsepower and traction engines for farm purposes; hay loaders, potato diggers, fodder or feed cutters, grain crushers, fanning mills, hay tedders, farm or field rollers, manure spreaders, weeders, and windmills, and finished parts thereof imported for repair of the foregoing, except shafting, twenty per centum ad valorem.

Grindstones of sandstone, not mounted, finished or not, five cents per one hundred pounds.

Freestone, granite, sandstone, limestone, and all other monumental or building stone, except marble, breccia, and onyx, unmanufactured or not dressed, hewn, or polished, twelve and one-half per centum ad valorem.

Roofing slates, fifty-five cents per one hundred square feet.

Vitrified paving blocks, not ornamented or decorated in any manner, and paving blocks of stone, seventeen and one-half per centum ad valorem.

Oxide of iron, as a color, twenty-two and one-half per centum ad valorem.

Asbestos, further manufactured than ground; manufactures of asbestos or articles of which asbestos is the component material of chief value, including woven fabrics, wholly or in chief value of asbestos, twenty-two and one-half per centum ad valorem.

Printing ink, seventeen and one-half per centum ad valorem.

Cutlery, plated or not — pocketknives, penknives, scissors and shears, knives and forks for household purposes, and table steels, twenty-seven and one-half per centum ad valorem.

Bells and gongs, brass corners and rules for printers, twenty-seven and one-half per centum ad valorem.

Basins, urinals, and other plumbing fixtures for bathrooms and lavatories; bathtubs, sinks, and laundry tubs of earthenware, stone, cement, or clay, or of other material, thirty-two and one-half per centum ad valorem.

Brass band instruments, twenty-two and one-half per centum ad valorem.

Clocks, watches, time recorders, clock and watch keys, clock cases, and clock movements, twenty-seven and one-half per centum ad valorem.

Printers' wooden cases and cabinets for holding type, twenty-seven and one-half per centum ad valorem.

Wood flour, twenty-two and one-half per centum ad valorem.

Canoes and small boats of wood, not power boats, twenty-two and one-half per centum ad valorem.

Feathers, crude, not dressed, colored, or otherwise manufactured, twelve and one-half per centum ad valorem.

Antiseptic surgical dressings, such as absorbent cotton, cotton wool, lint, lamb's wool, tow, jute, gauzes, and oakum, prepared for use as surgical dressings, plain or medicated; surgical trusses, pessaries, and suspensory bandages of all kinds, seventeen and one-half per centum ad valorem.

Plate glass, not beveled, in sheets or panes exceeding seven square feet each and not exceeding twenty-five square feet each, twenty-five per centum ad valorem.

Motor vehicles, other than for railways and tramways, and automobiles and parts thereof, not including rubber tires, thirty per centum ad valorem.

Iron or steel digesters for the manufacture of wood pulp, twenty-seven and one-half per centum ad valorem.

Musical instrument cases, fancy cases or boxes, portfolios, satchels, reticules, card cases, purses, pocketbooks, fly books for artificial flies, all the foregoing composed wholly or in chief value of leather, thirty per centum ad valorem.

Aluminum in crude form, five cents per pound.

Aluminum in plates, sheets, bars, and rods, eight cents per pound.

Laths, ten cents per one thousand pieces.

Shingles, thirty cents per thousand.

Sawn boards, planks, deals, and other lumber, planed or finished on one side, fifty cents per thousand feet, board measure; planed or finished on one side and tongued and grooved, or planed or finished on two sides, seventy-five cents per thousand feet, board measure; planed or finished on three sides, or planed and finished on two sides and tongued and grooved, one dollar and twelve and one-half cents per thousand feet, board measure; planed and finished on four sides, one dollar and fifty cents per thousand feet, board measure; and in estimating board measure under this schedule no deduction shall be made on board measure on account of planing, tonguing, and grooving.

Iron ore, including manganiferous iron ore, and the dross or residuum from burnt pyrites, ten cents per ton: *Provided*, That in levying and collecting the duty on iron ore no deduction shall be made from the weight of the ore on account of moisture which may be chemically or physically combined therewith.

Coal slack or culm of all kinds, such as will pass through a half-inch screen, fifteen cents per ton.

Provided, That the duties above enumerated shall take effect whenever the President of the United States shall have satisfactory evidence and shall make proclamation that on the articles hereinafter enumerated, the growth, product, or manufacture of the United States, or any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), when imported therefrom

into the Dominion of Canada, duties not in excess of the following are imposed, namely:

Fresh meats: Beef, veal, mutton, lamb, pork, and all other fresh or refrigerated meats excepting game, one and one-fourth cents per pound.

Bacon and hams, not in tins or jars, one and one-fourth cents per pound.

Meats of all kinds, dried, smoked, salted, in brine, or prepared or preserved in any manner, not otherwise herein provided for, one and one-fourth cents per pound.

Canned meats and canned poultry, twenty per centum ad valorem.

Extract of meat; fluid or not, twenty per centum ad valorem.

Lard, and compounds thereof, cottolene and cotton stearin, and animal stearin, one and one-fourth cents per pound.

Tallow, forty cents per one hundred pounds.

Egg yolk, egg albumen, and blood albumen, seven and one-half per centum ad valorem.

Fish (except shellfish), by whatever name known, packed in oil, in tin boxes or cans, including the weight of the package: (a) when weighing over twenty ounces and not over thirty-six ounces each, five cents per package; (b) when weighing over twelve ounces and not over twenty ounces each, four cents per package; (c) when weighing twelve ounces each or less, two cents per package; (d) when weighing thirty-six ounces each or more, or when packed in oil, in bottles, jars, or kegs, thirty per centum ad valorem.

Tomatoes and other vegetables, including corn, in cans or other air-tight packages, and including the weight of the package, one and one-fourth cents per pound.

Wheat flour and semolina; and rye flour, fifty cents per barrel of one hundred and ninety-six pounds.

Oatmeal and rolled oats, including the weight of paper covering, fifty cents per one hundred pounds.

Corn meal, twelve and one-half cents per one hundred pounds.

Barley malt, forty-five cents per one hundred pounds.

Barley, pot, pearled, or patent, one-half cent per pound.

Buckwheat flour or meal, one-half cent per pound.

Split peas, dried, seven and one-half cents per bushel of sixty pounds.

Prepared cereal foods, not otherwise provided for herein, seventeen and one-half per centum ad valorem.

Bran, middlings, and other offals of grain used for animal food, twelve and one-half cents per one hundred pounds.

Macaroni and vermicelli, one cent per pound.

Biscuits, wafers, and cakes, when sweetened with sugar, honey, molasses, or other material, twenty-five per centum ad valorem.

Biscuits, wafers, cakes, and other baked articles, composed in whole or in part of eggs or any kind of flour or meal, when combined with chocolate, nuts, fruits, or confectionery; also candied peel, candied popcorn, candied nuts, candied fruits, sugar candy, and confectionery of all kinds, thirty-two and one-half per centum ad valorem.

Maple sugar and maple sirup, one cent per pound.

Pickles, including pickled nuts, sauces of all kinds, and fish paste or sauce, thirty-two and one-half per centum ad valorem.

Cherry juice and prune juice, or prune wine, and other fruit juices, and fruit sirup, nonalcoholic, seventeen and one-half per centum ad valorem.

Mineral waters and imitations of natural mineral waters, in bottles or jugs, seventeen and one-half per centum ad valorem.

Essential oils, seven and one-half per centum ad valorem.

Grapevines; gooseberry, raspberry, and currant bushes, seventeen and one-half per centum ad valorem.

Farm wagons, and finished parts thereof, twenty-two and one-half per centum ad valorem.

Plows, tooth and disk harrows, harvesters, reapers, agricultural drills and planters, mowers, horserakes, cultivators; thrashing machines, including wind-stackers, baggers, weighers, and self-feeders therefor, and finished parts thereof imported for repair of the foregoing, fifteen per centum ad valorem.

Portable engines with boilers, in combination, horsepower and traction engines, for farm purposes; hay loaders, potato diggers, fodder or feed cutters, grain crushers, fanning mills, hay tedders, farm or field rollers, manure spreaders, weeders, and windmills, and finished parts thereof imported for repair of the foregoing, except shafting, twenty per centum ad valorem.

Grindstones of sandstone, not mounted, finished or not, five cents per one hundred pounds.

Freestone, granite, sandstone, limestone, and all other monumental or building stone, except marble, breccia and onyx, unmanufactured or not dressed, hewn or polished, twelve and one-half per centum ad valorem.

Roofing slates, fifty-five cents per one hundred square feet.

Vitrified paving blocks, not ornamented or decorated in any manner, and paving blocks of stone, seventeen and one-half per centum ad valorem.

Oxide of iron, as a color, twenty-two and one-half per centum ad valorem.

Asbestos further manufactured than ground: Manufactures of asbestos, or articles of which asbestos is the component material of chief value, including woven fabrics wholly or in chief value of asbestos, twenty-two and one-half per centum ad valorem.

Printing ink, seventeen and one-half per centum ad valorem.

Cutlery, plated or not: Pocketknives, penknives, scissors and shears, knives and forks for household purposes, and table steels, twenty-seven and one-half per centum ad valorem.

Bells and gongs, brass corners and rules for printers, twenty-seven and one-half per centum ad valorem.

Basins, urinals, and other plumbing fixtures for bathrooms and lavatories; bathtubs, sinks, and laundry tubs, of earthenware, stone, cement, or clay, or of other material, thirty-two and one-half per centum ad valorem.

Brass band instruments, twenty-two and one-half per centum ad valorem.

Clocks, watches, time recorders, clock and watch keys, clock cases, and clock movements, twenty-seven and one-half per centum ad valorem.

Printers' wooden cases and cabinets for holding type, twenty-seven and one-half per centum ad valorem.

Wood flour, twenty-two and one-half per centum ad valorem.

Canoes and small boats of wood, not power boats, twenty-two and one-half per centum ad valorem.

Feathers, crude, not dressed, colored or otherwise manufactured, twelve and one-half per centum ad valorem.

Antiseptic surgical dressings, such as absorbent cotton, cotton wool, lint, lamb's wool, tow, jute, gauzes, and oakum, prepared for use as surgical dressings, plain or medicated; surgical trusses, pessaries, and suspensory bandages of all kinds, seventeen and one-half per centum ad valorem.

Plate glass, not beveled, in sheets or panes exceeding seven square feet each, and not exceeding twenty-five square feet each, twenty-five per centum ad valorem.

Motor vehicles, other than for railways and tramways, and automobiles, and parts thereof, not including rubber tires, thirty per centum ad valorem.

Iron or steel digesters for the manufacture of wood pulp, twenty-seven and one-half per centum ad valorem.

Musical instrument cases, fancy cases or boxes, portfolios, satchels, reticules, card cases, purses, pocketbooks, fly books for artificial flies; all the foregoing composed wholly or in chief value of leather, thirty per centum ad valorem.

Cement, Portland, and hydraulic or water lime in barrels, bags, or casks, the weight of the package to be included in the weight for duty, eleven cents per one hundred pounds.

Trees: Apple, cherry, peach, pear, plum, and quince, of all kinds, and small peach trees known as June buds, two and one-half cents each.

Condensed milk, the weight of the package to be included in the weight for duty, two cents per pound.

Biscuits without added sweetening, twenty per centum ad valorem.

Fruits in air-tight cans or other air-tight packages, the weight of the cans or other packages to be included in the weight for duty, two cents per pound.

Peanuts, shelled, one cent per pound.

Peanuts, unshelled, one-half cent per pound.

Coal, bituminous, round and run of mine, including bituminous coal such as will not pass through a three-quarter inch screen, forty-five cents per ton.

That the articles mentioned in the following paragraphs, the growth, product, or manufacture of the Dominion of Canada, when imported therefrom into the United States or any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), shall be exempt from duty, namely:

Live animals: Cattle, horses and mules, swine, sheep, lambs, and all other live animals.

Poultry, dead or alive.

Wheat, rye, oats, barley, and buckwheat, dried peas and beans, edible.

Corn, sweet corn, or maize.

Hay, straw, and cowpeas.

Fresh vegetables: Potatoes, sweet potatoes, yams, turnips, onions, cabbages, and all other vegetables in their natural state.

Fresh fruits: Apples, pears, peaches, grapes, berries, and all other edible fruits in their natural state, except lemons, oranges, limes, grapefruit, shad-docks, pomelos, and pineapples.

Dried fruits: Apples, peaches, pears, and apricots, dried, desiccated, or evaporated.

Dairy products: Butter, cheese, and fresh milk and cream: *Provided*, That cans actually used in the transportation of milk or cream may be passed back and forth between the two countries free of duty, under such regulations as the respective Governments may prescribe.

Eggs of barnyard fowl, in the shell.

Honey.

Cottonseed oil.

Seeds: Flaxseed or linseed, cotton seed, and other oil seeds; grass seed, including timothy and clover seed; garden, field, and other seed not herein otherwise provided for, when in packages weighing over one pound each (not including flower seeds).

Fish of all kinds, fresh, frozen, packed in ice, salted, or preserved in any form, except sardines and other fish preserved in oil; and shellfish of all kinds, including oysters, lobsters, and clams in any state, fresh or packed, and coverings of the foregoing.

Seal, herring, whale, and other fish oil, including sod oil: *Provided*, That fish oil, whale oil, seal oil, and fish of all kinds, being the product of fisheries carried on by the fishermen of the United States, shall be admitted into Canada as the product of the United States, and, similarly, that fish oil, whale oil, seal oil, and fish of all kinds, being the product of fisheries carried on by the fishermen of Canada, shall be admitted into the United States as the product of Canada.

Salt.

Mineral waters, natural, not in bottles or jugs.

Timber, hewn, sided or squared otherwise than by sawing, and round timber used for spars or in building wharves.

Sawed boards, planks, deals, and other lumber, not further manufactured than sawed.

Paving posts, railroad ties, and telephone, trolley, electric-light, and telegraph poles of cedar or other woods.

Wooden staves of all kinds, not further manufactured than listed or jointed, and stave bolts.

Pickets and palings.

Plaster rock, or gypsum, crude, not ground.

Mica, unmanufactured or rough trimmed only, and mica, ground or bolted.

Feldspar, crude, powdered or ground.

Asbestos, not further manufactured than ground.

Fluorspar, crude, not ground.

Glycerine, crude, not purified.

Talc, ground, bolted, or precipitated, naturally or artificially, not for toilet use.

Sulphate of soda; or salt cake, and soda ash.

Extracts of hemlock bark.

Carbon electrodes.

Brass in bars and rods, in coil or otherwise, not less than six feet in length, or brass in strips, sheets, or plates, not polished, planished, or coated.

Cream separators of every description, and parts thereof imported for repair of the foregoing.

Rolled iron or steel sheets, or plates, number fourteen gauge or thinner, galvanized or coated with zinc, tin, or other metal, or not.

Crucible cast-steel wire, valued at not less than six cents per pound.

Galvanized iron or steel wire, curved or not, numbers nine, twelve, and thirteen wire gauge.

Typesetting and typesetting machines and parts thereof, adapted for use in printing offices.

Barbed fencing wire of iron or steel, galvanized or not.

Coke.

Rolled round wire rods in the coil, of iron or steel, not over three-eighths of an inch in diameter, and not smaller than number six wire gauge.

Provided, That the articles above enumerated, the growth, product, or manufacture of the Dominion of Canada, shall be exempt from duty when the President of the United States shall have satisfactory evidence and shall make proclamation that the following articles, the growth, product, or manufacture of the United States or any of its possessions (except the Philippine Islands and the Islands of Guam and Tutuila), are admitted into the Dominion of Canada free of duty, namely:

Live animals: Cattle, horses and mules, swine, sheep, lambs, and all other live animals.

Poultry, dead or alive.

Wheat, rye, oats, barley, and buckwheat; dried peas and beans, edible.

Corn, sweet corn, or maize (except into Canada for distillation).

Hay, straw, and cowpeas.

Fresh vegetables: Potatoes, sweet potatoes, yams, turnips, onions, cabbages, and all other vegetables in their natural state.

Fresh fruits: Apples, pears, peaches, grapes, berries, and all other edible fruits in their natural state.

Dried fruits: Apples, peaches, pears, and apricots, dried, desiccated, or evaporated.

Dairy products: Butter, cheese, and fresh milk and cream: *Provided*, That cans actually used in the transportation of milk or cream may be passed back and forth between the two countries free of duty, under such regulations as the respective Governments may prescribe.

Eggs of barnyard fowl, in the shell.

Honey.

Cottonseed oil.

Seeds: Flaxseed or linseed, cotton seed, and other oil seeds; grass seed, including timothy and clover seed; garden, field, and other seed not herein otherwise provided for, when in packages weighing over one pound each (not including flower seeds).

Fish of all kinds, fresh, frozen, packed in ice, salted or preserved in any form, except sardines and other fish preserved in oil; and shellfish of all kinds, including oysters, lobsters, and clams in any state, fresh or packed, and coverings of the foregoing.

Seal, herring, whale, and other fish oil, including cod oil: *Provided*, That fish oil, whale oil, seal oil, and fish of all kinds, being the product of fisheries carried on by the fishermen of the United States, shall be admitted into Canada as the product of the United States, and similarly that fish oil, whale oil, seal oil, and fish of all kinds, being the product of fisheries carried on by the fishermen of Canada, shall be admitted into the United States as the product of Canada.

Salt.

Mineral waters, natural, not in bottles or jugs.

Timber, hewn, sided or squared otherwise than by sawing, and round timber used for spars or in building wharves.

Sawed boards, planks, deals, and other lumber, not further manufactured than sawed.

Paving posts, railroad ties, and telephone, trolley, electric light, and telegraph poles of cedar or other woods.

Wooden staves of all kinds, not further manufactured than listed or jointed, and stave bolts.

Pickets and palings.

Plaster rock or gypsum, crude, not ground.

Mica, unmanufactured or rough trimmed only, and mica, ground or bolted.

Feldspar, crude, powdered or ground.

Asbestos not further manufactured than ground.

Fluorspar, crude, not ground.

Glycerine, crude, not purified.

Talc, ground, bolted or precipitated, naturally or artificially, not for toilet use.

Sulphate of soda, or salt cake, and soda ash.

Extracts of hemlock bark.

Carbon electrodes.

Brass in bars and rods, in coil or otherwise, not less than six feet in length, or brass in strips, sheets, or plates, not polished, planished, or coated.

Cream separators of every description, and parts thereof imported for repair of the foregoing.

Rolled iron or steel sheets or plates, number fourteen gauge or thinner, galvanized or coated with zinc, tin, or other metal, or not.

Crucible cast-steel wire, valued at not less than six cents per pound.

Galvanized iron or steel wire, curved or not, numbers nine, twelve, and thirteen wire gauge.

Typecasting and typesetting machines and parts thereof, adapted for use in printing offices.

Barbed fencing wire of iron or steel, galvanized or not.

Coke.

Rolled round wire rods in the coil, of iron or steel, not over three-eighths of an inch in diameter, and not smaller than number six wire gauge. [37 Stat. L. 4-11.]

SEC. 2. [*Pulp and paper.*] Pulp of wood mechanically ground; pulp of wood, chemical, bleached, or unbleached; news print paper, and other paper, and paper board, manufactured from mechanical wood pulp or from chemical wood pulp, or of which such pulp is the component material of chief value, colored in the pulp, or not colored, and valued at not more than four cents per pound, not including printed or decorated wall paper, being the products of Canada, when imported therefrom directly into the United States, shall be admitted free of duty, on the condition precedent that no export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise), or any prohibition or restriction in any way of the exportation (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), shall have been imposed upon such paper, board, or wood pulp, or the wood used in the manufacture of such paper, board, or wood pulp, or the wood pulp used in the manufacture of such paper or board. [37 Stat. L. 11.]

SEC. 3. [*Trade agreements with Canada.*] That for the purpose of further readjusting the duties on importations into the United States of article or articles the growth, product, or manufacture of the Dominion of Canada, and of the exportation into the Dominion of Canada of article or articles the growth, product, or manufacture of the United States, the President of the United States is authorized and requested to negotiate trade agreements with the Dominion of Canada wherein mutual concessions are made looking toward freer trade relations and the further reciprocal expansion of trade and commerce: *Provided, however,* That said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection. [37 Stat. L. 12.]

An Act To amend paragraph five hundred of the Act approved August fifth, nineteen hundred and nine, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes."

[Act of July 27, 1911, ch. 4.]

[*Customs duties — free list.*] That paragraph five hundred of the Act approved August fifth, nineteen and nine, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," shall be so amended as to read as follows:

" 500. Articles the growth, produce, or manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other containers or coverings of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; also quicksilver flasks or bottles, iron or steel drums used for the shipment of acids, of either domestic or foreign manufacture, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, but the exemption of bags from duty shall apply only to such domestic bags as may be imported by the exporter thereof, and if any such articles are subject to internal-revenue tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded; photographic dry plates or films of American manufacture (except moving-picture films), exposed abroad, whether developed or not, and films from moving-picture machines, light struck or otherwise damaged, or worn out, so as to be unsuitable for any other purpose than the recovery of the constituent materials, provided the basic films are of American manufacture, but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded warehouse and exported under any provision of law: *And provided further*, That when manufactured tobacco which has been exported without payment of internal-revenue tax shall be reimported it shall be retained in the custody of the collector of customs until internal-revenue stamps in payment of the legal duties shall be placed thereon: *And provided further*, That cattle, horses, sheep, and other domestic animals straying across the boundary line into any foreign country or driven across such boundary line by the owners for temporary pasturage purposes only, together with their offspring, shall be dutiable, unless brought back to the United States within six months, under regulations to be prescribed by the Secretary of the Treasury, in accordance with the provisions of paragraph four hundred and ninety-two." [37 Stat. L. 12.]

An Act To extend the privileges of the Act approved June tenth, eighteen hundred and eighty, to the port of Brownsville, Texas.

[Act of Aug. 17, 1911, ch. 23.]

[*Brownsville, Tex., granted immediate transportation facilities.*] That the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, governing the transportation of dutiable merchandise without appraisement be, and the same are hereby, extended to the port of Brownsville, Texas. [37 Stat. L. 22.]

Section 1 of the Act of June 10, 1880, is given in 2 Fed. Stat. Annot. 712.

DAMS.

See *RIVERS, HARBORS, AND CANALS.*

DEBTS.

See *PUBLIC DEBT.*

DENTAL CORPS.

See *WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

DEPARTMENTS.

See *AGRICULTURE; COMMERCE AND LABOR; INTERIOR DEPARTMENT; NAVY; POSTAL SERVICE; TREASURY DEPARTMENT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

DESERT LANDS.

See *PUBLIC LANDS.*

DIPLOMATIC AND CONSULAR OFFICERS.

Act of June 25, 1910, Ch. 388, 65.

Sec. 1. *Daily Consular Reports* — Edition Increased, 65.

2. *Restrictions Repealed*, 66.

Act of March 3, 1911, Ch. 223, 66.

Consular Service — *Estates of Deceased Citizens* — *Duty of Auditor for State, etc., Departments*, 66.

An Act Providing for the printing of Daily Consular Reports.

[Act of June 25, 1910, ch. 388.]

[SEC. 1.] [*Daily Consular Reports* — edition increased.] That the Secretary of Commerce and Labor be, and he is hereby, authorized to have printed, for distribution by the Department of Commerce and Labor, an edition of

Daily Consular Reports not to exceed twenty thousand copies in any one issue: *Provided*, That the usual number shall not be printed. [*36 Stat. L. 821.*]

SEC. 2. [*Restrictions repealed.*] That that part of section seventy-three of an Act approved January twelfth, eighteen hundred and ninety-five, providing for the public printing and binding and the distribution of public documents, which reads "Of the reports of consular officers, one thousand five hundred copies; five hundred for the Senate, one thousand for the House," and that part of an Act approved February ninth, eighteen hundred and ninety-nine, making appropriations for the diplomatic and consular service for the fiscal year ending June thirtieth, nineteen hundred, which reads "Each issue of diplomatic, consular, and other commercial reports shall not exceed ten thousand copies," are hereby repealed. [*36 Stat. L. 821.*]

See 6 Fed. Stat. Annot. 167.

An Act Amending section seventeen hundred and nine of the Revised Statutes of the United States.

[*Act of March 3, 1911, ch. 228.*]

[*Consular service — estates of deceased citizens — duty of auditor for state, etc., departments.*] That section seventeen hundred and nine of the Revised Statutes of the United States is hereby amended by the addition of the following paragraph:

"Sixth. The Auditor for the State and other Departments shall act as conservator of such part of these estates as may be received at the Treasury, and for their protection the Secretary of the Treasury may order such effects to be sold as may consist of jewelry or other articles which have heretofore or may hereafter be received at the Treasury, and pay the expenses of such sale out of the proceeds, provided application for these effects shall not have been made by the legal claimant within two years after their receipt. The Auditor is authorized to indorse all bills of exchange, promissory notes, and other evidences of indebtedness due to such estates, and to take such steps as may be necessary for their collection. The proceeds of such sales, together with such other moneys as may be collected by him, shall be deposited into the Treasury in trust for the legal claimant, and be reported to the Secretary of State." [*36 Stat. L. 1083.*]

For R. S. sec. 1709, see 2 Fed. Stat. Annot. 797.

DISCRIMINATION.

See *INTERSTATE COMMERCE.*

DISORDERLY HOUSES.

See *WHITE SLAVE TRAFFIC.*

DISTRICT ATTORNEYS.

See *JUDICIAL OFFICERS.*

DISTRICT COURTS.

See *JUDICIARY.*

DOCUMENTS.

See *PUBLIC DOCUMENTS.*

EDUCATION.

Act of March 4, 1911, Ch. 265, 67.

Sec. 1. Marine Schools — Loan of Naval Vessels, etc., for, 67.

2. Appropriation to Aid in Support, 67.

3. Detail of Officers, 68.

4. Conflicting Laws Repealed, 68.

An Act For the establishment of marine schools, and for other purposes.

[Act of March 4, 1911, ch. 265.]

[**SEC. 1.**] [*Marine schools — loan of naval vessels, etc., for.*] That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of a State, a suitable vessel of the navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each of the following ports of the United States: Boston, Philadelphia, New York, Seattle, San Francisco, Baltimore, Detroit, Saginaw, Michigan, Norfolk, and Corpus Christi, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship-marine engineering, and all matters pertaining to the proper construction, equipment, and sailing of vessels or any particular branch thereof. [*36 Stat. L. 1353.*]

SEC. 2. [*Appropriation to aid in support.*] That a sum not exceeding the amount annually appropriated by any State or municipality for the purpose of maintaining such a marine school or schools or the nautical branch thereof is hereby authorized to be appropriated for the purpose of aiding in the main-

tenance and support of such school or schools: *Provided, however,* That appropriations shall be made for one school in any port heretofore named in section one and that the appropriation for any one year shall not exceed twenty-five thousand dollars for any one school. [*36 Stat. L. 1353.*]

SEC. 3. [*Detail of officers.*] That the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the navy as superintendents of or instructors in such schools: *Provided,* That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy and the officers so detailed recalled: *And provided further,* That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime. [*36 Stat. L. 1353.*]

SEC. 4. [*Conflicting laws repealed.*] That all laws and parts of laws in conflict herewith are hereby repealed. [*36 Stat. L. 1354.*]

ELECTIONS.

Act of June 25, 1910, Ch. 392, 69.

- Sec. 1. Publicity to Political Contributions — Political Committees Defined, 69.*
2. Officers Required — Duties of Treasurer — Accounts, 69.
3. Receipts for all Expenses — Preservation, 69.
4. Detailed Statement of Contributions to Be Given Treasurer — Recording, 70.
5. Statement to Clerk of the House of Representatives — Preservation and Inspection, 70.
6. Details of Statements, 70.
7. Statement from Others Not Made to Political Committee, 71.
8. Personal, Traveling, etc., Expenses Excepted, 71.
9. Legal Expenses to Maintain or Contest Elections, 71.
10. Punishment for Violations 71.

Act of Aug. 19, 1911, Ch. 33, 71.

- Sec. 1. Publicity to Political Contributions — Statement to Clerk of House of Representatives, 71.*
2. "Candidates" — Statements Required from — Promises and Expenditures by, 72.

An Act Providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected.

[Act of June 25, 1910, ch. 392.]

[**SEC. 1.**] [*Publicity to political contributions — political committees defined.*] That the term "political committee" under the provisions of this Act shall include the national committees of all political parties and the national congressional campaign committees of all political parties and all committees, associations, or organizations which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be elected. [36 Stat. L. 822.]

SEC. 2. [*Officers required — duties of treasurer — accounts.*] That every political committee as defined in this Act shall have a chairman and a treasurer. It shall be the duty of the treasurer to keep a detailed and exact account of all money or its equivalent received by or promised to such committee or any member thereof, or by or to any person acting under its authority or in its behalf, and the name of every person, firm, association, or committee from whom received, and of all expenditures, disbursements, and promises of payment or disbursement made by the committee or any member thereof, or by any person acting under its authority or in its behalf, and to whom paid, distributed, or disbursed. No officer or member of such committee, or other person acting under its authority or in its behalf, shall receive any money or its equivalent, or expend or promise to expend any money on behalf of such committee, until after a chairman and treasurer of such committee shall have been chosen. [36 Stat. L. 823.]

SEC. 3. [*Receipts for all expenses — preservation.*] That every payment or disbursement made by a political committee exceeding ten dollars in amount be evidenced by a receipted bill stating the particulars of expense, and every

such record, voucher, receipt, or account shall be preserved for fifteen months after the election to which it relates. [36 Stat. L. 823.]

SEC. 4. [*Detailed statement of contributions to be given treasurer — recording.*] That whoever, acting under the authority or in behalf of such political committee, whether as a member thereof or otherwise, receives any contribution, payment, loan, gift, advance, deposit, or promise of money or its equivalent shall, on demand, and in any event within five days after the receipt of such contribution, payment, loan, gift, advance, deposit, or promise, render to the treasurer of such political committee a detailed account of the same, together with the name and address from whom received, and said treasurer shall forthwith enter the same in a ledger or record to be kept by him for that purpose. [36 Stat. L. 823.]

SEC. 5. [*Statement to clerk of the House of Representatives — preservation and inspection.*] That the treasurer of every such political committee shall, within thirty days after the election at which Representatives in Congress were chosen in two or more States, file with the Clerk of the House of Representatives at Washington, District of Columbia, an itemized, detailed statement, sworn to by said treasurer and conforming to the requirements of the following section of this Act. The statement so filed with the Clerk of the House of Representatives shall be preserved by him for fifteen months, and shall be a part of the public records of his office, and shall be open to public inspection. [36 Stat. L. 823.]

For amendment to this section, see sec. 1 of the Act of Aug. 19, 1911, ch. 33, given *infra*, p. 71.

SEC. 6. [*Details of statements.*] That the statements required by the preceding section of this Act shall state:

First. The name and address of each person, firm, association, or committee who or which has contributed, promised, loaned, or advanced to such political committee, or any officer, member, or agent thereof, either in one or more items, money or its equivalent of the aggregate amount or value of one hundred dollars or more.

Second. The total sum contributed, promised, loaned, or advanced to such political committee, or to any officer, member, or agent thereof, in amounts less than one hundred dollars.

Third. The total sum of all contributions, promises, loans, and advances received by such political committee or any officer, member, or agent thereof.

Fourth. The name and address of each person, firm, association, or committee to whom such political committee, or any officer, member, or agent thereof, has disbursed, distributed, contributed, loaned, advanced, or promised any sum of money or its equivalent of the amount or value of ten dollars or more, and the purpose thereof.

Fifth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof, where the amount or value of such disbursement, distribution, loan, advance, or promise to any one person, firm, association, or committee in one or more items is less than ten dollars.

Sixth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee or any officer, member, or agent thereof. [36 Stat. L. 823.]

For amendment to this section, see sec. 1 of the Act of Aug. 19, 1911, ch. 33, given *infra*, p. 71.

SEC. 7. [*Statement from others not made to political committee.*] That every person, firm, association, or committee, except political committees as hereinbefore defined, that shall expend or promise any sum of money or other thing of value amounting to fifty dollars or more for the purpose of influencing or controlling, in two or more States, the result of an election at which Representatives to the Congress of the United States are elected, unless he or it shall contribute the same to a political committee as hereinbefore defined, shall file the statements of the same under oath, as required by section six of this Act, in the office of the Clerk of the House of Representatives, at Washington, District of Columbia, which statements shall be held by said Clerk in all respects as required by section five of this Act. [36 Stat. L. 824.]

SEC. 8. [*Personal, traveling, etc., expenses excepted.*] That any person may in connection with such election incur and pay from his own private funds for the purpose of influencing or controlling, in two or more States, the result of an election at which Representatives to the Congress of the United States are elected all personal expenses for his traveling and for purposes incidental to traveling, for stationery and postage, and for telegraph and telephone service without being subject to the provisions of this Act. [36 Stat. L. 824.]

For amendment to this section, see sec. 1 of the Act of Aug. 19, 1911, ch. 33, given *infra*, p. 72.

This section is renumbered as sec. 9 by sec. 2 of said Act of Aug. 19, 1911. A new sec. 8 is inserted by that Act.

SEC. 9. [*Legal expenses to maintain or contest elections.*] That nothing contained in this Act shall limit or affect the right of any person to spend money for proper legal expenses in maintaining or contesting the results of any election. [36 Stat. L. 824.]

This section is renumbered as sec. 10 by sec. 2 of the Act of Aug. 19, 1911, given *infra*, p. 72.

SEC. 10. [*Punishment for violations.*] That every person willfully violating any of the foregoing provisions of this Act shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both. [36 Stat. L. 824.]

This section is renumbered as sec. 11 by sec. 2 of the Act of Aug. 19, 1911, given *infra*, p. 72.

An Act To amend an act entitled "An act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected" and extending the same to candidates for nomination and election to the offices of Representative and Senator in the Congress of the United States and limiting the amount of campaign expenses.

[Act of Aug. 19, 1911, ch. 33.]

[SEC. 1.] [*Publicity to political contributions — statement to clerk of House of Representatives.*] That sections five, six, and eight of an Act entitled "An Act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected," approved June twenty-fifth, nineteen hundred and ten, be, and the same are hereby, amended to read as follows:

"SEC. 5. That the treasurer of every such political committee shall, not more than fifteen days and not less than ten days next before an election at which Representatives in Congress are to be elected in two or more States, file in the office of the Clerk of the House of Representatives at Washington, District of Columbia, with said Clerk, an itemized detailed statement; and on

each sixth day thereafter until such election said treasurer shall file with said Clerk a supplemental itemized detailed statement. Each of said statements shall conform to the requirements of the following section of this Act, except that the supplemental statement herein required need not contain any item of which publicity is given in a previous statement. Each of said statements shall be full and complete, and shall be signed and sworn to by said treasurer.

"It shall also be the duty of said treasurer to file a similar statement with said Clerk within thirty days after such election, such final statement also to be signed and sworn to by said treasurer and to conform to the requirements of the following section of this Act. The statements so filed with the Clerk of the House shall be preserved by him for fifteen months and shall be a part of the public records of his office and shall be open to public inspection.

"SEC. 6. That the statements required by the preceding section of this Act shall state:

"First. The name and address of each person, firm, association, or committee who or which has contributed, promised, loaned, or advanced to such political committee, or any officer, member, or agent thereof, either in one or more items, money or its equivalent of the aggregate amount or value of one hundred dollars or more, and the amount or sum contributed, promised, loaned, or advanced by each.

"Second. The aggregate sum contributed, promised, loaned, or advanced to such political committee, or to any officer, member, or agent thereof, in amounts of less than one hundred dollars.

"Third. The total sum of all contributions, promises, loans, and advances received by such political committee or any officer, member, or agent thereof.

"Fourth. The name and address of each person, firm, association, or committee to whom such political committee, or any officer, member, or agent thereof, has distributed, disbursed, contributed, loaned, advanced, or promised any sum of money or its equivalent of the amount or value of ten dollars or more, stating the amount or sum distributed, disbursed, contributed, loaned, advanced, or promised to each, and the purpose thereof.

"Fifth. The aggregate sum distributed, disbursed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof, where the amount or value of such distribution, disbursement, loan, advance, or promise to any one person, firm, association, or committee in one or more items is less than ten dollars.

"Sixth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof."

"SEC. 8. That any person may in connection with such election incur and pay from his own private funds for the purpose of influencing or controlling, in two or more States, the results of an election at which Representatives to the Congress of the United States are elected, all necessary personal expenses for his traveling, for stationery, and postage, and for telegraph and telephone service without being subject to the provisions of this Act." [37 Stat. L. 25.]

SEC. 2. [*"Candidates" — statements required from — promises and expenditures by.*] That section eight, as above amended, and sections nine and ten of said act be renumbered as sections nine, ten, and eleven, and that a new section be inserted after section seven of the said original act, to read as follows:

"SEC. 8. The word 'candidate' as used in this section shall include all

persons whose names are presented for nomination for Representative or Senator in the Congress of the United States at any primary election or nominating convention, or for indorsement or election at any general or special election held in connection with the nomination or election of a person to fill such office, whether or not such persons are actually nominated, indorsed, or elected.

"Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made, for the purpose of procuring his nomination or election.

"Every person who shall be a candidate for nomination at any primary election or nominating convention, or for indorsement at any general or special election, or election by the legislature of any State, as Senator in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which he is seeking indorsement, and not less than five nor more than ten days before the day upon which the first vote is to be taken in the two houses of the legislature before which he is a candidate for election as Senator, file with the Secretary of the Senate at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination or election.

"Every such candidate for nomination at any primary election or nominating convention, or for indorsement or election at any general or special election, or for election by the legislature of any State, shall, within fifteen days after such primary election or nominating convention, and within thirty days after any such general or special election, and within thirty days after the day upon which the legislature shall have elected a Senator, file with the Clerk of the House of Representatives or with the Secretary of the Senate, as the case may be, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from

any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, up to, on, and after the day of such primary election, nominating convention, general or special election, or election by the legislature, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination, indorsement, or election.

"Every such candidate shall include therein a statement of every promise or pledge made by him, or by any one for him with his knowledge and consent or to whom he has given authority to make any such promise or pledge, before the completion of any such primary election or nominating convention or general or special election or election by the legislature, relative to the appointment or recommendation for appointment of any person to any position of trust, honor, or profit, either in the county, State, or Nation, or in any political subdivision thereof, or in any private or corporate employment, for the purpose of procuring the support of such person or of any person in his candidacy, and if any such promise or pledge shall have been made the name or names, the address or addresses, and the occupation or occupations, of the person or persons to whom such promise or pledge shall have been made, shall be stated, together with a description of the position relating to which such promise or pledge has been made. In the event that no such promise or pledge has been made by such candidate, that fact shall be distinctly stated.

"No candidate for Representative in Congress or for Senator of the United States shall promise any office or position to any person, or to use his influence or to give his support to any person for any office or position for the purpose of procuring the support of such person, or of any person, in his candidacy; nor shall any candidate for Senator of the United States give, contribute, expend, use, or promise any money or thing of value to assist in procuring the nomination or election of any particular candidate for the legislature of the State in which he resides, but such candidate may, within the limitations and restrictions and subject to the requirements of this act, contribute to political committees having charge of the disbursement of campaign funds.

"No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided*, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election: *Provided further*, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within

the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

"The statements herein required to be made and filed before the general election, or the election by the legislature at which such candidate seeks election, need not contain items of which publicity is given in a previous statement, but the statement required to be made and filed after said general election or election by the legislature shall, in addition to an itemized statement of all expenses not theretofore given publicity, contain a summary of all preceding statements.

"Any person, not then a candidate for Senator of the United States, who shall have given, contributed, expended, used, or promised any money or thing of value to aid or assist in the nomination or election of any particular member of the legislature of the State in which he resides, shall, if he thereafter becomes a candidate for such office, or if he shall thereafter be elected to such office without becoming a candidate therefor, comply with all of the provisions of this section relating to candidates for such office, so far as the same may be applicable; and the statement herein required to be made, verified, and filed after such election shall contain a full, true, and itemized account of each and every gift, contribution, expenditure, and promise whenever made, in any wise relating to the nomination or election of members of the legislature of said State, or in any wise connected with or pertaining to his nomination and election of which publicity is not given in a previous statement.

"Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths under the laws of the State in which he is a candidate, and shall be sworn to or affirmed by the candidate in the district in which he is a candidate for Representative, or the State in which he is a candidate for Senator in the Congress of the United States: *Provided*, That if at the time of such primary election, nominating convention, general or special election, or election by the State legislature said candidate shall be in attendance upon either House of Congress as a Member thereof, he may at his election verify such statements before any officer authorized to administer oaths in the District of Columbia: *Provided further*, That the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives or to the Secretary of the Senate, as the case may be, duly stamped and registered within the time required herein shall be deemed a sufficient filing of any such statement under any of the provisions of this Act.

"This Act shall not be construed to annul or vitiate the laws of any State, not directly in conflict herewith, relating to the nomination or election of candidates for the offices herein named, or to exempt any such candidate from complying with such State laws." [37 Stat. L. 26.]

ELECTRIC LINES.

See TELEGRAPH, TELEPHONE, CABLE, AND ELECTRIC LINES.

EMPLOYERS' LIABILITY.

Equipment of Locomotives, see RAILROADS.

Injuries to Employees on Panama Canal, see RIVERS, HARBORS, AND CANALS.

And see generally, RAILROADS.

ENTRY OF VESSELS.

See CUSTOMS DUTIES.

ESTIMATES, APPROPRIATIONS, AND REPORTS.

Act of June 22, 1910, Ch. 331, 76.

Navy — Reports of Secretary, 76.

Act of June 25, 1910, Ch. 384, 77.

Sec. 1. Interior Department Buildings — Repairs, 77.

Lighthouse Establishment — Detailed Statements to Be Made with Estimates, 77.

Immigration — Detailed Estimates Required, 77.

6. Book of Estimates — Statement of Sales, etc., to Be Separate from, 77.

Act of March 4, 1911, Ch. 237, 77.

Sec. 1. Court of Customs Appeals — Detailed Statement Required, 77.

Commerce Court — Detailed Statement Required, 77.

CROSS-REFERENCES.

Annual Financial Statement of Secretary of Agriculture, see AGRICULTURE.

Cost of Work on Indian Reservations, see INDIANS.

Expenses of Parting and Refining Bullion, see COINAGE, MINTS, AND ASSAY OFFICES.

Fine Arts Commission, Annual Appropriation for, see FINE ARTS COMMISSION.

Indian Appropriations, Secretary of Interior to Report, see INDIANS.

Interior Department, Reports to Congress on Indian Affairs, see INDIANS.

Irrigation Projects on Indian Lands, see INDIANS.

Officers, Clerks, and Employees in Agricultural Department, see AGRICULTURE.

Withdrawal of Public Lands, see PUBLIC LANDS.

An Act To repeal a portion of sections four hundred and twenty-nine and thirty-seven hundred and twenty of the Revised Statutes of the United States.

[*Act of June 22, 1910, ch. 331.*]

[*Navy — reports of secretary.*] That the second clause of section four hundred and twenty-nine of the Revised Statutes of the United States and the following words in section thirty-seven hundred and twenty of the Revised Statutes of the United States: "and reported by the Secretary of the Navy to Congress at the commencement of every regular session. The report shall

contain a schedule embracing the offers by classes, indicating such as have been accepted," be, and the same are hereby, repealed. [36 Stat. L. 591.]

For R. S. sec. 429, see 2 Fed. Stat. Annot. 926; for R. S. sec. 3720, see 6 Fed. Stat. Annot. 111.

[SEC. 1.] [*Interior Department buildings — repairs.*] * * * Repairs of buildings, Interior Department: For repairs of Interior Department and Pension buildings, and of the old Post-Office Department building, occupied by the Interior Department, including preservation and repair of steam heating and electric lighting plants and elevators, twenty thousand dollars, of which sum not exceeding seven thousand five hundred dollars may be expended for day labor, except for work done by contract: *Provided*, That a detailed statement of the expenditure of this appropriation for the fiscal year nineteen hundred and ten shall be made to Congress at the beginning of its next regular session, and thereafter a similar statement for each subsequent fiscal year shall be submitted to Congress at the beginning of each regular session. [36 Stat. L. 737.]

This and the three paragraphs following are from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

[*Lighthouse establishment — detailed statements to be made with estimates.*] * * * Hereafter there shall be submitted, following each estimate for support of the Light-House Establishment, statements showing the amount required for each object of expenditure mentioned in each of said estimates, together with a statement of the expenditures under each of such objects for the fiscal year terminated next preceding the period of submitting said estimates. [36 Stat. L. 755.]

[*Immigration — detailed estimates required.*] * * * Hereafter there shall be submitted, following the estimates under the foregoing appropriation for expenses of regulating immigration, statements showing the amount required for each object of expenditure mentioned in said estimates, together with a statement of the expenditures under each of such objects for the fiscal year terminated next preceding the period of submitting said estimates. [36 Stat. L. 764.]

SEC. 6. [*Book of Estimates — statement of sales, etc., to be separate from.*] Hereafter the statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be submitted to Congress at the beginning of each regular session thereof as a separate communication and shall not hereafter be included in the annual Book of Estimates. [36 Stat. L. 773.]

[SEC. 1.] [*Court of Customs Appeals — detailed statement required.*] * * * A detailed statement of the expenditures of the appropriations for the United States Court of Customs Appeals shall be submitted to Congress at the beginning of each regular session thereof. [36 Stat. L. 1234.]

This and the following paragraph are from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1911, ch. 237.

[*Commerce Court — detailed statement required.*] * * * A detailed statement of the expenditure of the appropriations for the United States Commerce Court shall be submitted to Congress at the beginning of each regular session thereof. [36 Stat. L. 1234.]

EVIDENCE.

Act of May 7, 1910, Ch. 216, 78.

United States Courts — Immunity of Witnesses, 78.

An Act To repeal section eight hundred and sixty of the Revised Statutes.

[Act of May 7, 1910, ch. 216.]

[United States courts — immunity of witnesses.] That section eight hundred and sixty of the Revised Statutes of the United States be, and the same is hereby, repealed. *[36 Stat. L. 352.]*

For R. S. sec. 860, see 3 Fed. Stat. Annot. 5.

EXECUTIVE DEPARTMENTS.

Contracts for New Buildings, see PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.

Supplies for, see PUBLIC CONTRACTS.

And see generally, *AGRICULTURE; COMMERCE AND LABOR; NAVY; TREASURY DEPARTMENT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

EXECUTIVE MANSION.

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.*

EXPRESS COMPANIES.

See *INTERSTATE COMMERCE.*

FALSE ACCOUNTS AND REPORTS.

Act of March 4, 1911, Ch. 270, 79.

Government Employees—Punishment for Making False Entries in Records, etc.—Punishment for Making False Report of Public or Trust Moneys, 79.

An Act To provide punishment for the falsification of accounts and the making of false reports by persons in the employ of the United States.

[Act of March 4, 1911, ch. 270.]

[*Government employees — punishment for making false entries in records, etc. — punishment for making false report of public or trust moneys.*] That whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of keeping accounts or records of any kind, shall, with intent to deceive, mislead, injure, or defraud the United States or any person, make in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing; or whoever, being an officer, clerk, agent, or other person holding any office or employment under the Government of the United States and, being charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, shall, with like intent, make a false report of such moneys or securities, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both. [36 Stat. L. 1355.]

FINE ARTS COMMISSION.

Act of May 17, 1910, Ch. 243, 80.

Sec. 1. Commission of Fine Arts Created, 80.

Expenditure Authorized, 80.

An Act Establishing a Commission of Fine Arts.

[Act of May 17, 1910, ch. 243.]

[SEC. 1.] [*Commission of fine arts created.*] That a permanent Commission of Fine Arts is hereby created to be composed of seven well-qualified judges of the fine arts, who shall be appointed by the President, and shall serve for a period of four years each, and until their successors are appointed and qualified. The President shall have authority to fill all vacancies. It shall be the duty of such commission to advise upon the location of statues, fountains, and monuments in the public squares, streets, and parks in the District of Columbia, and upon the selection of models for statues, fountains, and monuments erected under the authority of the United States and upon the selection of artists for the execution of the same. It shall be the duty of the officers charged by law to determine such questions in each case to call for such advice. The foregoing provisions of this Act shall not apply to the Capitol building of the United States and the building of the Library of Congress. The commission shall also advise generally upon questions of art when required to do so by the President, or by any committee of either House of Congress. Said commission shall have a secretary and such other assistance as the commission may authorize, and the members of the commission shall each be paid actual expenses in going to and returning from Washington to attend the meetings of said commission and while attending the same. [36 Stat. L. 371.]

SEC. 2. [*Expenditure authorized.*] That to meet the expenses made necessary by this Act an expenditure of not exceeding ten thousand dollars a year is hereby authorized. [36 Stat. L. 371.]

FISHERIES.

Seal Fisheries, see ALASKA.

FOREST RESERVES.

See *TIMBER LANDS AND FOREST RESERVES.*

FOREST SERVICE.

See *AGRICULTURE*.

FORTIFICATIONS.

See *NATIONAL DEFENSE SECRETS*.

FREIGHT CHARGES.

See *INTERSTATE COMMERCE*.

FUNGICIDE.

See *AGRICULTURE*.

GAME.

In Alaska, see ALASKA.

GAS LANDS.

See *MINERAL LANDS, MINES, AND MINING*.

GAS PIPE LINES.

See *PUBLIC LANDS*.

GLACIER NATIONAL PARKS.

See *PUBLIC PARKS*.

GOLD COIN.

See *COINAGE, MINTS, AND ASSAY OFFICES.*

GRAND JURY.

See *JUDICIARY; JURIES.*

HARBORS.

See *RIVERS, HARBORS, AND CANALS.*

HAWAIIAN ISLANDS.

Act of May 27, 1910, Ch. 258, 82.

Sec. 1. Hawaii — Government in — General Laws of United States, 82.

2. Legislature — Compensation of Members, 83.

3. Appropriations — Legislature to Make, 83.

4. Legislative Powers — Indebtedness — Maximum — Term of Bonds, 83.

5. Public Lands, 84.

6. Disqualifications of Judge or Furor, 86.

7. Public Property, 86.

8. Officers — Pay, 87.

9. Naturalization, 87.

Act of June 17, 1910, Ch. 297, 87.

Legislature — Pay of Members — Extra Session, 87.

An Act To amend an Act entitled "An Act to provide a government for the Territory of Hawaii," approved April thirtieth, nineteen hundred.

[*Act of May 27, 1910, ch. 258.*]

[**SEC. 1.**] [*Hawaii — government in — general laws of United States.*]

That section five of an Act entitled "An Act to provide a government for the Territory of Hawaii," approved April thirtieth, nineteen hundred, is hereby amended to read as follows:

"**SEC. 5.** That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided*, That sections eighteen hundred and forty-one to eighteen hundred and ninety-one, inclusive, nineteen hundred and ten and nineteen hundred and twelve, of the Revised Statutes, and the amendments thereto, and an Act entitled 'An Act to

prohibit the passage of local or special laws in the Territories of the United States, to limit territorial indebtedness, and for other purposes,' approved July thirtieth, eighteen hundred and eighty-six, and the amendments thereto, shall not apply to Hawaii." [36 Stat. L. 443.]

See 3 Fed. Stat. Annot. 188.

SEC. 2. [*Legislature — compensation of members.*] That section twenty-six of said Act is hereby amended to read as follows:

"SEC. 26. That the members of the legislature shall receive for their services, in addition to mileage at the rate of ten cents a mile each way, the sum of six hundred dollars for each regular session, payable in three equal installments on and after the first, thirtieth, and fiftieth days of the session, and the sum of two hundred dollars for each special session: *Provided*, That they shall receive no compensation for any extra session held under the provisions of section fifty-four of this Act." [36 Stat. L. 444.]

See 3 Fed. Stat. Annot. 192.

SEC. 3. [*Appropriations — legislature to make.*] That section fifty-two of said Act is hereby amended to read as follows:

"SEC. 52. That appropriations, except as herein otherwise provided, shall be made by the legislature." [36 Stat. L. 444.]

See 3 Fed. Stat. Annot. 196.

SEC. 4. [*Legislative powers — indebtedness — maximum — term of bonds.*] That section fifty-five of said Act is hereby amended so that the part thereof relating to public indebtedness and beginning with the words "nor shall any debt" shall read as follows: "Nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbor, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or the subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond seven per centum of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond three per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof; nor shall any bond or other instrument of any such indebtedness be issued unless made payable in not more than thirty years from the date of the issue thereof; nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States: *Provided*, That the legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes." [36 Stat. L. 444.]

See 3 Fed. Stat. Annot. 197.

SEC. 5. [*Public lands.*] That section seventy-three of said Act is hereby amended by adding thereto the following:

"No person shall hereafter be entitled to receive any certificate of occupation, right of purchase lease, cash freehold agreement, or special homestead agreement who or whose husband or wife shall previously have taken or held any land under any such certificate, lease, or agreement hereafter made or issued, or under any homestead lease or patent based thereon; or who or whose husband or wife, or both of them, shall then own other land in the Territory, the combined area of which and the land in question exceeds eighty acres; or who is an alien, unless he has declared his intention to become a citizen of the United States as provided by law; nor shall any person who, having so declared his intention, shall hereafter take or hold under any such certificate, lease, or agreement, continue so to hold or become entitled to a homestead lease or patent of the land, unless he shall have become a citizen within five years after so taking.

"No land for which any such certificate, lease, or agreement shall hereafter be issued, or any part thereof or interest therein or control thereof, shall, without the written consent of the commissioner and governor, thereafter, whether before or after a homestead lease or patent has been issued thereon, be or be contracted to be in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to or acquired or held by or for the benefit of any alien or corporation; or, before or after the issuance of a homestead lease or before the issuance of a patent, to or by or for the benefit of any other person; or, after the issuance of a patent, to or by or for the benefit of any person who owns, holds, or controls, directly or indirectly, other land or the use thereof the combined area of which and the land in question exceeds eighty acres: *Provided*, That these prohibitions shall not apply to transfers or acquisitions by inheritance or between tenants in common.

"Any land in respect of which any of the foregoing provisions shall be violated shall forthwith be forfeited and resume the status of public land and may be recovered by the Territory or its successors in an action of ejectment or other appropriate proceeding. And noncompliance with the terms of any such certificate, lease, or agreement, or of the law applicable thereto, shall entitle the commissioner, with the approval of the governor before patent has been issued, with or without legal process, notice, demand, or previous entry, to retake possession and thereby determine the estate: *Provided*, That the times limited for compliance with any such terms may be extended by the commissioner, with such approval, upon its appearing that an effort has been made in good faith to comply therewith.

"The persons entitled to take under any such certificate, lease, or agreement shall be determined by drawing or lot, after public notice as hereinafter provided; and any lot not taken, or taken and forfeited, or any lot or part thereof surrendered with the consent of the commissioner, which is hereby authorized, may be disposed of upon application at not less than the advertised price by any such certificate, lease, or agreement without further notice. The notice of any sale, drawing, or allotment of public land shall be by publication for a period of not less than sixty days in one or more newspapers of general circulation published in the Territory.

"The commissioner, with the approval of the governor, may give to any citizen of the United States or to any person who has legally declared his intention to become a citizen, and who shall hereafter become such, which said person has, or who and whose predecessors in interest have, improved any parcel of public lands and resided thereon continuously since April thirtieth, nineteen

hundred, a preference right to purchase so much of such parcel and such adjoining land as may reasonably be required for a home, at a fair price, to be determined by three disinterested citizens appointed by the governor, in the determination of which price the value of improvement shall, when deemed just and reasonable, be disregarded: *Provided, however,* That this privilege shall not extend to any original lessee or to an assignee of an entire lease of public lands.

"The commissioner may also, with such approval, issue, for a nominal consideration, to any church or religious organization, or person or persons or corporation representing it, a patent for any parcel of public land occupied continuously for not less than five years heretofore and still occupied by it as a church site under the laws of Hawaii.

"No sale of lands for other than homestead purposes, except as herein provided, and no exchange by which the Territory shall convey lands exceeding either forty acres in area or five thousand dollars in value shall be made. No lease of agricultural lands exceeding forty acres in area, or of pastoral or waste lands exceeding two hundred acres in area, shall be made without the approval of two-thirds of the board of public lands which is hereby constituted, the members of which are to be appointed by the governor as provided in section eighty of this Act, and until the legislature shall otherwise provide said board shall consist of six members and its members be appointed for terms of four years: *Provided, however,* That the commissioner may, with the approval of said board, sell for residence purposes lots and tracts, not exceeding three acres in area, and that sales of government lands may be made upon the approval of said board whenever necessary to locate thereon railroad rights of way, railroad tracks, side tracks, depot grounds, pipe lines, irrigation ditches, pumping stations, reservoirs, factories and mills and appurtenances thereto, including houses for employees, mercantile establishments, hotels, churches, and private schools, and all such sales shall be limited to the amount actually necessary for the economical conduct of such business or undertaking: *Provided further,* That no exchange of government lands shall hereafter be made without the approval of two-thirds of the members of said board, and no such exchange shall be made except to acquire lands directly for public uses.

"Whenever twenty-five or more persons, having the qualifications of homesteaders, who have not theretofore made application under this Act shall make written application to the commissioner of public lands for the opening of agricultural lands for settlement in any locality or district, it shall be the duty of said commissioner to proceed expeditiously to survey and open for entry agricultural lands, whether unoccupied or under lease with the right of withdrawal, sufficient in area to provide homesteads for all such persons, together with all persons of like qualifications who shall have filed with such commissioner prior to the survey of such lands written applications for homesteads in the district designated in said applications. The lands to be so opened for settlement by said commissioner shall be either the specific tract or tracts applied for or other suitable and available agricultural lands in the same geographical district and, as far as possible, in the immediate locality of and as nearly equal to that applied for as may be available: *Provided, however,* That no leased land, under cultivation, shall be taken for homesteading until any crops growing thereon shall have been harvested.

"It shall be the duty of the commissioner of public lands to cause to be surveyed and opened for homestead entry a reasonable amount of desirable agricultural lands and also of pastoral lands in various parts of the Territory for homestead purposes on or before January first, nineteen hundred and eleven, and he shall annually thereafter cause to be surveyed for homestead purposes

such amount of agricultural lands and pastoral lands in various parts of the Territory as there may be demand for by persons having the qualifications of homesteaders; and in laying out any homestead the Commissioner of Public Lands shall include therein an amount, not exceeding eighty acres in area, sufficient to support thereon an ordinary family; and all necessary expenses for surveying and opening any such lands for homestead shall be paid for out of any funds of the territorial treasury derived from the sale or lease of the public lands, which funds are hereby made available for such purposes.

"Nothing herein contained shall be construed to prevent said commissioner from surveying and opening for homestead purposes and as a single homestead entry public lands suitable for both agricultural and pastoral purposes, whether such lands be situated in one body or detached tracts, to the end that homesteaders may be provided with both agricultural and pastoral lands wherever there is demand therefor; nor shall the ownership of a residence lot or tract, not exceeding three acres in area, hereafter disqualify any citizen from applying for and receiving any form of homestead entry, including a homestead lease.

"All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the governor, and all patents and deeds of such land shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawaii, as amended by this Act, shall, except as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory. The commissioner is hereby authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawaii into full force and effect." [36 Stat. L. 444.]

See 3 Fed. Stat. Annot. 202.

SEC. 6. [*Disqualifications of judge or juror.*] That section eighty-four of said Act is hereby amended to read as follows:

"SEC. 84. That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated." [36 Stat. L. 447.]

See 3 Fed. Stat. Annot. 206.

SEC. 7. [*Public property.*] That section ninety-one of said Act is hereby amended to read as follows:

"SEC. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint

resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature." [36 Stat. L. 447.]

See 3 Fed. Stat. Annot. 208.

SEC. 8. [*Officers — pay.*] That section ninety-two of said Act is hereby amended to read as follows:

"SEC. 92. That the following officers shall receive the following annual salaries to be paid by the United States: The governor, seven thousand dollars; the secretary of the Territory, four thousand dollars; the chief justice of the supreme court of the Territory, six thousand dollars; the associate justices of the supreme court, five thousand five hundred dollars each; the judges of the circuit courts, four thousand dollars each; the United States district attorney, four thousand dollars; the United States marshal, three thousand dollars. And the governor shall receive annually, in addition to his salary, the sum of five hundred dollars for stationery, postage, and incidentals; also his traveling expenses while absent from the capital on official business, and the sum of two thousand dollars annually for his private secretary." [36 Stat. L. 448.]

See 3 Fed. Stat. Annot. 208.

SEC. 9. [*Naturalization.*] That section one hundred of said Act is hereby amended by adding thereto the following:

"All records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the taking effect of the naturalization Act of June twenty-ninth, nineteen hundred and six, in or from any circuit court of the Territory of Hawaii, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized." [36 Stat. L. 448.]

See 3 Fed. Stat. Annot. 210.

[*Legislature — pay of members — extra session.*] * * * That the members of the legislature of the Territory of Hawaii shall not draw their compensation of two hundred dollars, or any mileage, for any extra session held in compliance with section fifty-four of an Act to provide a government for the Territory of Hawaii, approved April thirtieth, nineteen hundred. [36 Stat. L. 501.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

For the Act of April 30, 1900, see 3 Fed. Stat. Annot. 186.

HAZING.

See *MILITARY ACADEMY*.

HOMESTEAD.

See *PUBLIC LANDS*.

HOSPITALS AND ASYLUMS.

Act of June 25, 1910, Ch. 384, 88.

National Home for Disabled Volunteer Soldiers — Applications for Admission, 88.

CROSS-REFERENCE.

Insane Persons in Alaska, see ALASKA.

[*National home for disabled volunteer soldiers — applications for admission.*] * * * Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided. [36 Stat. L. 736.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

HOUSE OF REPRESENTATIVES.

See CONGRESS.

IMMIGRATION.

Act of March 26, 1910, Ch. 128, 89.

Sec. 1. *Classes of Aliens Excluded*, 89.

2. *Prostitutes, etc.*, 90.

Act of March 4, 1911, Ch. 285, 92.

Sec. 1. *Immigration Service—Credit of Reimbursements*, 92.

CROSS-REFERENCES.

Bureau of Immigration and Naturalization, see *NATURALIZATION*.

Estimates for Expenses, see *ESTIMATES, APPROPRIATIONS, AND REPORTS*.

And see generally, *WHITE SLAVE TRAFFIC*.

An Act To amend an Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven.

[Act of March 26, 1910, ch. 128.]

[SEC. 1.] [*Classes of aliens excluded.*] That section two of the Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven, is hereby amended so as to read as follows:

"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons

hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor or under such regulations as he may from time to time prescribe: *Provided*, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude: *Provided, further*, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: *And provided further*, That skilled labor may be imported if labor of like kind unemployed can not be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants." [36 Stat. L. 263.]

This section as originally enacted is given in the 1909 Supp. Fed. Stat. Annot. 162.

SEC. 2. [*Prostitutes, etc.*] That section three of an Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven, is hereby amended so as to read as follows:

"SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occur. Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort

habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband.[""] [36 Stat. L. 264.]

This section as originally enacted is given in 1909 Supp. Fed. Stat. Annot. 163.

For sections 20 and 21 of the Act of Feb. 20, 1907, above mentioned, see 1909 Supp. Fed. Stat. Annot. 170.

Constitutionality of statute.—The provision in this section for the deportation of any alien woman who after her immigration into the United States shall be found practicing prostitution therein, regardless of the length of time which has elapsed since her entry, is within the constitutional power of Congress, and valid. *U. S. v. Weis*, (1910) 181 Fed. 860; *U. S. v. Williams*, (1910) 183 Fed. 904.

Time for deportation unlimited.—Under the provision in this amended section that "any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States . . . shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this Act," there is no limitation of the time within which an alien prostitute may be deported to three years from the time of her entry as was the case under the section before amendment, it being one of the purposes of the amendment to abolish such limitation as to the class of aliens referred to therein; and the amended section, while not retrospective, applies to any alien woman found so conducting herself as to come within its provisions since its enactment, regardless of her previous conduct or of the time of her entry into the country. *U. S. v. Weis*, (1910) 181 Fed. 860; *U. S. v. Prentiss*, (1910) 182 Fed. 894; *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158.

Three years' previous residence no bar.—Under this amended section an alien prostitute is subject to deportation though she has been in the country more than three years at the time of her arrest and before the passage of the statute. *U. S. v. Williams*, (1910) 183 Fed. 904; *Sire v. Berkshire*, (1911) 185 Fed. 967; *Ladaux v. Berkshire*, (1911) 185 Fed. 971.

Venue.—Where an indictment charged an illegal importation into the United States of an alien woman for an immoral purpose, and

showed that the importation was complete at the port where the alien was landed, the venue was in that district, and could not be laid in another district to which accused and the alien thereafter went. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

In *U. S. v. Lavoie*, (1910) 182 Fed. 943, it appeared that the accused imported a female alien, who was a prostitute, from British Columbia into the northern district of California in March, 1908, visited her in San Francisco occasionally, where she continued to practice prostitution, but after the spring of 1908 their relations were interrupted until 1910, when defendant again met her in Seattle, in the western district of Washington, and renewed illicit relations with her. It was held that such relations had in Washington were not "pursuant to the illegal importation," there being no continuity of association, and hence defendant could not be convicted of keeping or maintaining in the Washington district, but was only guilty of importing, for which he was only subject to prosecution in the northern district of California.

Immoral purpose.—An indictment for keeping, maintaining, controlling, supporting, or harboring an alien female pursuant to an illegal importation for an immoral purpose, alleging that such purpose was unlawful cohabitation and adultery, sufficiently charged that the purpose was immoral. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

Mere unlawful cohabitation within a district with an alien woman imported for immoral purposes is not in violation of this section prohibiting the holding or attempt to hold any alien woman or girl for immoral purposes in pursuance of an illegal importation; Congress having no jurisdiction to control the morals of alien women within the United States unless in some manner connected with unlawful importation. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

Intimidation by inspectors.—In *U. S. v. Williams*, (1911) 185 Fed. 598, the evidence was held to show that aliens detained pending proceedings for their deportation were, by the influence of the inspector who was hearing their case, persuaded and intimidated from exercising their right to be represented

by counsel, under the rules prescribed by the Secretary of Commerce and Labor providing that in such cases the alien arrested shall be given a hearing before the Commissioner of Immigration or an immigration inspector, and that in such stage of the hearing as the commissioner or inspector shall deem proper the alien shall be apprised that he may thereafter be represented by counsel, who, if selected, shall be permitted to be present during the further conduct of the hearing, so that the proceedings were fatally irregular, and the order of the Secretary of Commerce and Labor deporting such aliens based upon the proceedings was invalid, and the detention of the aliens thereunder illegal.

Fair trial.—Where certain alien prostitutes on being arrested in deportation proceedings were each granted a hearing on the

question of deportation, and there voluntarily testified, and each admitted facts essential to authorize an order of deportation, an objection that they were not accorded a fair trial was untenable. *U. S. v. Williams*, (1910) 183 U. S. 904.

Amendment not retroactive as to carrier.—This section abrogates the three-year time limit for deportation of aliens at the expense of the carrier by which they unlawfully entered as provided by the Act of March 3, 1903, ch. 1012, sections 19 and 21, 32 Stat. L. 1218, 10 Fed. Stat. Annot. 108, but does not operate retroactively and hence does not apply to an alien prostitute where the three-year limit expired before the passage of this amendment. *U. S. v. North German Lloyd Steamship Co.*, (1911) 186 Fed. 672.

[SEC. 1.] [*Immigration service — credit of reimbursements.*] * * * That from and after July first, nineteen hundred and eleven, all moneys paid into the Treasury to reimburse the Immigration Service for expenses of detained aliens paid from the appropriation for expenses of regulating immigration, shall be credited to the appropriation for the expenses of regulating immigration for the fiscal year in which the expenses were incurred. [36 Stat. L. 1442.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

IMMUNITY.

See *EVIDENCE*.

IMPORTS AND EXPORTS.

Of Insecticides, see AGRICULTURE.

INDIANS.

Act of April 4, 1910, Ch. 140, 94.

Sec. 1. Indian Tribes — Annual Statement of Reimbursable Accounts — Payment of Balances Due — Accounting — Annual Report of Cost of Survey and Allotment Work, 94.

Irrigation Projects on Indian Reservations — Estimates Required — Limit of Cost — Annual Report of All Projects — Preliminary Surveys, etc. — Co-operation with Other Bureaus, 95.

Superintendents of Irrigation — Employment of, 95.

Interpreters, 95.

Irrigation Projects — Statement of Cost, etc., 95.

Act of May 6, 1910, Ch. 204, 96.

Grants to Railways of Lands in Indian Reservations, 96.

Act of June 25, 1910, Ch. 431, 96.

Sec. 1. Indian Trust Allotments — Disposal to Heirs of Intestate Indians — Discretion of Secretary of Interior — Partition — Rules for Sales, etc. — Issue of Patents in Fee — Distribution of Proceeds — Competency Certificates — Deposit of Indian Funds in Banks — Indemnity Bond, 96.

2. Disposal of Trust Allotments by Will, 97.

3. Surrender of Trust Allotments to Children — Conditions, 97.

4. Leases of Trust Allotments, 98.

5. Inducing Conveyances by Indians of Trust Interests Unlawful — Punishment for, 98.

6. Timber Depredations — Punishment, 98.

7. Indian Reservations — Sales of Timber on Unallotted Lands in, 99.

8. Sales of Timber on Trust Allotments, 99.

9. Lands in Severalty to Indians — Allotments to Be Made by Special Agents and Reservation Agent, 99.

10. Indians in Washington — Inalienable Patents to Lots in Indian Villages, 99.

11. Camp Mojave Reservation. (Special), 99.

12. Pahute Indians. (Special), 99.

13. Indian Reservations — Power, etc., Sites in, May Be Reserved, 99.

14. Trust Allotments — Canceling Patents in Power Sites, etc. — Reimbursing Indians — Lieu Allotments, 100.

15. Otoe and Missouri Reservation. (Special), 100.

16. Railroad Rights of Way through Indian Lands — Stations Required on Town Sites, 100.

17. Issue of Allotments to Indians Having None, Repealed — Allotments on Reservations — Area Increased — In Irrigation Projects — Treaty Allotments — Allotments Not in Reservations — Amount Allowed — Trust Patents to Issue — Payment of Fees from the Treasury, 100.

18. Shoshone Reservation. (Special), 102.

19. Repeals, 102.

20. Repeals, 102.

21. Sisseton and Wahpeton Sioux. (Special), 102.

22. Surplus Property on Reservations — Transfers Authorized — Proceeds from Sales to Be Covered in, 102.

23. Indian Supplies — Purchased under Regular Contracts, 102.

24. Red Lake Indian Reservation. (Special), 102.

25. Kiowa, etc., Pasture Lands, Okla. (Special), 102.

26. Mildred McIntosh, Creek Indian — Sales by Guardian Confirmed. (Special), 102.

- Sec. 27. Chippewa Indian Reservations, Minn.—Sales of Timber on Pine Lands—Disposal of Unsold Timber—Schedules, etc., to Applicants—Conduct of Sales—Opening to Homestead Entry—Additional Payment for Timber—Lands in National Forest Excluded. (Special), 102.*
- 28. Winnibigoshish Band of Chippewas, Minn.—Village Site Reserved for. (Special), 103.*
- 29. Flathead Reservation, Mont.—Classification, etc., of Vacant, etc., Lands—Disposal of. (Special), 103.*
- 30. Colville Reservation, Wash.—Allotments to Indians of Diminished Reservation. (Special), 103.*
- 31. National Forests—Allotments to Indians Living in—Applications, etc., 103.*
- 32. Five Civilized Tribes—Title to Lands Deeded to Deceased Indians, 103.*
- 33. Provisions Not Affecting Osages, etc., 103.*

Act of March 3, 1911, Ch. 210, 103.

- Sec. 1. Secretary of Interior to Report to Congress as to Use of Certain Appropriations, 103.*
- Encouraging Farming Industry among Indians—Repayment—Reuse of Fund—Detailed Report—Osage Civilization Fund Covered into the Treasury—Supplying Insufficient Funds Repealed, 104.*
- Yuma and Colorado River Reservations—Allotment of Irrigable Lands Increased—Cost Advanced—Reimbursement—Advances a Lien on Allotment—Satisfaction, 104.*
- Employee to Sign Approval of Secretary of Interior to Tribal Deeds, etc., 105.*
- Choctaws and Chickasaws—Tribal Contracts—For Legal Services—Limit—Approved by President—Deposit of Tribal Funds—Designation of Banks, etc.—Use of Interest, 105.*
- Sec. 27. Annual Statements to Be Made of Fiscal Affairs of Indians for Preceding Year, 106.*
- 28. Judgments to Indians—Payments to Be Made by Interior Department—Accounting, 106.*

CROSS-REFERENCE.

Jurisdiction of Crimes on Indian Reservations, see JUDICIARY.

An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eleven.

[Act of April 4, 1910, ch. 140.]

[SEC. 1.] *[Indian tribes—annual statement of reimbursable accounts—payment of balances due—accounting—annual report of cost of survey and allotment work.] * * ** Hereafter the Secretary of the Interior shall cause to be stated annual accounts between the United States and each tribe of Indians arising under appropriations heretofore, herein, or hereafter to be made, which by law are required to be reimbursed to the United States, crediting in said accounts the sums so reimbursed, if any; and the Secretary of the Interior shall pay, out of any fund or funds belonging to such tribe or tribes of Indians applicable thereto and held by the United States in trust or otherwise, all balances of accounts due to the United States and not already reimbursed to the Treasury, and deposit such sums in the Treasury as miscellaneous receipts; and such accounts shall be received and examined by the proper auditor of the Treasury Department and the balances arising thereon certified

to the Secretary of the Treasury: *Provided*, That hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year of all survey and allotment work on Indian reservations. [36 Stat. L. 270.]

[*Irrigation projects on Indian reservations — estimates required — limit of cost — annual report of all projects — preliminary surveys, etc. — co-operation with other bureaus.*] * * * hereafter no new irrigation project on any Indian reservation, allotments or lands, shall be undertaken until it shall have been estimated for and a maximum limit of cost ascertained from surveys, plans, and reports submitted by the chief irrigation engineer in the Indian service and approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and such limit of cost shall in no case be exceeded without express authorization of Congress, and hereafter no new project to cost in the aggregate to exceed thirty-five thousand dollars shall be undertaken on any Indian reservation or allotment without specific authority of Congress; and the Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by systems or projects, showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon for construction, extension, repair, or maintenance, of each irrigation system or reclamation project on Indian reservations, allotments or lands to and including June thirtieth, nineteen hundred and ten; and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year: *Provided further*, That nothing herein contained shall be construed to prohibit reasonable expenditures from this appropriation for preliminary surveys and investigations to determine the feasibility and estimated cost of new projects, or to prevent the Bureau of Indian Affairs from having the benefit of consultation with engineers in other branches of the public service or carrying out existing agreements with the Reclamation Service; [36 Stat. L. 270.]

[*Superintendents of irrigation — employment of.*] * * * That the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, may employ superintendents of irrigation who shall be skilled irrigation engineers, not to exceed seven in number. [36 Stat. L. 271.]

[*Interpreters.*] * * * That hereafter no person employed by the United States and paid for any other service shall be paid for interpreting. [36 Stat. L. 272.]

[*Irrigation projects — statement of cost, etc.*] * * * That the Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon, of each irrigation project for which specific appropriation is made in this Act, to and including June thirtieth, nineteen hundred and ten, and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year. [36 Stat. L. 272.]

An Act Granting lands for reservoirs, and so forth.

[Act of May 6, 1910, ch. 204.]

[*Grants to railways of lands in Indian reservations.*] That the provisions of the Act entitled "An Act making appropriation for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and ten," approved March third, nineteen hundred and nine, which authorized the Secretary of the Interior to grant to railway companies lands in Indian reservations for reservoirs, material or ballast pits, or for the purpose of planting and growing trees to protect their lines of railway, be, and the same are hereby, extended and made applicable to any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation; that the damages and compensation to be paid to any Indian allottee shall be ascertained and fixed in such manner as the Secretary of the Interior may direct and shall be paid by the railway company to said Secretary; that the damages and compensation paid to the Secretary of the Interior by the railway company taking any such land shall be paid by said Secretary to the allottee sustaining such damages. [36 Stat. L. 349.]

For the Act of March 3, 1909, above extended, see 1909 Supp. Fed. Stat. Annot. 239.

An Act To provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes.

[Act of June 25, 1910, ch. 431.]

[SEC. 1.] [*Indian trust allotments — disposal to heirs of intestate Indians — discretion of Secretary of Interior — partition — rules for sales, etc. — issue of patents in fee — distribution of proceeds — competency certificates — deposit of Indian funds in banks — indemnity bond.*] That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid in deferred payments, a further amount, not exceeding fifteen per centum of the purchase price may be so for-

feited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: *Provided further*, That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: *Provided*, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. [36 Stat. L. 855.]

SEC. 2. [*Disposal of trust allotments by will.*] That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided further*, That sections one and two of this Act shall not apply to the State of Oklahoma. [36 Stat. L. 856.]

Application of statute. — In *Bond v. U. S.*, (1910) 181 Fed. 613, it was held that the provision of this section that when any Indian to whom an allotment has been made, or may hereafter be made, dies before the expiration of the trust period, and before issuance of a patent, without having disposed of the allotment by will, the Secretary of the Interior shall ascertain the legal heirs of the decedent and his decision shall be final and conclusive, applies to any allottee who dies before the expiration of the trust period, whether the allotment has been made at the time of the passage of the act or is made in the future, and whether the death occurs before or after the passage of the act.

Repeal of earlier acts. — The provision of this section that if an Indian allottee dies

before the expiration of the trust period and the issuance of a patent without having disposed of his allotment by will, the Secretary of the Interior shall ascertain the legal heirs of such decedent, and his decision shall be final and conclusive, operated to repeal Act Cong. Feb. 6, 1901, ch. 217, 31 Stat. L. 760, 3 Fed. Stat. Annot. 503, conferring on Circuit Courts of the United States jurisdiction over matters growing out of the execution of the Allotment Act, and deprived the courts of jurisdiction to determine such heirship, and since the Act of 1910 contained no saving clause, the authority of the courts under the repealed Act of 1901 immediately ceased in so far as pending causes were concerned. *Bond v. U. S.*, (1910) 181 Fed. 613.

SEC. 3. [*Surrender of trust allotments to children — conditions.*] That in any case where an Indian has an allotment of land, or any right, title, or interest in such an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior, for the benefit of any of his or her children to whom no allotment of land shall have been made; and thereupon the Secretary of the

Interior shall cause the estate so relinquished to be allotted to such child or children subject to all conditions which attached to it before such relinquishment. [36 Stat. L. 856.]

SEC. 4. [*Leases of trust allotments.*] That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior. [36 Stat. L. 856.]

SEC. 5. [*Inducing conveyances by Indians of trust interests unlawful — punishment for.*] That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made. [36 Stat. L. 857.]

SEC. 6. [*Timber depredations — punishment.*] That section fifty of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine (Thirty-fifth United States Statutes at Large, page one thousand and ninety-eight), is hereby amended so as to read:

"SEC. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both." [36 Stat. L. 857.]

See 1909 Supp. Fed. Stat. Annot. 419.

That section fifty-three of said Act is hereby amended so as to read:

"SEC. 53. Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both." [36 Stat. L. 857.]

See 1909 Supp. Fed. Stat. Annot. 419.

SEC. 7. [*Indian reservations — sales of timber on unallotted lands in.*] That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin. [36 Stat. L. 857.]

SEC. 8. [*Sales of timber on trust allotments.*] That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior. [36 Stat. L. 857.]

SEC. 9. [*Lands in severalty to Indians — allotments to be made by special agents and reservation agent.*] That section three of the Act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), be, and the same hereby is, amended to read as follows:

"SEC. 3. That the allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office." [36 Stat. L. 857.]

As originally enacted this section is given in 3 Fed. Stat. Annot. 493.

SEC. 10. [*Indians in Washington — inalienable patents to lots in Indian villages.*] That the Secretary of the Interior be, and he is hereby, authorized, whenever in his opinion it shall be conducive to the best welfare and interest of the Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lot described therein to persons other than members of the tribe, except on approval of the Secretary of the Interior; and if any such Indian shall die subsequent to the approval of this Act, and before receiving patent to the lot occupied by him, the lot to which such Indian would have been entitled if living shall be patented in his name and shall be disposed of as provided for in section one of this Act. [36 Stat. L. 858.]

SEC. 11. [*Camp Mojave reservation.*] [*Special.*]

SEC. 12. [*Pahute Indians.*] [*Special.*]

SEC. 13. [*Indian reservations — power, etc., sites in, may be reserved.*] That the Secretary of the Interior be, and he is hereby, authorized, in his dis-

cretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress: *Provided*, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with this Act. [36 Stat. L. 858.]

SEC. 14. [*Trust allotments — canceling patents in power sites, etc. — reimbursing Indians — lieu allotments.*] That the Secretary of the Interior, after notice and hearing, is hereby authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: *Provided*, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: *Provided further*, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project. [36 Stat. L. 859.]

SEC. 15. [*Otoe and Missouri reservation.*] [*Special.*]

SEC. 16. [*Railroad rights of way through Indian lands — stations required on town sites.*] That section one of the Act entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes," approved March second, eighteen hundred and ninety-nine, be, and the same hereby is, amended by adding thereto the following:

"*Provided also*, That as a condition precedent to each and every grant of a right of way under authority of this Act, each and every railway company applying for such grant shall stipulate that it will construct and permanently maintain suitable passenger and freight stations for the convenience of each and every town site established by the Government along said right of way." [36 Stat. L. 859.]

See 3 Fed. Stat. Annot. 511.

SEC. 17. [*Issue of allotments to Indians having none, repealed — allotments on reservations — area increased — in irrigation projects — treaty allotments — allotments not in reservations — amount allowed — trust patents to issue — payment of fees from the Treasury.*] That so much of the Indian appropriation Act for the fiscal year nineteen hundred and ten, approved March third, nineteen hundred and nine, as reads as follows, to wit: "That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper, not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the Act of February eighth, eighteen hundred and eighty-seven," be, and the same is hereby, repealed, and sections one and four of the Act of February twenty-eighth, eighteen hundred and ninety-

one (Twenty-sixth Statutes, page seven hundred ninety-four), be, and the same are hereby, amended to read as follows:

"SEC. 1. That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided*, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further*, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified in this Act, with the consent of the Indians expressed in such manner as the President in his discretion may require."

"SEC. 4. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the Act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior." [36 Stat. L. 859.]

The provision of the Act of March 3, 1909, above repealed, is given in 1909 Supp. Fed. Stat. Annot. 240. For secs. 1 and 4 of the Act of Feb. 28, 1891, see 3 Fed. Stat. Annot. 499, 501.

SEC. 18. [*Shoshone Reservation.*] [*Special.*]

SEC. 19. [*Repeals.*] That sections four hundred and sixty-eight, four hundred and sixty-nine, and two thousand and ninety-one of the Revised Statutes of the United States be, and they are hereby, repealed. [36 Stat. L. 860.]

For R. S. secs. 468, 469, see 2 Fed. Stat. Annot. 928; for R. S. sec. 2091, see 3 Fed. Stat. Annot. 362.

SEC. 20. [*Repeals.*] That the following sections in the following Acts making appropriations for the current and contingent expenses of the Indian service, to wit: Section eight of the Act of March third, eighteen hundred and seventy-five; section eight of the Act of March second, eighteen hundred and ninety-five; section eight of the Act of March third, nineteen hundred and one; and section six of the Act of May twenty-seventh, nineteen hundred and two, be, and they are hereby, repealed. [36 Stat. L. 861.]

For sec. 8 of the Act of March 3, 1875, see 2 Fed. Stat. Annot. 928; for sec. 8 of the Act of March 3, 1901, see 2 Fed. Stat. Annot. 929.

SEC. 21. [*Sisseton and Wahpeton Sioux.*] [*Special.*]

SEC. 22. [*Surplus property on reservations — transfers authorized — proceeds from sales to be covered in.*] That section six of the Indian appropriation Act of July first, eighteen hundred and ninety-eight, be, and it is hereby, amended so as to read as follows:

"SEC. 6. That whenever there is on hand at any of the Indian reservations government property not required for the use and benefit of the Indians on such reservations, the Secretary of the Interior is authorized to cause any such property to be transferred to any other Indian reservation where it may be used advantageously, or to cause it to be sold and the proceeds thereof deposited and covered into the Treasury in conformity with section thirty-six hundred and eighteen of the Revised Statutes of the United States." [36 Stat. L. 861.]

See 3 Fed. Stat. Annot. 371. For R. S. sec. 3618, see 6 Fed. Stat. Annot. 548.

SEC. 23. [*Indian supplies — purchases under regular contracts.*] That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed. [36 Stat. L. 861.]

R. S. sec. 3709 is given in 6 Fed. Stat. Annot. 93.

SEC. 24. [*Red Lake Indian Reservation.*] [*Special.*]SEC. 25. [*Kiowa, etc., pasture lands, Okla.*] [*Special.*]

SEC. 26. [*Mildred McIntosh, Creek Indian — sales by guardian confirmed.*] [*Special.*]

SEC. 27. [*Chippewa Indian reservations, Minn. — sales of timber on pine lands — disposal of unsold timber — schedules, etc., to applicants — conduct of sales — opening to homestead entry — additional payment for timber — lands in National Forest excluded.*] [*Special.*]

SEC. 28. [*Winnibigoshish band of Chippewas, Minn. — village site reserved for.*] [*Special.*]

SEC. 29. [*Flathead Reservation, Mont. — classification, etc., of vacant, etc., lands — disposal of.*] [*Special.*]

SEC. 30. [*Colville Reservation, Wash. — allotments to Indians of diminished reservation.*] [*Special.*]

SEC. 31. [*National forests — allotments to Indians living in — applications, etc.*] That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section * of this Act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided. [*36 Stat. L. 863.*]

SEC. 32. [*Five Civilized Tribes — title to lands deeded to deceased Indians.*] Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life. [*36 Stat. L. 863.*]

SEC. 33. [*Provisions not affecting Osages, etc.*] That the provisions of this Act shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, except as provided in section thirty-two. [*36 Stat. L. 863.*]

An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and twelve.

[*Act of March 3, 1911, ch. 210.*]

[SEC. 1.] [*Secretary of Interior to report to Congress as to use of certain appropriations.*] * * * To conduct experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits, for the purposes of preserving living and growing timber on Indian reservations and allotments, and to advise the Indians as to the proper care of forests: *Provided*, That this shall not, as to timber, apply to the Menominee Indian Reservation in Wisconsin or the Red Lake Indian Reservation in Minnesota; for the employment of suitable persons as matrons to teach Indian women housekeeping and other household duties, and for furnishing necessary equipments and renting quarters for them where necessary; for the employment of practical farmers and stockmen, in addition

to the agency and school farmers now employed; and to superintend and direct farming and stock raising among Indians, four hundred thousand dollars: *Provided further*, That not to exceed five thousand dollars of the amount herein appropriated shall be used to conduct experiments on Indian school or agency farms to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits: *Provided, also*, That the amounts paid to matrons, farmers, and stockmen herein provided for shall not be included within the limitation on salaries and compensation of employees contained in the Act of June seventh, eighteen hundred and ninety-seven: *Provided still further*, That hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year relating to the use of appropriations made for the purposes herein provided for. [36 Stat. L. 1060.]

[*Encouraging farming industry among Indians — repayment — reuse of fund — detailed report — Osage civilization fund covered into the Treasury — supplying insufficient funds repealed.*] * * * There is hereby appropriated the sum of thirty thousand dollars, or so much thereof as may be necessary, to be immediately available, for the purpose of encouraging industry among Indians, and to aid them to engage in the culture of fruits, grains, and other crops. The said sum may be used for the purchase of animals, machinery, tools, implements, and other agricultural equipment: *Provided*, That the sum hereby appropriated shall be expended subject to the conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, on or before June thirtieth, nineteen hundred and eighteen, and all repayments to this fund made on or before June thirtieth, nineteen hundred and seventeen are hereby appropriated for the same purpose as the original fund, and the entire fund, including such repayments, shall remain available until June thirtieth, nineteen hundred and seventeen, and all repayments to the fund hereby created which shall be made subsequent to June thirtieth, nineteen hundred and seventeen, shall be covered into the Treasury and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law: *Provided further*, That the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of the use of this fund: *Provided still further*, That the Secretary of the Interior shall close the account known as the civilization fund created by article one of the treaty with the Osage Indians, dated September twenty-ninth, eighteen hundred and sixty-five (Fourteenth Statutes at Large, page six hundred and eighty-seven), and cause the balance of any unexpended moneys in that fund to be covered into the Treasury, and thereafter it shall not be withdrawn or applied except in consequence of a subsequent appropriation by law; and that section eleven of the Indian appropriation Act for the fiscal year eighteen hundred and ninety-eight, approved June seventh, eighteen hundred and ninety-seven (Thirtieth Statutes at Large, page ninety-three), is hereby repealed. [36 Stat. L. 1061.]

For sec. 11 of the Act of June 7, 1897, above repealed, see 2 Fed. Stat. Annot. 898.

[*Yuma and Colorado River Reservations — allotment of irrigable lands increased — cost advanced — reimbursement — advances a lien on allotment — satisfaction.*] * * * The first proviso in section twenty-five of the Indian appropriation Act, approved April twenty-first, nineteen hundred and four (Thirty-third Statutes, page two hundred and twenty-four), is hereby amended so that the first sentence in said proviso shall read as follows: "*Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the

said reservations ten acres of the irrigable lands; " and there is hereby appropriated the sum of eighteen thousand dollars, or so much thereof as may be necessary, to defray the cost of the irrigation of the increased allotments, for the fiscal year nineteen hundred and twelve: *Provided*, That the entire cost of irrigation of the allotted lands shall be reimbursed to the United States from any funds received from the sale of the surplus lands of the reservations or from any other funds that may become available for such purpose: *Provided further*, That in the event any allottee shall receive a patent in fee to an allotment of land irrigated under this project, before the United States shall have been wholly reimbursed as herein provided, then the proportionate cost of the project to be apportioned equitably by the Secretary of the Interior, shall become a first lien on such allotment, and the fact of such lien shall be recited on the face of each patent in fee issued and the amount of the lien set forth thereon, which said lien, however, shall not be enforced so long as the original allottee, or his heirs, shall actually occupy the allotment as a homestead, and the receipt of the Secretary of the Interior or of the officer, agent, or employee duly authorized by him for that purpose, for the payment of the amount assessed against any allotment as herein provided shall, when duly recorded by the recorder of deeds in the county wherein the land is located, operate as a satisfaction of such lien. [36 Stat. L. 1063.]

Section 25 of the Act of April 21, 1904, above amended, is given in 10 Fed. Stat. Annot. 435.

[*Employee to sign approval of Secretary of Interior to tribal deeds, etc.*]
 * * * That the Secretary of the Interior be, and he is hereby, authorized to designate an employee or employees of the Department of the Interior to sign, under the direction of the Secretary, in his name and for him, his approval of tribal deeds to allottees, to purchasers of town lots, to purchasers of unallotted lands, to persons, corporations, or organizations for lands reserved to them under the law for their use and benefit, and to any tribal deeds made and executed according to law for any of the Five Civilized Tribes of Indians in Oklahoma. [36 Stat. L. 1069.]

[*Choctaws and Chickasaws — tribal contracts — for legal services — limit — approved by President — deposit of tribal funds — designation of banks, etc. — use of interest.*] * * * That tribal contracts which are necessary to the administration of the affairs of the Choctaw and Chickasaw Tribes of Indians may be made by the Secretary of the Interior: *Provided*, That contracts for professional legal services of attorneys may be made by the tribes for a stipulated amount and period, in no case exceeding one year in duration and five thousand dollars per annum in amount, with reasonable and necessary expenses to be approved and paid under the direction of the Secretary of the Interior, but such contracts for legal services shall not be of any validity until approved by the President.

The net receipts from the sales of surplus and unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, after deducting the necessary expense of advertising and sale, may be deposited in national or State banks in the State of Oklahoma in the discretion of the Secretary of the Interior, such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor, as he may prescribe. The interest accruing on such funds may be used to defray the expense of the per capita payments of such funds. [36 Stat. L. 1070.]

SEC. 27. [*Annual statements to be made of fiscal affairs of Indians for preceding year.*] Annually, on the first Monday in December, the Secretary of the Interior shall transmit to the Speaker of the House of Representatives a statement of the fiscal affairs of all Indian tribes for whose benefit expenditures from either public or tribal funds shall have been made by any officer, clerk, or employee in the Interior Department during the preceding fiscal year; and such statement shall show (1) the total amount of all moneys, from whatever source derived, standing to the credit of each tribe of Indians, in trust or otherwise, at the close of such fiscal year; (2) an analysis of such credits, by funds, showing how and when they were created, whether by treaty stipulation, agreement, or otherwise; (3) the total amount of disbursements from public or trust funds made on account of each tribe of Indians for such fiscal year; and (4) an analysis of such disbursements showing the amounts disbursed (a) for per capita payments in money to Indians, (b) for salaries or compensation of officers and employees, (c) for compensation of counsel and attorney's fees, and (d) for support and civilization. [36 Stat. L. 1077.]

SEC. 28. [*Judgments to Indians — payments to be made by Interior Department — accounting.*] Hereafter payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law. [36 Stat. L. 1077.]

INSANE PERSONS.

In Alaska, see ALASKA.

Naturalization of Wife and Minor Children of Insane Alien Making Homestead Entries, see NATURALIZATION.

INSECTICIDE ACT.

See *AGRICULTURE.*

INTERIOR DEPARTMENT.

Bureau of Mines, see MINERAL LANDS, MINES, AND MINING.

Reclamation Act, see WATERS.

Report of Expenditures to Congress, see ESTIMATES, APPROPRIATIONS, AND REPORTS.

Reports to Congress on Indian Affairs, see INDIANS.

Statement of Accounts with Indian Tribes, see INDIANS.

And see generally, *INDIANS; PUBLIC LANDS.*

INTERNAL REVENUE.

Act of May 13, 1910, Ch. 236, 107.

Internal Revenue — Allowances to Storekeepers, etc., Modified, 107.

Act of June 17, 1910, Ch. 297, 107.

Sec. 1. Care, etc., of Corporation Returns — Regulation of Inspection, 107.

Act of June 22, 1910, Ch. 329, 108.

*Sec. 1. Internal Revenue — Distilled Spirits — Surveys — Basis of Capacity — Sour Mash — Filtration-Aeration Process Added — Sweet Mash, 108.
2. Fermenting Period — Emptying Tubs — Periods Changed for Filling — Filtration-Aeration Process Added — Sweet Mash, 108.*

Act of June 23, 1910, Ch. 356, 109.

Storekeepers, etc. — Cumulative Leave of Absence Allowed — Computation — Regulations, 109.

Act of Feb. 24, 1911, Ch. 149, 109.

Storekeepers, Gaugers, and Storekeeper-Gaugers — Pay Increased, 109.

Act of March 2, 1911, Ch. 198, 109.

Distilled Spirits — Fruit Brandies — Exemption from General Spirit Regulations — Use of Artificial Sweetening Permitted, 109.

Act of March 2, 1911, Ch. 199, 110.

Distilled Spirits — Withdrawal in Metal Tanks or Tank Cars Free of Tax for Government Use, 110.

Act of March 4, 1911, Ch. 237, 110.

Sec. 1. Purchases for Internal-Revenue Service, 110.

An Act To amend section sixty-three of the Act of August twenty-eighth, eighteen hundred and ninety-four (Twenty-eighth Statutes, page five hundred and sixty-seven).

[*Act of May 13, 1910, ch. 236.*]

[*Internal revenue — allowances to storekeepers, etc., modified.*] That section sixty-three of the Act of August twenty-eighth, eighteen hundred and ninety-four (Twenty-eighth Statutes, page five hundred and sixty-seven), be, and the same is hereby, amended so as to read as follows:

“**SEC. 63.** That storekeepers, storekeeper-gaugers, and gaugers, when traveling to or from assignments, or when transferred from one assignment to another, either in the same district or in different districts, shall receive the same compensation per day during the time necessarily occupied in traveling that they would be entitled to if on duty at the place to which assigned or transferred, or from which relieved, together with actual and necessary traveling expenses.” [36 Stat. L. 369.]

See 3 Fed. Stat. Annot. 572.

“August twenty-eighth” in title and first paragraph of this Act is evidently a clerical error for “August twenty-seventh.” — Ed.

[**SEC. 1.**] [*Care, etc., of corporation returns — regulation of inspection.*]

* * * For classifying, indexing, exhibiting and properly caring for the returns of all corporations, required by section thirty-eight of an Act entitled “An Act to provide revenue, equalize duties, encourage the industries of the United States, and for other purposes,” approved August fifth, nineteen hundred and nine, including the employment, in the District of Columbia, of such

clerical and other personal services and for rent of such quarters as may be necessary, twenty-five thousand dollars: *Provided*, That any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President. [36 Stat. L. 494.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

Section 38 of the Act of Aug. 5, 1909, above amended, is given in 1909 Supp. Fed. Stat. Annot. 829.

An Act To amend paragraph two of section thirty-two hundred and sixty-four, Revised Statutes of the United States, as amended by section five of the Act of March first, eighteen hundred and seventy-nine, and section thirty-two hundred and eighty-five, Revised Statutes of the United States, as amended by section three of the Act of May twenty-eighth, eighteen hundred and eighty.

[Act of June 22, 1910, ch. 329.]

SEC. 1.] [*Internal revenue — distilled spirits — surveys — basis of capacity — sour mash — filtration-aeration process added — sweet mash.*] That paragraph two of section thirty-two hundred and sixty-four, Revised Statutes of the United States, as amended by section five, Act of March first, eighteen hundred and seventy-nine, be amended so as to read as follows:

"In all surveys forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses, except in distilleries operated on the sour mash principle, in which distilleries sixty gallons of beer brewed or fermented from grain shall represent not less than one bushel of grain, and except that in distilleries where the filtration-aeration process is used, with the approval of the Commissioner of Internal Revenue; that is, where the mash after it leaves the mash tub is passed through a filtering machine before it is run into the fermenting tub, and only the filtered liquor passes into the fermenting tub, seventy gallons of beer brewed or fermented from grain shall represent not less than one bushel of grain. The provisions hereof relating to filtration-aeration process shall apply only to sweet-mash distilleries." [36 Stat. L. 590.]

For R. S. sec. 3264, as it read prior to this amendment, see 3 Fed. Stat. Annot. 642.

SEC. 2. [*Fermenting period — emptying tubs — periods changed for filling — filtration-aeration process added — sweet mash.*] That section thirty-two hundred and eighty-five, Revised Statutes of the United States, as amended by section three, Act of May twenty-eighth, eighteen hundred and eighty, be amended so as to read as follows:

"Every fermenting tub shall be emptied at or before the end of the fermenting period; no fermenting tub in a sweet-mash distillery shall be filled oftener than once in seventy-two hours, nor in a sour-mash distillery oftener than once in ninety-six hours, nor in a rum distillery oftener than once in one hundred and forty-four hours, nor in a distillery where the filtration-aeration process is employed, that is, where the mash after it leaves the mash tub is passed through a filtering machine, before it is run into the fermenting tub, and only the filtered liquor passes into the fermenting tub, and the approval of the Commissioner of Internal Revenue being secured, oftener than once in twenty-four hours. The provisions hereof relating to filtration-aeration process shall apply only to sweet-mash distilleries." [36 Stat. L. 590.]

R. S. sec. 3285, as it read prior to this amendment, is given in 3 Fed. Stat. Annot. 656.

An Act Granting cumulative annual leave of absence to storekeepers, gaugers, and storekeeper-gaugers, with pay.

[Act of June 23, 1910, ch. 356.]

[*Storekeepers, etc. — cumulative leave of absence allowed — computation — regulations.*] That storekeepers, gaugers, and storekeeper-gaugers shall be, and are hereby, granted a cumulative annual leave of absence, with pay, not to exceed in the aggregate fifteen days for any one year: *Provided*, That said leave of absence is so computed as not to exceed one and one-quarter days for each twenty-six days said storekeepers, gaugers, and storekeeper-gaugers are actually assigned to duty: *Provided further*, That such leave shall be operative under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. [36 Stat. L. 592.]

An Act To amend the provisions of the Act of March third, eighteen hundred and eighty-five, limiting the compensation of storekeepers, gaugers, and storekeeper-gaugers in certain cases to two dollars a day, and for other purposes.

[Act of Feb. 24, 1911, ch. 149.]

[*Storekeepers, gaugers, and storekeeper-gaugers — pay increased.*] That the provisions of the legislative, executive, and judicial appropriations Act for the fiscal year ending June thirtieth, eighteen hundred and eighty-six (Twenty-third Statutes, page four hundred and four), approved March third, eighteen hundred and eighty-five, which limits to two dollars per day the compensation of storekeepers, gaugers, and storekeeper-gaugers assigned to distilleries whose registered capacity is twenty bushels or less, be, and the same is hereby, amended, so as to read as follows:

“Hereafter storekeepers, gaugers, and storekeeper-gaugers who are assigned to distilleries with a registered capacity of twenty bushels or less, or who are assigned to other places where the compensation is now less than three dollars a day, shall receive three dollars a day for services.” [36 Stat. L. 928.]

The provision of the Act of March 3, 1885, above amended, is given in 3 Fed. Stat. Annot. 568.

An Act To amend the internal-revenue laws relating to distilled spirits, and for other purposes.

[Act of March 2, 1911, ch. 198.]

[*Distilled spirits — fruit brandies — exemption from general spirit regulations — use of artificial sweetening permitted.*] That section thirty-two hundred and fifty-five of the Revised Statutes, as amended by Act of June third, eighteen hundred and ninety-six (Twenty-ninth Statutes, page one hundred and ninety-five), be amended so as to read as follows:

“**Sec. 3255.** The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may exempt distillers of brandy made exclusively from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, plums, pawpaws, persimmons, prunes, figs, or cherries from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so: *Provided*, That where, in the manufacture of wine, artificial sweetening has been used the wine or the fruit pomace residuum may be used in the distillation of brandy, and such use

shall not prevent the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, from exempting such distiller from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so." [36 Stat. L. 1014.]

See 3 Fed. Stat. Annot. 634.

An Act To amend section thirty-two hundred and eighty-seven of the Revised Statutes of the United States as amended by section six of chapter one hundred and eight of an Act approved May twenty-eighth, eighteen hundred and eighty, page one hundred and forty-five, volume twenty-one, United States Statutes at Large.

[Act of March 2, 1911, ch. 199.]

[*Distilled spirits — withdrawal in metal tanks or tank cars free of tax for government use.*] That section thirty-two hundred and eighty-seven of the Revised Statutes of the United States, as amended by section six of chapter one hundred and eight of an Act approved May twenty-eighth, eighteen hundred and eighty, page one hundred and forty-five of volume twenty-one, United States Statutes at Large, be, and the same is hereby, amended so as to read as follows:

"*Provided further*, That alcohol or high-proof spirits withdrawn free of tax for the use of the United States, as authorized by section thirty-four hundred and sixty-four, Revised Statutes, may be drawn off for transfer by pipes direct from the receiving cisterns in the cistern room of any distillery to closed metal storage tanks situated in the distillery bonded warehouse and transferred from such storage tanks to tanks or tank cars for shipment, upon the execution of such bonds and under such regulations as the Secretary of the Treasury may prescribe." [36 Stat. L. 1014.]

See 3 Fed. Stat. Annot. 656.

[SEC. 1.] [*Purchases for internal-revenue service.*] * * * Hereafter the purchase of stationery for the Internal-Revenue Service shall be made under the direction of the Secretary of the Treasury as in the case of other branches of the public service under the Treasury Department. [36 Stat. L. 1125.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1911, ch. 22.

INTERSTATE COMMERCE.

Act of June 18, 1910, Ch. 309, III.

Secs. 1-5. Court of Commerce (Superseded by Chapter 9 of the Judicial Code, see post, p. 111.)

6. *Agent in Washington to Be Designated by Carriers for Service of Process, etc.—Service in Default of Designation, 111.*
7. *Section 1 of Interstate Commerce Act Amended, 112.*
8. *Section 4 of Interstate Commerce Act Amended, 115.*
9. *Section 6 of Interstate Commerce Act Amended, 116.*
10. *Section 10 of Interstate Commerce Act Amended, 117.*
11. *Section 13 of Interstate Commerce Act Amended, 118.*
12. *Section 15 of Interstate Commerce Act Amended, 119.*
13. *Section 16 of Interstate Commerce Act Amended, 123.*
14. *Section 20 of Interstate Commerce Act Amended, 125.*
15. *Prior Proceedings, Obligations, etc., Not Impaired, 126.*
16. *Issue of Stocks and Bonds by Railroads — President to Appoint Commission to Investigate — Employment of Experts, etc. — Compensation — Details from Departments, etc. — Expenses, 126.*
17. *Injunctions Based on Alleged Unconstitutionality of State Statutes. (Superseded and Re-enacted by Section 266 of the Judicial Code, see post, p. 242), 127.*
18. *Effect, 127.*

CROSS-REFERENCES.

Arbitration, Member of Interstate Commerce Commission or of Court of Commerce to Act, see LABOR.

Commerce Court, see JUDICIARY.

Insecticides, Regulation of, see AGRICULTURE.

Liability of Carriers to Employees, see RAILROADS.

Railway Accidents, Reports of, see RAILROADS.

Safety Appliances on Railroads, see RAILROADS.

WHITE SLAVE TRAFFIC, see that title.

An Act To create a commerce court, and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes.

[Act of June 18, 1910, ch. 309.]

[SECS. 1-5.] [Court of Commerce — superseded by chapter 9 of the Judicial Code. See post, p. 215.]

SEC. 6. [Agent in Washington to be designated by carriers for service of process, etc. — service in default of designation.] * * * It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said commerce court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to

time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or commerce court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission. [36 Stat. L. 544.]

The omitted part of the above sec. 6, constituting the first paragraph thereof, relates to the Court of Commerce, and was re-enacted

as sec. 214 of ch. 9 of the Judicial Code, and is given post, p. 223.

SEC. 7. [Section 1 of Interstate Commerce Act amended.] That section one of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby now amended so as to read as follows:

[Application — transportation by pipe lines, etc., between states — telegraph, telephone, and cable companies included — railroad, etc. — within a territory — foreign shipments — transshipments — within one state not included.] "SECTION 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid. [36 Stat. L. 544.]

[Express and sleeping car companies — "railroad" to include bridges, etc. — switches, terminal facilities, etc., also — "transportation" to include cars, facilities for storing, icing, etc. — carriers to furnish, etc. — through routes — return of cars, etc. — charges to be just and reasonable — telegraph, etc., mes-

sages — classification — contracts by telegraph, etc., companies with carriers.]
 "The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services. [36 Stat. L. 545.]

[*Classification of property, etc., to be just and reasonable — regulations — facilities for baggage, etc. — unjust classifications, etc., of interstate and foreign commerce unlawful — passes, etc., prohibited — exceptions — interchange for employees, families, etc. — epidemics, etc. — exchange of telegraph franks — persons included as "employees" — "families" extended — penalty for violations — jurisdiction.*] "And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms,

and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

"No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof. [36 Stat. L. 546.]

See 10 Fed. Stat. Annot. 170.

[*Railroads not to carry products in which interested — timber excepted.*]

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the Dis-

trict of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. [36 Stat. L. 547.]

[*Switches and cars to be furnished by carriers — enforcement.*] “Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.” [36 Stat. L. 547.]

For sec. 1 of the Act of Feb. 4, 1887, and prior amendments, see 3 Fed. Stat. Annot. 809; 1909 Supp. Fed. Stat. Annot. 255.

SEC. 8. [Section 4 of Interstate Commerce Act amended.] That section four of said Act to regulate commerce be amended so as to read as follows:

[*Long and short hauls — aggregate charge for shorter not to exceed longer distance over same route — allowance in special cases — temporary continuance of present rates — applications for changes — competition with water routes — increase of reduced rates restricted.*] “SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Pro-*

vided further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." [36 Stat. L. 547.]

For sec. 4 of the Act of Feb. 4, 1887, above amended, see 3 Fed. Stat. Annot. 823.

SEC. 9. [Section 6 of Interstate Commerce Act amended.] That section six of said Act to regulate commerce, as heretofore amended, is hereby now amended by adding four new paragraphs at the end thereof, as follows:

[Schedules of rates, etc. — schedules not giving effective date unlawful — penalty for noncompliance with regulations, orders, etc., of commission — penalty for failing to give, or misstating rates for shipment — name of resident agent to be posted at every freight station.] "The commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the commission shall be void and its use shall be unlawful.

"In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to

address such request in substantially the following form: 'The Station Agent of the ——— Company at ——— Station,' together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office." [36 Stat. L. 548.]

For sec. 6 of the Act of Feb. 4, 1887, and prior amendments, see 3 Fed. Stat. Annot. 827; 1909 Supp. Fed. Stat. Annot. 260.

SEC. 10. [Section 10 of Interstate Commerce Act amended.] That section ten of said Act to regulate commerce, as heretofore amended, be now amended so as to read as follows:

[Violations of act by carriers, officers, etc., a misdemeanor — penalty — punishment for unlawful discrimination in rates, etc. — issuing false billing, classification, etc., by carrier, a misdemeanor — punishment — attempting to secure lower rates, by false billing, etc., by shipper, a misdemeanor — making false claim for damages, etc., in transit, a misdemeanor — punishment — artificial persons — attempting, etc., to secure unjust discrimination from carrier, by bribery, etc., a misdemeanor — punishment — action for damages.] "SEC. 10. That any common carrier subject to the provisions of [t]his Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

"Any person, corporation, or company, or any agent or officer thereof, who

shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom." [36 Stat. L. 549.]

For sec. 10 of the Act of Feb. 4, 1887, see 3 Fed. Stat. Annot. 835.

SEC. 11. [Section 13 of Interstate Commerce Act amended.] That section thirteen of said Act to regulate commerce be amended so as to read as follows:

[Complaints for violations — filing of complaints against carriers for violations — notification to carrier — effect of reparation — investigation by com-

mission — commission to investigate complaints by state commission, or on its own motion — enforcement of orders — direct damage not necessary.] “SEC. 13. That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

“Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.” [36 Stat. L. 550.]

For sec. 13 of the Act of Feb. 4, 1887, see 3 Fed. Stat. Annot. 842.

SEC. 12. [Section 15 of Interstate Commerce Act amended.] That section fifteen of said Act to regulate commerce, as heretofore amended, is hereby now amended so as to read as follows:

[Violations — commission to determine if charges, classifications, etc., are unjust, discriminatory, etc. — just and reasonable rates to be observed — orders to carriers — taking effect of orders — continuance — apportionment of joint rates, etc., by commission on failure of agreement by carriers.] “SEC. 15. That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first

section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order. [36 Stat. L. 551.]

[*New rates, classifications, etc. — commission to determine propriety of — suspension until decision — final determination — extension of suspension — hearings on rates increased since January 1, 1910.*] “Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after Janu-

any first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. [36 Stat. L. 552.]

[*Commission may establish through routes, joint classifications, and rates, etc., on failure of carriers — water connection included — electric roads not carrying freight excepted — water transportation excluded.*] “The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. [36 Stat. L. 552.]

[*Through routes to embrace entire length of railroad — exception — shipper's choice of routes to be observed — issue of through bill of lading, etc., as requested — choice of competing lines.*] “And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

“In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances

have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported. [36 Stat. L. 552.]

[*Disclosing information of shipments unlawful — receiving, unlawful — exception for legal process — adjustment of accounts — penalty for violations.*] “It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

“Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars. [36 Stat. L. 553.]

[*Allowance for transportation facilities, etc., furnished by shipper — determination by commission.*] “If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. [36 Stat. L. 553.]

[*Other powers of commission not excluded.*] “The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this Act.” [36 Stat. L. 554.]

For sec. 15 of the Act of Feb. 4, 1887, see 3 Fed. Stat. Annot. 843.

Character of shipment. — In Texas, etc., R. Co. v. Louisiana R. Commission, (1910) 183 Fed. 1005, it appeared that complainant rail-

road companies filed with the Interstate Commerce Commission a schedule of rates from points in Louisiana to New Orleans for export shipments. The railroad commission of Louisiana had also fixed a schedule of differ-

ent and lower rates on local shipments between the same points. It also by an order allowed four days' free storage on local shipments and twenty days on shipments intended for export, in which order the railroads acquiesced, and also delivered shipments for export at the ship's side free of charge for switching. Certain shipments were delivered to complainants from points in Louisiana for carriage to New Orleans on bills of lading of substantially the local form, and on their arrival the consignees demanded and received the free storage accorded export shipments and free delivery to the vessel

carrier; the shipments being delivered by complainants directly from their cars to such carrier, as was intended by the owner when it was shipped. It was held that, notwithstanding the use of the local bills of lading, the contract between the shippers and complainants was one for an export shipment, over which the Louisiana railroad commission had no jurisdiction, and that complainants were entitled, and even required, to charge the rates on such shipments fixed by their schedules filed with the Interstate Commerce Commission.

SEC. 13. [*Section 16 of Interstate Commerce Act amended.*] That section sixteen of said Act to regulate commerce, as heretofore amended, is hereby now amended so as to read as follows:

[*Enforcing orders of commission — payment of money damages.*] "SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. [36 Stat. L. 554.]

[*Proceedings in Circuit Court if money be not paid — findings, etc., of commission prima facie evidence — attorney's fee — time limit for filing complaints.*] "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after. [36 Stat. L. 554.]

[*Joining of parties — service of process — recoveries.*] "In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is

brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff. [36 Stat. L. 554.]

[*Service of orders.*] "Every order of the commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law. [36 Stat. L. 554.]

[*Suspension of orders.*] "The commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper. [36 Stat. L. 554.]

[*Compliance by carriers required.*] "It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. [36 Stat. L. 554.]

[*Penalty for carrier not obeying orders.*] "Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. [36 Stat. L. 554.]

[*Recovery of forfeitures.*] "The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs. [36 Stat. L. 555.]

[*Duties of district attorneys, etc.*] "It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. [36 Stat. L. 555.]

[*Employment of attorneys, etc., by commission — expenses.*] "The commission may employ such attorneys as it finds necessary for proper legal aid and service of the commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the commission's own instance or upon complaint, or to appear for and represent the commission in any case pending in the commerce court; and the expenses of such employment shall be paid out of the appropriation for the commission. [36 Stat. L. 555.]

[*Commerce court to enforce orders other than money payments — powers of court.*] "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the commerce court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its

officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. [36 Stat. L. 555.]

[Copies of schedules, etc., made public records — receivable as evidence — certified copies.] “The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission’s seal, shall be received in evidence with like effect as the originals.” [36 Stat. L. 555.]

For sec. 16 of the Act of Feb. 4, 1887, and prior amendments, see 3 Fed. Stat. Annot. 844; 1909 Supp. Fed. Stat. Annot. 268.

SEC. 14. [Section 20 of Interstate Commerce Act amended.] That section twenty of said Act to regulate commerce, as heretofore amended, is hereby amended by striking out the following paragraph:

[Annual statements — matter stricken out.] “Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the commission it shall be subject to the forfeitures last above provided;” [36 Stat. L. 555.]

And by inserting in lieu of the paragraph so stricken out the following:

[Annual reports of statistics; period changed — penalty for noncompliance — monthly, periodical, or special reports, authorized — penalty for failure.] “Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by

the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided." [36 Stat. L. 556.]

For sec. 20 of the Act of Feb. 4, 1887, and prior amendments, see 3 Fed. Stat. Annot. 850; 1909 Supp. Fed. Stat. Annot. 271.

Power to require reports.— Authority to require the secretary or similar officer of the carriers, subject to the Act of March 4, 1907, 1909 Supp. Fed. Stat. Annot. 582, regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or where there has been no excess service, to make a separate oath to that effect, in lieu of the

form to be used in detailing excess service, was conferred upon the Interstate Commerce Commission by the provision of section 4 of that act, empowering it to call to its aid in the enforcement of the act "all powers granted to it," when read in connection with this section, authorizing the Commission to require the carriers to file periodical or special reports under oath concerning any matter about which it is by law authorized or required to keep itself informed, or which it is required to enforce. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 622.

SEC. 15. [Prior proceedings, obligations, etc., not impaired.] That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the Acts of said commission; and in any cases, proceedings, or matters now pending before it, the commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated; and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation, or association. [36 Stat. L. 556.]

SEC. 16. [Issue of stocks and bonds by railroads — President to appoint commission to investigate — employment of experts, etc. — compensation — details from departments, etc. — expenses.] That the President is hereby authorized to appoint a commission to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same, and to fix the compensation of the members of such commission. Said commission shall be and is hereby authorized to employ experts to aid in the work of inquiry and examination, and such clerks, stenographers, and other assistants as may be necessary, which employees shall be paid such compensation as the commission may deem just and reasonable upon a certificate to be issued by the chairman of the commission. The several departments and bureaus of the Government shall detail from time to time such officials and employees and furnish such information to the commission as may be directed by the President. For the purposes of its investigations the commission shall be authorized to incur and have paid upon the certificate of its chairman such

expenses as the commission shall deem necessary: *Provided, however,* That the total expenses authorized or incurred under the provisions of this section for compensation, employees, or otherwise, shall not exceed the sum of twenty-five thousand dollars. [*36 Stat. L. 556.*]

SEC. 17. [*Injunctions based on alleged unconstitutionality of state statutes.*] [*Superseded and re-enacted by sec. 266 of the Judicial Code, see post, p. 242.*]

SEC. 18. [*Effect.*] That this Act, shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately. [*36 Stat. L. 557.*]

IRRIGATION.

Irrigation Districts, see TERRITORIES.
And see generally *PUBLIC LANDS; WATERS.*

ISTHMIAN CANAL.

See *RIVERS, HARBORS, AND CANALS.*

JUDGES.

See *JUDICIARY.*

JUDICIAL OFFICERS.

Act of April 9, 1910, Ch. 152, 128.

United States Courts—District Attorneys—Returns to Solicitor of the Treasury Modified, 128.

Act of June 25, 1910, Ch. 397, 128.

Texas Judicial Districts—Pay of District Attorneys and Marshals, 128.

Act of June 25, 1910, Ch. 411, 129.

Louisiana Eastern Judicial District—Marshal's Salary Increased, 129.

Act of Feb. 3, 1911, Ch. 38, 129.

United States Courts—Circuit Courts of Appeals—Deputy Clerks Authorized, 129.

Act of Feb. 21, 1911, Ch. 144, 129.

United States Courts—Marshals May Administer Oaths to Deputies, etc., Presenting Accounts, 129.

Act of March 3, 1911, Ch. 230, 129.

Hot Springs Mountain Reservation, Ark.—Jurisdiction Over—Any United States Commissioner Given Jurisdiction Over All Violations, 129.

Act of March 4, 1911, Ch. 269, 130.

United States Courts—Marshals—Double Fees in Certain States Repealed—Field Deputies Authorized—Compensation—Actual Expenses—Additional Allowance—Report of Appointments—Effect, 130.

Act of March 4, 1911, Ch. 285, 130.

United States Attorneys for New Jersey and Nevada—Salaries, 130.

An Act To amend section seven hundred and seventy-three of the Revised Statutes.

[*Act of April 9, 1910, ch. 152.*]

[*United States courts—district attorneys—returns to Solicitor of the Treasury modified.*] That section seven hundred and seventy-three of the Revised Statutes be, and the same is hereby, amended to read as follows:

“**Sec. 773.** It shall be the duty of the United States district attorneys to make and forward to the Solicitor of the Treasury, for his information and the purposes of a permanent record, such reports relating to suits in which the United States is a party as may be required by the Solicitor of the Treasury with the approval of the Attorney-General.” [36 Stat. L. 294.]

For R. S. sec. 773, see 4 Fed. Stat. Annot. 156.

An Act To make uniform the salaries of United States district attorneys and marshals in Texas.

[*Act of June 25, 1910, ch. 397.*]

[*Texas judicial districts—pay of district attorneys and marshals.*] That from and after July first, nineteen hundred and ten, each United States district attorney and marshal of any Texas district shall receive as salary the sum of four thousand dollars per annum. [36 Stat. L. 822.]

Act of June 25, 1910.

JUDICIAL OFFICERS.

Act of March 3, 1911.

An Act Providing for an increase of salary for the United States marshal for the eastern district of Louisiana.

[*Act of June 25, 1910, ch. 411.*]

[*Louisiana eastern judicial district — marshal's salary increased.*] That, commencing with the fiscal year beginning July first, nineteen hundred and ten, the salary of the United States marshal for the eastern district of Louisiana be fixed at the rate of four thousand dollars per annum. [36 Stat. L. 838.]

An Act Providing for the appointment of deputy clerks to the United States circuit court of appeals.

[*Act of Feb. 3, 1911, ch. 33.*]

[*United States courts — Circuit Courts of Appeals — deputy clerks authorized.*] That one deputy of the clerk of each circuit court of appeals may be appointed by the court on the application of the clerk and may be removed at the pleasure of the court. In case of the death of the clerk his deputy shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. [36 Stat. L. 895.]

An Act To authorize United States marshals and their respective chief office deputies to administer certain oaths.

[*Act of Feb. 21, 1911, ch. 144.*]

[*United States courts — marshals may administer oaths to deputies, etc., presenting accounts.*] That each United States marshal and each chief deputy United States marshal is hereby authorized and empowered to administer oaths to the marshal's deputies and other persons presenting to the marshal claims and accounts for payment: *Provided*, That the United States marshal or chief deputy marshal shall not be entitled to any fee for administering such oaths. [36 Stat. L. 927.]

An Act To amend section one of the Act approved March second, nineteen hundred and seven, being an Act to amend an Act entitled "An Act conferring jurisdiction upon United States commissioners over offenses committed on a portion of the permanent Hot Springs Mountain Reservation, Arkansas."

[*Act of March 3, 1911, ch. 230.*]

[*Hot Springs Mountain Reservation, Ark. — jurisdiction over — any United States commissioner given jurisdiction over all violations.*] That section one of the Act approved March second, nineteen hundred and seven (Thirty-fourth Statutes, page twelve hundred and eighteen), is amended so as to read as follows:

"That any United States commissioner duly appointed by the United States district court for the eastern district of Arkansas, and residing in said

district, shall have power and jurisdiction to hear and act upon all complaints made of any and all violations of said Act of Congress approved April twentieth, nineteen hundred and four." [36 Stat. L. 1086.]

For sec. 1 of the Act of March 2, 1907, hereby amended, see 1909 Supp. Fed. Stat. Annot. 282.

An Act To amend section eleven, Act of May twenty-eighth, eighteen hundred and ninety-six.

[Act of March 4, 1911, ch. 269.]

[*United States courts — marshals — double fees in certain states repealed — field deputies authorized — compensation — actual expenses — additional allowance — report of appointments — effect.*] That section eleven of the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, approved May twenty-eighth, eighteen hundred and ninety-six, be, and the same is hereby, amended to read as follows:

"SEC. 11. That at any time when, in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and, who, unless sooner removed by the district court as now provided by law, shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation, receive the gross fees, including mileage, as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime: *Provided*, That a field deputy may elect to receive actual expenses on any trip in lieu of mileage: *Provided further*, That in special cases, where in his judgment justice requires, the Attorney-General may make an additional allowance, not, however, in any case to make the aggregate annual compensation of any field deputy in excess of two thousand five hundred dollars nor more than the gross fees earned by such field deputy. The marshal, immediately after making any appointment or appointments under this section, shall report the same to the Attorney-General, stating the facts as distinguished from conclusions constituting the reason for such appointment, and the Attorney-General may at any time cancel any such appointment as the public interest may require."

This Act to take effect from and after July first, nineteen hundred and eleven. [36 Stat. L. 1355.]

See 4 Fed. Stat. Annot. 77.

[*United States attorneys for New Jersey and Nevada — salaries.*] * * * That beginning July first, nineteen hundred and eleven, the salary of the United States attorney for the district of New Jersey shall be five thousand dollars per annum: *And provided further*, That the annual salary of the United States attorney for the district of Nevada shall be, after the beginning of the fiscal year nineteen hundred and twelve, four thousand dollars. [36 Stat. L. 1426.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 235.

JUDICIARY.

I. THE JUDICIAL CODE,¹ 132.

CHAPTER I. DISTRICT COURTS—ORGANIZATION, 132.

II. DISTRICT COURTS—JURISDICTION, 138.

III. DISTRICT COURTS—REMOVAL OF CAUSES, 144.

IV. DISTRICT COURTS—MISCELLANEOUS PROVISIONS, 151.

V. DISTRICT COURTS—DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES, 159.

VI. CIRCUIT COURTS OF APPEALS, 191.

VII. THE COURT OF CLAIMS, 198.

VIII. THE COURT OF CUSTOMS APPEALS, 211.

IX. THE COMMERCE COURT, 215.

X. THE SUPREME COURT, 224.

XI. PROVISIONS COMMON TO MORE THAN ONE COURT, 238.

XII. JURIES, 245.

XIII. GENERAL PROVISIONS, 249.

XIV. REPEALING PROVISIONS, 250.

II. APPEALS TO CIRCUIT COURT OF APPEALS AND TO SUPREME COURT, 255.

Act of Feb. 13, 1911, Ch. 47, 255.

Sec. 1. United States Courts—Appeal, etc., to Circuit Courts of Appeals—Printed Transcript of Record to Be Filed—Original Documents, 255.

2. Appeals, etc., to Supreme Court—Use of Printed Record in Court Below as Part of Transcript—Use of Uncertified Copies of Record—Clerk's Fee—No Written Transcript of Printed Record Required, 256.

III. EXPEDITING TRUST, ETC., CASES, 256.

Act of June 25, 1910, Ch. 428, 256.

Expediting Hearings of Trust, etc., Cases, 256.

IV. UNITED STATES COURT FOR CHINA, 257.

Act of May 6, 1910, Ch. 199, 257.

United States Court for China—Judge and District Attorney—Sessions Other than at Shanghai, 257.

V. COURTS IN ARKANSAS, IDAHO, AND MISSOURI, 257.

Act of March 5, 1910, Ch. 82, 257.

Arkansas Western Judicial District—Transfer of Certain Criminal Cases to Fort Smith Division—Trials on Transfer—Certified Copies of Record Entries, etc.—Compensation to Be Paid by United States, 257.

Act of Feb. 23, 1911, Ch. 148, 258.

Sec. 1. Idaho Judicial District—Divisions of District, 258.

2. Terms—Transfer of Pending Suits, etc.—Offices of Clerk, etc.—Deputy Clerk at Cœur d'Alene City, 259.

Act of Feb. 7, 1911, Ch. 39, 259.

Missouri Eastern Judicial District—Maries County Transferred to—Pending Causes, 259.

¹The notes under the various sections of this Act pointing out the source of the enactments, changes made, and the reasons therefor are generally taken from the report of the Special Joint Committee on the Revision of the Laws, which was submitted to the House of Representatives March 15, 1910. In a good many of the notes, however, the editor has made his own comments and added cross-references to related sections; and the notes to sections or provisions that were not contained in the Judicial Code as submitted by the Committee are the editor's alone.

CROSS-REFERENCE.

See *JUDICIAL OFFICERS; MONEY PAID INTO COURT.*

[I. THE JUDICIAL CODE.]

An Act To codify, revise, and amend the laws relating to the judiciary.

[Act of March 3, 1911, ch. 281.]

That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows:

TITLE.

THE JUDICIARY.

CHAPTER ONE.

DISTRICT COURTS — ORGANIZATION.

Sec.

1. District courts established; appointment and residence of judges.
2. Salaries of district judges.
3. Clerks.
4. Deputy clerks.
5. Criers and bailiffs.
6. Records; where kept.
7. Effect of altering terms.
8. Trials not discontinued by new term.
9. Court always open as courts of admiralty and equity.
10. Monthly adjournments for trial of criminal causes.
11. Special terms.
12. Adjournment in case of nonattendance of judge.
13. Designation of another judge in case of disability of judge.

Sec.

14. Designation of another judge in case of an accumulation of business.
15. When designation to be made by Chief Justice.
16. New appointment and revocation.
17. Designation of district judge in aid of another judge.
18. When circuit judge may be designated to hold district court.
19. Duty of district and circuit judge in such cases.
20. When district judge is interested or related to parties.
21. When affidavit of personal bias or prejudice of judge is filed.
22. Continuance in case of vacancy in office.
23. Districts having more than one judge; division of business.

SEC. 1. [*District courts established; appointment and residence of judges.*] In each of the districts described in chapter five, there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: *Provided*, That whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district: *Provided further*, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: *Provided further*, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof.

Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor. [36 Stat. L. 1087.]

This section states in concise language the number of judges in the respective judicial districts and was existing law.

"All Acts and parts of Acts authorizing the appointment of United States circuit or

district judges . . . enacted prior to February first, nineteen hundred and eleven," are repealed by Judicial Code, sec. 297, *infra*, p. 250, and the Circuit Courts are abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 2. [*Salaries of district judges.*] Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments. [36 Stat. L. 1087.]

This section is a re-enactment of a provision in the Act of Feb. 12, 1903, ch. 547, 32 Stat. L. 825, 10 Fed. Stat. Annot. 198. R. S. sec 554, 4 Fed. Stat. Annot. 217, providing for the salaries of district judges, is

expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

Traveling expenses, etc., of circuit justices and circuit and district judges, see Judicial Code, sec. 259, *infra*, p. 240.

SEC. 3. [*Clerks.*] A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law. [36 Stat. L. 1087.]

This section is a re-enactment, without change, of R. S. sec. 555, 4 Fed. Stat. Annot. 74, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

See the reference to this section in the first note to chapter 5, *infra*, p. 160.

SEC. 4. [*Deputy clerks.*] Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. [36 Stat. L. 1087.]

R. S. sec. 558, 4 Fed. Stat. Annot. 74, expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, authorized the judge to appoint deputy clerks upon the application of the clerk. In view of the fact that in many special cases Congress had provided that the clerk shall appoint the deputies, this section was so revised as to permit the clerk to appoint all deputies, with the approval of the district judge; and has conferred upon the clerk the power to remove any deputy with the concurrence of the judge. It was believed that since the clerk is held responsi-

ble for the acts of his deputies he should be given the power of appointment.

A provision was also added that the court may designate the place at which any deputy is to reside and maintain an office.

The words "except as otherwise specially provided" at the beginning of the section are added for the reason that in a number of the sections in chapter 5, *infra*, there are provisions specially requiring deputy clerks to be appointed at certain places of holding court.

See the reference to this section in the first note to chapter 5, *infra*, p. 161.

SEC. 5. [*Criers and bailiffs.*] The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes. [36 Stat. L. 1088.]

This section was drawn from R. S. sec. 289, *infra*, p. 249, reference to the authority of such courts to appoint criers is omitted from the section.

SEC. 6. [*Records; where kept.*] The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge. [36 Stat. L. 1088.]

This section is a re-enactment, without change, of R. S. sec. 562, 4 Fed. Stat. Annot. 218, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 7. [*Effect of altering terms.*] No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof. [36 Stat. L. 1088.]

This section is a re-enactment, without change, of R. S. sec. 573, 4 Fed. Stat. Annot. 671, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 8. [*Trials not discontinued by new term.*] When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened. [36 Stat. L. 1088.]

This section is a re-enactment of R. S. sec. 746, 4 Fed. Stat. Annot. 556, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only material change is the omission of the words "circuit or" before the words "district court," the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 9. [*Court always open as courts of admiralty and equity.*] The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. [36 Stat. L. 1088.]

This section is a re-enactment of R. S. sec. 574, 4 Fed. Stat. Annot. 671, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The words "so far as equity jurisdiction has been conferred upon them" were omitted here in view of the fact that the jurisdiction of the Circuit Courts is transferred to the District Courts by this Judicial Code, ch. 2, *infra*, p. 138, and secs. 289, 291, *infra*, p. 249. No other material change is made.

SEC. 10. [*Monthly adjournments for trial of criminal causes.*] District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases. [36 Stat. L. 1088.]

This section is a re-enactment, without change, of R. S. sec. 578, 4 Fed. Stat. Annot. 672, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 11. [*Special terms.*] A special term of any district court may be held at the same place where any regular term is held, or at such other place in the

district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term. [36 Stat. L. 1088.]

This section is a re-enactment, without change, of R. S. sec. 581, 4 Fed. Stat. Annot. 672, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 12. [*Adjournment in case of nonattendance of judge.*] If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct. [36 Stat. L. 1088.]

In the District Court the judge could authorize the marshal to adjourn any term of court when the judge was unable to be present. In the Circuit Court the clerk could adjourn court, in the absence of the marshal, upon the order of the judge. The applicable provisions of R. S. sec. 583, 4 Fed. Stat. Annot. 673; R. S. secs. 671, 672, 4 Fed.

Stat. Annot. 688, all of which are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, are merged in this section; and it has been so modified as to permit either the clerk or the marshal to adjourn the court, upon the order of the judge, and also to adjourn the court, during a term, upon a proper order of the court.

SEC. 13. [*Designation of another judge in case of disability of judge.*] When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. [36 Stat. L. 1089.]

This section combines the provisions of R. S. sec. 591, 4 Fed. Stat. Annot. 675 (expressly repealed by Judicial Code, sec. 297, *infra*, p. 250), and the amendment thereto made by the Act of March 4, 1907, ch. 2940, 34 Stat. L. 1417, 1909 Supp. Fed. Stat. Annot. 293. Reference to holding terms of the Circuit Court is omitted, for obvious rea-

sons. The section stated the existing law, changed only as necessary for purposes of revision. The word "any" is substituted for the word "the" before the words "circuit judge" for the reason that at present every circuit has two or more circuit judges, there being but one at the time of the enactment of the Revised Statutes.

SEC. 14. [*Designation of another judge in case of accumulation of business.*] When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the

circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein. [36 Stat. L. 1089.]

This section is drawn from R. S. sec. 592, 4 Fed. Stat. Annot. 676, expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. Reference to the Circuit Court is omitted for obvious reasons; also the provision at the end of R. S. sec. 592, above cited, for the

reason that no appeals now lie to the former Circuit Courts. The word "any" is substituted for the word "the" before the words "circuit judge" for the reason given in the note to sec. 13, *supra*.

SEC. 15. [*When designation to be made by chief justice.*] If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section. [36 Stat. L. 1089.]

This section is drawn from R. S. sec. 593, 4 Fed. Stat. Annot. 676, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. In the first line of the section the word "all" has been substituted for the word "the." Farther in the section the words "clerk of the district court" have been substituted for the words "district

clerk," the word "other" has been added, and the words "next contiguous," before the semicolon, have been omitted. The effect of this omission is to authorize the Chief Justice to designate *any* district judge to hold court as therein provided, instead of limiting the selection to a judge of a contiguous circuit.

SEC. 16. [*New appointment and revocation.*] Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment. [36 Stat. L. 1089.]

This section is drawn from R. S. sec. 594, 4 Fed. Stat. Annot. 676, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. In the first line the words "any

such" have been substituted for "the," and farther in the section the words "in the manner" have been added for the purpose of supplying a plain omission in the text.

SEC. 17. [*Designation of district judge in aid of another judge.*] It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit. [36 Stat. L. 1089.]

By transposing R. S. sec. 596, 4 Fed. Stat. Annot. 677, so as to precede R. S. sec. 595, 4 Fed. Stat. Annot. 676, the words "and it shall be the duty of the district judge, so designated and appointed, to hold the district or circuit [court] as aforesaid," become redundant, since the same provision is repeated in Judicial Code, sec. 19, *infra*, p. 137. The section is so changed as to definitely impose the required duty upon the senior circuit judge then present in the circuit, rather

than upon *any* circuit judge. This is for the purpose of avoiding confusion in making such designations.

Part of R. S. sec. 596, above cited, was repealed in the Sundry Civil Appropriation Act of March 3, 1881, ch. 133, § 1 Stat. L. 454, 4 Fed. Stat. Annot. 677, and that section and R. S. sec. 595, above cited, are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 18. [*When circuit judge may be designated to hold District Court.*] Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court. [36 Stat. L. 1089.]

This section, in a strict sense, is new legislation. Its purpose, as explained in the general report of the committee on revision which was submitted March 15, 1910, is to permit circuit judges to try cases in the District Courts, in order to prevent congestion

of business in those courts, and to afford business for the circuit judges in circuits in which there is not sufficient business in the Circuit Courts of Appeals to occupy the time of the judges.

SEC. 19. [*Duty of district and circuit judge in such cases.*] It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. [36 Stat. L. 1090.]

This section is drawn from R. S. sec. 595, 4 Fed. Stat. Annot. 676, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The words "or circuit" are inserted in the first line of the section before the word "judge"; and the words "during the continuance of such disability, or, in the case of an accumulation of business," are

omitted as being redundant; and by reason of the transposition of R. S. sec. 596, 4 Fed. Stat. Annot. 677, to precede this section, and the insertion of the new section 18, *supra*, the word "four" in the second line of the section is changed to "six." The purpose of changing the order of the section was to avoid needless repetition of provisions.

SEC. 20. [*When district judge is interested or related to parties.*] Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen. [36 Stat. L. 1090.]

This section is drawn from R. S. sec. 601, 4 Fed. Stat. Annot. 678, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, the latter part thereof being omitted as obsolete by reason of the abolition of the Circuit Courts by Judicial Code, sec. 289, *infra*, p. 249. Instead of certifying the case

to the Circuit Court, the section as revised makes it the duty of the circuit judge, senior in commission, then present in the circuit, to designate some other judge to sit in the trial of the case in which the resident judge is disqualified.

SEC. 21. [*When affidavit of personal bias or prejudice of judge is filed.*] Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and

application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. [36 Stat. L. 1090.]

This section is entirely new legislation.

SEC. 22. [*Continuance in case of vacancy in office.*] When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen. [36 Stat. L. 1090.]

This section is a re-enactment, with some changes, of R. S. sec. 602, 4 Fed. Stat. Annot. 679, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 23. [*Districts having more than one judge; division of business.*] In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district. [36 Stat. L. 1090.]

The substance of this section is to be found in the Act of Feb. 27, 1907, ch. 2073, sec. 2, 34 Stat. L. 998, 1909 Supp. Fed. Stat. Annot. 307, for Nebraska; the Act of March 2, 1907, ch. 2575, sec. 2, 34 Stat. L. 1253, 1909 Supp. Fed. Stat. Annot. 302, for California; the Act of March 2, 1909, 1909 Supp. Fed. Stat.

Annot. 315, 324, for Oregon and the Western District of Washington; and the Act of Feb. 24, 1910, ch. 56, sec. 3, 36 Stat. L. 202, for Maryland. To avoid the necessity for a similar provision in future acts of this character, the section is so drawn as to be general in its application.

CHAPTER TWO.

DISTRICT COURTS — JURISDICTION.

Sec.

24. Original jurisdiction.

- Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.
2. Of crimes and offenses.
 3. Of admiralty causes, seizures, and prizes.
 4. Of suits under any law relating to the slave trade.
 5. Of cases under internal revenue, customs, and tonnage laws.
 6. Of suits under postal laws.
 7. Of suits under the patent, the copyright, and the trademark laws.
 8. Of suits for violation of interstate commerce laws.
 9. Of penalties and forfeitures.
 10. Of suits on debentures.
 11. Of suits for injuries on account of acts done under laws of the United States.
 12. Of suits concerning civil rights.
 13. Of suits against persons having knowledge of conspiracy, etc.
 14. Of suits to redress the deprivation, under color of law, of civil rights.

Sec.

24. Original jurisdiction — Continued.

- Par. 15. Of suits to recover certain offices.
16. Of suits against national-banking associations.
 17. Of suits by aliens for torts.
 18. Of suits against consuls and vice-consuls.
 19. Of suits and proceedings in bankruptcy.
 20. Of suits against the United States.
 21. Of suits for the unlawful inclosure of public lands.
 22. Of suits under immigration and contract-labor laws.
 23. Of suits against trusts, monopolies, and unlawful combinations.
 24. Of suits concerning allotments of land to Indians.
 25. Of partition suits where United States is joint tenant.
 25. Appellate jurisdiction under Chinese-exclusion laws.
 26. Appellate jurisdiction over Yellowstone National Park.
 27. Jurisdiction of crimes on Indian reservations in South Dakota.

SEC. 24. [*Original jurisdiction.*] The district courts shall have original jurisdiction as follows:

First. [*Where the United States are plaintiffs; and of civil suits at common law or in equity.*] Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. [*Of crimes and offenses.*] Of all crimes and offenses cognizable under the authority of the United States.

Third. [*Of admiralty causes, seizures, and prizes.*] Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fourth. [*Of suits under any law relating to the slave trade.*] Of all suits arising under any law relating to the slave trade.

Fifth. [*Of cases under internal revenue, customs and tonnage laws.*] Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Sixth. [*Of suits under postal laws.*] Of all cases arising under the postal laws.

Seventh. [*Of suits under the patent, the copyright, and the trade-mark laws.*] Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. [*Of suits for violation of interstate commerce laws.*] Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. [*Of penalties and forfeitures.*] Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. [*Of suits on debentures.*] Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh, [*Of suits for injuries on account of acts done under laws of the*

United States.] Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. [*Of suits concerning civil rights.*] Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. [*Of suits against persons having knowledge of conspiracy, etc.*] Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. [*Of suits to redress the deprivation, under color of law, of civil rights.*] Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. [*Of suits to recover certain offices.*] Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. [*Of suits against national banking associations.*] Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. [*Of suits by aliens for torts.*] Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. [*Of suits against consuls and vice-consuls.*] Of all suits against consuls and vice consuls.

Nineteenth. [*Of suits and proceedings in bankruptcy.*] Of all matters and proceedings in bankruptcy.

Twentieth. [*Of suits against the United States.*] Concurrent with the

Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however*, That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further*, That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. [*Of suits for the unlawful inclosure of public lands.*] Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. [*Of suits under immigration and contract labor laws.*] Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. [*Of suits against trusts, monopolies, and unlawful combinations.*] Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. [*Of suits concerning allotments of land to Indians.*] Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The above twenty-fourth paragraph was amended to read as here given by the Act of Dec. 21, 1911. The amendment consisted in the addition of the last sentence, beginning with the words "And the judgment."

Twenty-fifth. [*Of partition suits where United States is joint tenant.*] Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common

or joint tenants, such suits to be brought in the district in which such land is situate. [36 Stat. L. 1091.]

R. S. sec. 563, 4 Fed. Stat. Annot. 218, and R. S. sec. 629, 4 Fed. Stat. Annot. 245, parts of which are repeatedly referred to in this note, are expressly repealed *in toto* by Judicial Code, sec. 297, *infra*, p. 250.

First.—The jurisdiction of the Circuit Courts as to suits at common law, or in equity, or on the ground of diverse citizenship, etc., was last conferred by sec. 1 of the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 433, 4 Fed. Stat. Annot. 386, which section is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The Act above cited was passed for the purpose of correcting mistakes contained in the Act of March 3, 1887, ch. 373, 24 Stat. L. 552. In *U. S. v. Sayward* (1895), 160 U. S. 493, 498, 16 S. Ct. 371, 40 U. S. (L. ed.) 508, the Supreme Court construed the language of the first section above cited and proceeded to restate it in its own language. Judicial Code, sec. 24, purposely follows the language of the Supreme Court in that case.

With the foregoing jurisdiction of the Circuit Courts the Judicial Code paragraph merges the jurisdiction of the District Courts conferred by the fourth paragraph of R. S. sec. 563, 4 Fed. Stat. Annot. 220. Paragraphs 1, 2, and 3 of R. S. sec. 629, 4 Fed. Stat. Annot. 245, 246, were superseded by the Act of 1888, above cited, and sections 1, 2, 3, 4, 6, and 7 of the latter Act are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

Second.—Under this paragraph has been merged the jurisdiction conferred upon the Circuit and District Courts by paragraphs 1 and 2 of R. S. sec. 563, 4 Fed. Stat. Annot. 218, 219, and paragraphs 19 and 20 of R. S. sec. 629, 4 Fed. Stat. Annot. 250, 251, and also that conferred by the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 433, 4 Fed. Stat. Annot. 265, and the Act of Sept. 4, 1890, ch. 874, 26 Stat. L. 424, 2 Fed. Stat. Annot. 351, 352.

As to the exclusive jurisdiction in this class of cases, see paragraph "First" of Judicial Code, sec. 256, *infra*, p. 239.

Third.—Under this paragraph has been merged the jurisdiction conferred by paragraphs 8 and 9 of R. S. sec. 563, 4 Fed. Stat. Annot. 220, 234, and paragraph 6 of R. S. sec. 629, 4 Fed. Stat. Annot. 247.

As to the exclusive jurisdiction in these classes of cases, see paragraphs "Third" and "Fourth" of Judicial Code, sec. 256, *infra*, p. 239.

Fourth.—This paragraph vests in the District Courts the jurisdiction vested in the Circuit Courts by paragraph 7 of R. S. sec. 629, 4 Fed. Stat. Annot. 248.

Fifth.—This paragraph merges in the District Courts the jurisdiction vested in both the Circuit and District Courts under paragraph 5 of R. S. sec. 563, 4 Fed. Stat. Annot. 220, and paragraph 4 of R. S. sec. 629, 4 Fed. Stat. Annot. 246.

Sixth.—This paragraph merges the concurrent jurisdiction of cases arising under

the postal laws, which was vested by paragraph 1 of R. S. sec. 563, 4 Fed. Stat. Annot. 218, and paragraph 4 of R. S. sec. 629, 4 Fed. Stat. Annot. 246.

Seventh.—This paragraph confers upon the District Courts the jurisdiction which the Circuit Court had over cases arising under the patent, the copyright, and the trademark laws in paragraph 9 of R. S. sec. 629, 4 Fed. Stat. Annot. 245, and section 17 of the Act of Feb. 20, 1905, 33 Stat. L. 728, 10 Fed. Stat. Annot. 414.

As to the exclusive jurisdiction in patent-right and copyright cases, see paragraph "Fifth" of Judicial Code, sec. 256, *infra*, p. 239.

Eighth.—This paragraph declares the jurisdiction of cases arising under the interstate commerce acts which had been vested in the Circuit and District Courts by the Act of Feb. 4, 1887, ch. 104, 21 Stat. L. 379, 3 Fed. Stat. Annot. 809, excepting therefrom the jurisdiction conferred upon the Commerce Court by Judicial Code, sec. 207, *infra*, p. 218.

Ninth.—This paragraph confers upon the District Courts the jurisdiction which had been vested in the Circuit Courts by paragraph 5 of R. S. sec. 629, 4 Fed. Stat. Annot. 247, and upon the District Courts by paragraphs 3 and 6 of R. S. sec. 563, 4 Fed. Stat. Annot. 219, 220.

As to the exclusive jurisdiction in this class of cases, see paragraph "Second" of Judicial Code, sec. 256, *infra*, p. 239.

Tenth.—This paragraph vests in the District Courts the same jurisdiction that the Circuit and District Courts had exercised concurrently under paragraph 10 of R. S. sec. 563, 4 Fed. Stat. Annot. 234, and paragraph 8 of R. S. sec. 629, 4 Fed. Stat. Annot. 248.

Eleventh.—This paragraph confers upon the District Courts the jurisdiction vested in the Circuit Courts by paragraph 12 of R. S. sec. 629, 4 Fed. Stat. Annot. 248.

Twelfth.—The reference to R. S. sec. 1885, in paragraph 11 of R. S. sec. 563, 4 Fed. Stat. Annot. 234, evidently was a mistake, and should have been to R. S. sec. 1980, 1 Fed. Stat. Annot. 796—the same jurisdiction conferred upon the Circuit Courts under paragraph 17 of R. S. sec. 629, 4 Fed. Stat. Annot. 250, and concurrently upon the Circuit and District Courts by the Act of March 1, 1875, ch. 114, sec. 3, 18 Stat. L. 335, 1 Fed. Stat. Annot. 806. The Judicial Code paragraph confers it upon the District Courts.

Thirteenth.—This paragraph is taken from paragraph 18 of R. S. sec. 629, 4 Fed. Stat. Annot. 250, which conferred upon the Circuit Courts the jurisdiction herein conferred upon the District Courts.

Fourteenth.—This paragraph merges the jurisdiction which had been vested in the District Courts by paragraph 12 of R. S. sec. 563, 4 Fed. Stat. Annot. 234, and in the Circuit Courts by paragraph 16 of R. S. sec. 629, 4 Fed. Stat. Annot. 249.

Fifteenth.—The Circuit and District

Courts had concurrent jurisdiction of suits arising under the law revised in this paragraph, the former court under paragraph 17 of R. S. sec. 629, 4 Fed. Stat. Annot. 250, the latter under paragraph 11 of R. S. sec. 563, 4 Fed. Stat. Annot. 234.

Sixteenth.—The jurisdiction conferred by this paragraph is that which was vested in the District Courts by paragraph 15 of R. S. sec. 563, 4 Fed. Stat. Annot. 235, and in the Circuit Courts by paragraphs 10 and 11 of R. S. sec. 629, as modified by the Act of July 12, 1882, ch. 290, sec. 4, 5 Fed. Stat. Annot. 194, note, and section 4 of the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 436, 5 Fed. Stat. Annot. 193, which latter is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

Seventeenth.—This paragraph states the jurisdiction that was vested in the District Courts by paragraph 16 of R. S. sec. 563, 4 Fed. Stat. Annot. 235.

Eighteenth.—This paragraph states the jurisdiction that was vested in the District Courts by paragraph 17 of R. S. sec. 563, 4 Fed. Stat. Annot. 235. The words "except for offenses above the description aforesaid" are omitted as meaningless, and should not have been carried into the Revised Statutes. They refer to offenses the punishment for which exceeded a fine of \$100, or imprisonment exceeding six months, or whipping exceeding thirty stripes, as found in section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. L. 76, 4 Fed. Stat. Annot. 235, note, the punishment for offenses above that grade being vested in the Circuit Courts. See *U. S. v. Ravara* (1793), 2 Dall. (U. S.) 297, 27 Fed. Cas. No. 16,122, cited 4 Fed. Stat. Annot. 235, note.

As to the exclusive jurisdiction in this class of cases, see paragraph "Eighth" of Judicial Code, sec. 256, *infra*, p. 000.

Nineteenth.—This paragraph is merely declaratory of jurisdiction in the District Courts of all matters and proceedings in bankruptcy, conferred by sections 2 and 23 of the Bankruptcy Act of 1898, *post*, title Bankruptcy in this Supplement, and 1 Fed. Stat. Annot. 531, 590, and is stated substantially in the language of paragraph 18 of R. S. sec. 563, 4 Fed. Stat. Annot. 236.

As to the exclusive jurisdiction in this class of cases, see paragraph "Sixth" of Judicial Code, sec. 256, *infra*, p. 239.

Twentieth.—This paragraph recites the jurisdiction that was vested in the District Courts by the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 2 Fed. Stat. Annot. 80, and the amendments thereto in the Act of June 27, 1898, 30 Stat. L. 494, 2 Fed. Stat. Annot. 82, and the Act of Feb. 26, 1900, ch. 25, 31 Stat. L. 33, 2 Fed. Stat. Annot. 83.

In *U. S. v. Greathouse* (1897), 166 U. S. 601, 17 S. Ct. 701, 41 U. S. (L. ed.) 1130, the Supreme Court held that the provision in R. S. sec. 1069, 2 Fed. Stat. Annot. 65, giving to persons under disability the right to maintain suit within three years after disability ceased, was not repealed by the six-year limitation in the Tucker Act, above cited, and that it applied to cases in the District Courts as well as to cases in the Court of Claims. That saving clause has therefore been carried into this paragraph; and R. S. sec. 1069 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

The other changes in language in the paragraph are merely for purposes of revision.

See also as to jurisdiction of the Court of Claims, Judicial Code, secs. 145, 156, *infra*, pp. 200, 201.

Twenty-first.—This paragraph merely states the jurisdiction conferred concurrently upon the Circuit and District Courts by the Act of Feb. 25, 1885, ch. 149, 23 Stat. L. 321, 6 Fed. Stat. Annot. 533, to prevent the unlawful enclosure of public lands.

Twenty-second.—This paragraph states the jurisdiction that was vested in the Circuit and District Courts under the various acts relating to immigration, including the contract-labor and the Chinese-exclusion laws—namely, section 13 of the Act of March 3, 1891, ch. 551, 26 Stat. L. 1086, 3 Fed. Stat. Annot. 311; section 6 of the Act of May 5, 1892, ch. 60, 27 Stat. L. 25, 1 Fed. Stat. Annot. 765, note, as amended in Act of Nov. 3, 1893, ch. 14, 28 Stat. L. 7, 1 Fed. Stat. Annot. 764; and section 29 of the Act of Feb. 20, 1907, ch. 1134, 34 Stat. L. 907, 1909 Supp. Fed. Stat. Annot. 174.

Twenty-third.—This paragraph confers upon the District Courts the jurisdiction which was vested in the Circuit Courts under section 77 of the Wilson Tariff Act of Aug. 27, 1894, ch. 349, 28 Stat. L. 570, 7 Fed. Stat. Annot. 347, and sections 4 and 7 of the Sherman Anti-Trust Act of July 2, 1890, ch. 647, 26 Stat. L. 209, 210, 7 Fed. Stat. Annot. 344, 345.

Twenty-fourth.—This paragraph vests in the District Courts the jurisdiction that was exercised by Circuits Courts under a provision in the Indian Appropriation Act of Aug. 15, 1894, ch. 290, 3 Fed. Stat. Annot. 504, note, as amended in section 1 of the Act of Feb. 6, 1901, ch. 217, 31 Stat. L. 760, 3 Fed. Stat. Annot. 503.

Twenty-fifth.—The effect of this paragraph is to transfer to the District Courts the jurisdiction vested in the Circuit Courts by the Act of May 17, 1898, ch. 339, 30 Stat. L. 416, 5 Fed. Stat. Annot. 405.

SEC. 25. [Appellate jurisdiction under Chinese exclusion laws.] The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws. [36 Stat. L. 1094.]

This section merely states, in concise terms, the jurisdiction that was vested in the District and Circuit Courts by section 13 of the

Act of Sept. 13, 1888, ch. 1015, 25 Stat. L. 479, 1 Fed. Stat. Annot. 772.

SEC. 26. [*Appellate jurisdiction over Yellowstone National Park.*] The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four. [36 Stat. L. 1094.]

This section is merely declaratory of the original and appellate jurisdiction conferred upon the District Court for the district of

Wyoming by the Act of May 7, 1894, ch. 72, 28 Stat. L. 74, 6 Fed. Stat. Annot. 620.

SEC. 27. [*Jurisdiction of crimes on Indian reservations in South Dakota.*] The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota. [36 Stat. L. 1094.]

This section vests in the District Court the jurisdiction conferred upon Circuit and District Courts for the district of South Dakota

by the Act of Feb. 2, 1903, ch. 351, 32 Stat. L. 793, 10 Fed. Stat. Annot. 121.

CHAPTER THREE.

DISTRICT COURTS — REMOVAL OF CAUSES.

- Sec.
28. Removal of suits from State to United States district courts.
29. Procedure for removal.
30. Suits under grants of land from different States.
31. Removal of causes against persons denied any civil rights, etc.
32. When petitioner is in actual custody of State court.
33. Suits and prosecutions against revenue officers, etc.

- Sec.
34. Removal of suits by aliens.
35. When copies of records are refused by clerk of State court.
36. Previous attachment bonds, orders, etc., remain valid.
37. Suits improperly in district court may be dismissed or remanded.
38. Proceedings in suits removed.
39. Time for filing record; return of record, how enforced.

SEC. 28. [*Removal of suits from state to United States District Courts.*] Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending,

or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States. [36 Stat. L. 1094.]

Prior to the enactment of this section, when a suit brought in a state court was removed to a federal court, it was to the Circuit Court. The only change in the section consists in the substitution of the words "district court" for the words "circuit court," since Circuit Courts are abolished by Judicial Code, sec. 289, *infra*, p. 249. Aside from this change the section was existing law, as prescribed in section 2 of the Act of March 3, 1887, ch. 373, 24 Stat. L. 552, as amended by the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 434, 4 Fed. Stat. Annot. 386, 312, which is expressly repealed by Judicial

Code, sec. 297, *infra*, p. 250; and the last proviso, forbidding removal of certain actions against common carriers, is a re-enactment of a provision in section 6 of the Act of April 22, 1908, 35 Stat. L. 66, 1909 Supp. Fed. Stat. Annot. 585, as amended by the Act of April 5, 1910, ch. 143, 36 Stat. L. 291, this Supplement.

The words "this title" occurring twice in this section mean this Act, *i. e.*, this Judicial Code, as provided in Judicial Code, sec. 293, *infra*, p. 250; and the words "jurisdiction by this title" refer especially to Chapter Two.

SEC. 29. [Procedure for removal.] Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court

to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court. [36 Stat. L. 1095.]

The provisions in this section that the petition for removal shall be "duly verified," that the bond shall require the filing of a certified copy of the record "within thirty days from the date of filing said petition," that "written notice of said petition and bond for removal shall be given to the adverse party or parties prior to filing the same," that the copy is to be entered "within said thirty days," and that "the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or de-

mur to the declaration or complaint in said cause" — are new legislation. Otherwise the section is a re-enactment, without material change, of provisions in section 3 of the Act of March 3, 1887, ch. 373, as amended by the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 435, 4 Fed. Stat. Annot. 349; except that the words "district court" are substituted for the words "circuit court," the latter being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 30. [*Suits under grants of land from different states.*] If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim. [36 Stat. L. 1096.]

This section is taken from the latter portion of section 3 of the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 435, 4 Fed. Stat. Annot. 386, 349, amending that section of the Act of March 3, 1875, ch. 137, 18 Stat. L. 471, 4 Fed. Stat. Annot. 350, note, which became a part of R. S. sec. 647, 4 Fed. Stat. Annot. 265, the latter being now expressly repealed

by Judicial Code, sec. 297, *infra*, p. 250. The change from existing law is in the substitution of \$3,000 for \$2,000 as the jurisdictional amount, the substitution of the words "district court" for "circuit court," the adding of the words "the court" after the words "if he or they inform," and the substituting of the word "chapter" for "act."

SEC. 31. [*Removal of causes against persons denied any civil rights, etc.*]

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed. [36 Stat. L. 1096.]

This section is a re-enactment of R. S. sec. 641, 4 Fed. Stat. Annot. 258, without change except by substitution of the words "district court" for the words "circuit court," the

latter being abolished by Judicial Code, sec. 289, *infra*, p. 249. R. S. sec. 641 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 32. [*When petitioner is in actual custody of state court.*] When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ. [36 Stat. L. 1097.]

This section is a re-enactment of R. S. sec. 642, 4 Fed. Stat. Annot. 260, with only the same change as was made in Judicial Code,

sec. 31, *supra*. R. S. sec. 642 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 33. [*Suits and prosecutions against revenue officers, etc.*] When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for [*sic*] on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or other process except *capias*, the clerk of the district court shall issue a writ of *certiorari* to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by *capias* or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non *prosequitur* may be rendered against him, with costs for the defendant. [*36 Stat. L. 1097.*]

This section combines the provisions of R. S. sec. 643, 4 Fed. Stat. Annot. 260, and the first part of section 8 of the Sundry Civil

Appropriation Act of March 3, 1875, ch. 130, 18 Stat. L. 401, 6 Fed. Stat. Annot. 613, omitting that portion repealed by the Act

of Feb. 8, 1894, ch. 25, 28 Stat. L. 36, 2 Fed. Stat. Annot. 866. The words "or when any suit is commenced" are introduced solely for the purpose of properly combining the two Acts. The only change made from existing law is in the substitution of the words

"district court" for the words "circuit court," the latter being abolished by Judicial Code, sec. 289, *infra*, p. 249. R. S. sec. 643, above cited, is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 34. [*Removal of suits by aliens.*] Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section. [36 Stat. L. 1098.]

This section is a re-enactment of R. S. 644, 4 Fed. Stat. Annot. 264, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change made is in the use

of the words "district court" in place of the words "circuit court," the latter being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 35. [*When copies of records are refused by clerk of state court.*] In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court. [36 Stat. L. 1098.]

This section is a re-enactment, without change, of R. S. sec. 645, 4 Fed. Stat. Annot. 264, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 36. [*Previous attachment bonds, orders, etc., remain valid.*] When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. [36 Stat. L. 1098.]

This section is drawn from section 4 of the Act of March 3, 1875, ch. 137, 18 Stat. L. 471, 4 Fed. Stat. Annot. 370, which superseded R. S. sec. 646, 4 Fed. Stat. Annot. 264, both the Act of 1875 and the Revised Statutes section being also repealed by Judicial Code, sec. 297, *infra*, p. 250. Aside from

the omission of the word "and" at the beginning of the last sentence, the only change is in the substitution of the words "district court" for "circuit court," the latter being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 37. [*Suits improperly in district court may be dismissed or remanded.*] If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just. [36 Stat. L. 1098.]

This section is a re-enactment of section 5 of the Act of March 3, 1875, ch. 137, 18 Stat. L. 472, 4 Fed. Stat. Annot. 371, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, and the only change made is

by substitution of the word "district" for the word "circuit," the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 38. [*Proceedings in suits removed.*] The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal. [36 Stat. L. 1098.]

This section is a re-enactment of section 6 of the Act of March 3, 1875, ch. 137, 18 Stat. L. 472, 4 Fed. Stat. Annot. 378, which is expressly repealed by Judicial Code, sec. 297,

infra, p. 250, and the only change made is by substitution of the word "district" for the word "circuit," and "chapter" for "act."

SEC. 39. [*Time for filing record; return of record, how enforced.*] In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as

aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid. [36 Stat. L. 1099.]

This section is a re-enactment of section 7 of the Act of March 3, 1875, ch. 137, 18 Stat. L. 472, 4 Fed. Stat. Annot. 378, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The first paragraph of the section in the Act of 1875, above cited, is omitted; Judicial Code, sec. 29, *supra*, p. 145,

making provision for the filing of a copy of the record. In addition to using the word "chapter" for "act," and "district" for "circuit," and breaking the section into more sentences, the only other change consists in the omission of redundant language from the penal clause.

CHAPTER FOUR.

DISTRICT COURTS — MISCELLANEOUS PROVISIONS.

Sec.

40. Capital cases; where triable.
41. Offenses on the high seas, etc., where triable.
42. Offenses begun in one district and completed in another.
43. Suits for penalties and forfeitures, where brought.
44. Suits for internal-revenue taxes, where brought.
45. Seizures, where cognizable.
46. Capture of insurrectionary property, where cognizable.
47. Certain seizures cognizable in any district into which the property is taken.
48. Jurisdiction in patent cases.
49. Proceedings to enjoin Comptroller of the Currency.
50. When a part of several defendants can not be served.
51. Civil suits; where to be brought.
52. Suits in States containing more than one district.
53. Districts containing more than one division; where suit to be brought; transfer of criminal cases.
54. Suits of a local nature, where to be brought.
55. When property lies in different districts in same State.

Sec.

56. When property lies in different States in same circuit; jurisdiction of receiver.
57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.
58. Civil causes may be transferred to another division of district by agreement.
59. Upon creation of new district or division, where prosecution to be instituted or action brought.
60. Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.
61. Commissioners to administer oaths to appraisers.
62. Transfer of records to district court when a Territory becomes a State.
63. District judge shall demand and compel delivery of records of territorial court.
64. Jurisdiction of district courts in cases transferred from territorial courts.
65. Receivers to manage property according to State laws.
66. Suits against receiver.
67. Certain persons not to be appointed or employed as officers of courts.
68. Certain persons not to be masters or receivers.

SEC. 40. [*Capital cases; where triable.*] The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 729, 2 Fed. Stat. Annot. 354, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 41. [*Offenses on the high seas, etc., where triable.*] The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 730, 2 Fed. Stat. Annot. 345, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 42. [*Offenses begun in one district and completed in another.*] When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either

district, in the same manner as if it had been actually and wholly committed therein. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 731, 2 Fed. Stat. Annot. 347, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 43. [*Suits for penalties and forfeitures, where brought.*] All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 732, 3 Fed. Stat. Annot. 94, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 44. [*Suits for internal-revenue taxes, where brought.*] Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 733, 3 Fed. Stat. Annot. 595, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 45. [*Seizures, where cognizable.*] Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided. [36 Stat. L. 1100.]

This section is a re-enactment of R. S. sec. 734, 3 Fed. Stat. Annot. 95, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The words "made on the high seas" have been transposed to follow the words "proceedings on seizures," as it is the seizures, and not the laws, that are made on the high seas. No other change is made.

SEC. 46. [*Capture of insurrectionary property, where cognizable.*] Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 735, 6 Fed. Stat. Annot. 70, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 47. [*Certain seizures cognizable in any district into which the property is taken.*] Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district. [36 Stat. L. 1100.]

This section is a re-enactment of R. S. sec. 564, 6 Fed. Stat. Annot. 236, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. In one place the word "court" is omitted, as being redundant. No other change has been made.

SEC. 48. [*Jurisdiction in patent cases.*] In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought. [36 Stat. L. 1100.]

This section is a re-enactment of the Act of March 3, 1897, ch. 395, 29 Stat. L. 695, 5 Fed. Stat. Annot. 566. The only change made is by substituting the word "district" for "circuit," the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 49. [*Proceedings to enjoin Comptroller of the Currency.*] All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located. [36 Stat. L. 1100.]

This section is a re-enactment, without change, of R. S. sec. 736, 5 Fed. Stat. Annot. 197, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 50. [*When a part of several defendants cannot be served.*] When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit. [36 Stat. L. 1101.]

This section is a re-enactment, without change, of R. S. sec. 737, 4 Fed. Stat. Annot. 552, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 51. [*Civil suits; where to be brought.*] Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. [36 Stat. L. 1101.]

This section embraces the provisions of R. S. sec. 739, 4 Fed. Stat. Annot. 554, note, as modified in the Act of Aug. 13, 1888, ch. 866, sec. 1, 25 Stat. L. 434, 4 Fed. Stat. Annot. 265, 386, both of which are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The changes in phraseology were made for purposes of proper revision.

SEC. 52. [*Suits in States containing more than one district.*] When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be

brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State. [36 Stat. L. 1101.]

This section is a re-enactment of R. S. sec. 740, 4 Fed. Stat. Annot. 554, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The words "circuit or" be-

fore the words "district courts" are omitted, the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249. Otherwise no change is made.

SEC. 53. [*Districts containing more than one division; where suit to be brought; transfer of criminal cases.*] When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States district court in such division. [36 Stat. L. 1101.]

See a reference to this section in a paragraph in the first note to Judicial Code, Chapter Five, *infra*, p. 160.

In a great many Acts creating divisions of districts there are to be found provisions requiring that suits not of a local nature shall be brought in the division in which one of the defendants resides, etc., and provisions, similar in character, with respect to the removal of cases from state to federal courts. These provisions differ in some instances in the language used, but are substantially to the same effect. To avoid the necessity for repeating them in the various sections in which they otherwise should appear, and to avoid the necessity for repeating similar provisions in future Acts creating or changing divisions or districts, this section was inserted and made general in its application.

The section also contains the restriction

with respect to the place of prosecution of crimes and offenses found in many Acts; and the provision of the Act of June 2, 1906, ch. 2569, sec. 2, 34 Stat. L. 207, 1909 Supp. Fed. Stat. Annot. 301, authorizing the transfer of certain criminal cases from one division of the western district of Arkansas to another division for trial, etc., is also carried into the section and made general in its application. The purpose of this latter provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held in each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty.

SEC. 54. [*Suits of a local nature, where to be brought.*] In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides. [36 Stat. L. 1102.]

This section is a re-enactment, without change, of R. S. sec. 741, 4 Fed. Stat. Annot. 555, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 55. [*When property lies in different districts in same State.*] Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted. [36 Stat. L. 1102.]

This section is a re-enactment of R. S. sec. 742, 4 Fed. Stat. Annot. 555, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change is by omis-

sion of the words "circuit or" before the words "district court," the Circuit Courts having been abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 56. [*When property lies in different States in same circuit; jurisdiction of receiver.*] Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be. [36 Stat. L. 1102.]

This section is new legislation.

SEC. 57. [*Absent defendants in suits to enforce liens, remove clouds on titles, etc.*] When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or

demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law. [36 Stat. L. 1102.]

This section is a re-enactment of section 8 of the Act of March 3, 1875, ch. 137, 18 Stat. L. 472, 4 Fed. Stat. Annot. 380, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change in language

consists in the substitution of the words "district court" for "circuit court," the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 58. [*Civil causes may be transferred to another division of district by agreement.*] Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature. [36 Stat. L. 1103.]

This section is based upon the provisions in section 4 of the Act of Feb. 28, 1887, ch. 271, 24 Stat. L. 425, 4 Fed. Stat. Annot. 647, dividing Missouri into two districts, and in the Act of June 2, 1906, ch. 2569, sec. 1, 34 Stat. L. 206, 1909 Supp. Fed. Stat. Annot. 301, to regulate the practice in civil and criminal cases in the western district of Arkansas.

In recent years, in a number of instances, Congress has passed Acts dividing districts into from two to five divisions, and providing

for holding but one term of court a year in each division, and also providing that suits shall be brought in the division in which they arise. The result is, with but one term of court a year, there is great delay in litigation. Since the purpose of such a provision is solely to facilitate the disposition of cases, the section was so drawn as to be general in its application. See also a reference to this section in the first note to Judicial Code, Chapter Five, *infra*, p. 160.

SEC. 59. [*Upon creation of new district or division, where prosecution to be instituted or action brought.*] Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding. [36 Stat. L. 1103.]

This section is based upon provisions contained in a large number of Acts creating new districts or divisions, or transferring counties from one district or division to another. The purpose of the section is to ob-

viate the necessity for repeating, in similar Acts in the future, provisions of this character. See also a reference to this section in the first note to Judicial Code, Chapter Five, *infra*, p. 160.

SEC. 60. [*Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.*] The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted. [36 Stat. L. 1103.]

This section embraces the provisions found in section 6 of the Act of Aug. 5, 1886, ch. 928, 24 Stat. L. 309, 4 Fed. Stat. Annot. 20, dividing California into two districts, and section 7 of the Act of March 2, 1901, ch. 801, 31 Stat. L. 881, 4 Fed. Stat. Annot. 654, creating the middle district of Pennsylvania, and is intended to preserve liens acquired prior to the creation of a new district or the

transfer of any territory, and to provide a method of enforcing such lien where the property to which it has attached is within territory transferred to another district. It is also intended to avoid the necessity of carrying provisions of the character referred to into future Acts. See also a reference to this section in the first note to Judicial Code, Chapter Five, *infra*, p. 160.

SEC. 61. [*Commissioners to administer oaths to appraisers.*] Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court. [36 Stat. L. 1104.]

This section is a re-enactment, without change, of R. S. sec. 570, 4 Fed. Stat. Annot. 79, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 62. [*Transfer of records to district court when a territory becomes a state.*] When any Territory is admitted as a State, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said State. [36 Stat. L. 1104.]

This section is substantially a re-enactment of R. S. sec. 567, 4 Fed. Stat. Annot. 237, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The changes consist in the use of the words "highest court" instead of the words "court of appeals," for the reason that the appellate court of some of the territories is the "Supreme Court," and the term "highest" more

accurately expresses the court from which the cases will be transferred. The words "or to the circuit court of appeals" are inserted after the words "the Supreme Court," as Circuit Courts of Appeals now have jurisdiction over certain cases coming from the highest court of the territories. See Judicial Code, sec. 133, *infra*, p. 196.

SEC. 63. [*District judge shall demand and compel delivery of records of territorial court.*] It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law. [36 Stat. L. 1104.]

This section is a re-enactment, without change, of R. S. sec. 568, 4 Fed. Stat. Annot. 238, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 64. [*Jurisdiction of district courts in cases transferred from territorial courts.*] When any Territory is admitted as a State, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the trial courts of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same. [36 Stat. L. 1104.]

This section is substantially a re-enactment of R. S. sec. 569, 4 Fed. Stat. Annot. 238, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The changes

made are similar to those found in Judicial Code, sec. 62, *supra*, and were made for the same or similar reasons.

SEC. 65. [*Receivers to manage property according to state laws.*] Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both. [36 Stat. L. 1104.]

This section is a re-enactment, without material change, of section 2 of the Act of Aug. 13, 1888, ch. 866, 35 Stat. L. 436, 4 Fed. Stat. Annot. 386, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

The only changes made are the omission of the redundant matter in the penal clause, and the omission of the useless word "that" at the beginning of the section. These changes do not change the law.

SEC. 66. [*Suits against receiver.*] Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice. [36 Stat. L. 1104.]

This section is a re-enactment, without change, of section 3 of the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 436, 4 Fed. Stat.

Annot. 387, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 67. [*Certain persons not to be appointed or employed as officers of courts.*] No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court. *Provided*, That no such person at present holding a position or employment in a circuit court shall be debarred from similar appointment or employment in the district court succeeding to such circuit court jurisdiction. [36 Stat. L. 1105; 37 Stat. L. —.]

The above section 67 was amended to read as here given by the Act of Dec. 21, 1911. The amendment consisted of the addition of the proviso.

This section as originally adopted is a re-

enactment, without material change, of section 7 of the Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 437, 4 Fed. Stat. Annot. 69, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 68. [*Certain persons not to be masters or receivers.*] No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment. [36 Stat. L. 1105.]

This section is substantially a re-enactment of a provision in the Deficiency Appropriation Act of March 3, 1879, ch. 183, 20 Stat. L. 415, 4 Fed. Stat. Annot. 81, the only change

being the substitution of the words "of a district court" for "of the district or circuit courts," Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

CHAPTER FIVE.

DISTRICT COURTS — DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES.

Sec.

69. Judicial districts,

70. Alabama.

71. Arkansas.

Sec.

72. California.

73. Colorado.

74. Connecticut.

Sec.

- 75. Delaware.
- 76. Florida.
- 77. Georgia.
- 78. Idaho.
- 79. Illinois.
- 80. Indiana.
- 81. Iowa.
- 82. Kansas.
- 83. Kentucky.
- 84. Louisiana.
- 85. Maine.
- 86. Maryland.
- 87. Massachusetts.
- 88. Michigan.
- 89. Minnesota.
- 90. Mississippi.
- 91. Missouri.
- 92. Montana.
- 93. Nebraska.
- 94. Nevada.
- 95. New Hampshire.

Sec.

- 96. New Jersey.
- 97. New York.
- 98. North Carolina.
- 99. North Dakota.
- 100. Ohio.
- 101. Oklahoma.
- 102. Oregon.
- 103. Pennsylvania.
- 104. Rhode Island.
- 105. South Carolina.
- 106. South Dakota.
- 107. Tennessee.
- 108. Texas.
- 109. Utah.
- 110. Vermont.
- 111. Virginia.
- 112. Washington.
- 113. West Virginia.
- 114. Wisconsin.
- 115. Wyoming.

SEC. 69. [*Judicial districts.*] The United States are divided into judicial districts as follows: [*36 Stat. L. 1105.*]

Notes on chapter 5.—The following paragraphs are taken from the notes to this chapter in the report of the Congressional Committee on Revision:

In a number of Acts creating judicial districts or divisions are to be found provisions already fully covered by general laws applicable to all districts. These provisions have been omitted as redundant.

So, also, are to be found provisions declaring the division in which suits not of a local nature shall be brought, where process may be served, where prosecutions for crimes shall be instituted, and how they may be transferred to other divisions for prosecution, the division to which suits removed from state courts shall be removed, and fixing the time within which such removal may be had. All such provisions have been omitted from the several sections revised in this chapter and have been embraced in Judicial Code, sec. 53, *supra*, p. 154, which is made general in its application.

So, also, in several Acts are to be found provisions providing for the removal of civil cases from one division to another and prescribing the time and manner of removal. These provisions have likewise been omitted and Judicial Code, sec. 58, *supra*, p. 156, substituted in place thereof.

So, also, in a number of Acts are to be found provisions providing for the disposition of pending civil and criminal cases. These are also omitted and Judicial Code, sec. 59, *supra*, p. 157, substituted in place thereof.

In two Acts, one relating to California and one to Pennsylvania, are to be found provisions preserving liens upon property acquired prior to the passage of those Acts. They have been omitted from the sections relating to those states, and Judicial Code, sec. 60, *supra*, p. 157, substituted in lieu thereof.

So, also, in a number of Acts are to be found provisions requiring juries to be drawn from the division in which the suits to be

tried are pending. The result is, in a number of cases, this limitation applies to one division in a district and not to any other division thereof. All such provisions have been omitted, leaving the general law, revised in chapter 12, Juries, to control in the manner of the drawing of juries.

The general law (see Judicial Code, sec. 3, *supra*, p. 133) provides for one clerk of the court in each judicial district. In eight of the seventy-eight judicial districts embraced within the states special provision is made for more than one clerk, viz., Arkansas, eastern district, three clerks; Kentucky, eastern district, six clerks; Kentucky, western district, four clerks; Missouri, western district, four clerks; North Carolina, eastern district, five clerks; North Carolina, western district, four clerks; Virginia, western district, four clerks; Wisconsin, western district, three clerks. Each of these clerks is an independent clerk, entitled to the maximum compensation allowed the single clerk of each of the seventy judicial districts. So, in the eastern district of Kentucky, for example, each of the six clerks is entitled to retain out of the fees received, if enough for that purpose, a compensation of \$3,500, or six times the amount that could be retained by one clerk. As a matter of fact, in the eastern district of Kentucky the same man is clerk of the Circuit and the District Court at five places, thus entitling him to a maximum compensation of \$35,000 per annum, should the fees be sufficient. No good reason exists why there should be but one clerk in each of the seventy districts, and from three to six clerks in the remaining eight districts. For this reason the provisions authorizing the appointment of more than one clerk in a district are omitted, thus providing for but one clerk in each district. In lieu of clerks, deputy clerks are provided for at each place of holding court in the eight districts at which clerks are now provided for.

The general law (revised in Judicial Code,

sec. 4, *supra*, p. 133) leaves to the discretion of the judge the number of deputy clerks to be appointed. In a number of Acts Congress has provided that deputy clerks and deputy marshals shall be appointed for certain places. Provisions of this character have been retained in the sections in this chapter.

In other Acts are to be found provisions for deputy clerks at certain places, if the judge deems it necessary. This is merely a restatement of the general authority existing under Judicial Code, sec. 4, *supra*, p. 133; and all such provisions are omitted as redundant.

In other Acts are to be found provisions enlarging the general power because of some peculiar condition in the district not existing in other districts. For this reason a number of provisions of that character have been retained in the sections.

In the Revised Statutes one chapter is devoted to defining the judicial districts; another chapter to fixing the times and places of holding court; and still another chapter to special provisions respecting clerks, residence of judges, and appointment, residence, and compensation of deputy clerks in certain districts, etc.

Further, in the Revised Statutes, in those districts in which the counties were named, the sections provided that they should be composed of the counties as they existed on a certain date. For instance, in Illinois (sec. 536), the date is 1857; in Iowa (sec. 537), 1859; in Michigan (sec. 538), 1863; in Mississippi (sec. 539), 1838; in Missouri (sec. 540), 1857; in Ohio (sec. 544), 1855; in Pennsylvania (sec. 545), 1818; in South Carolina (sec. 546), 1823; in Tennessee (sec.

547), 1838 and 1856; and in Texas (sec. 548), 1852.

From this it is apparent that the only proper way to describe the districts and divisions, where there are more than one district or division in a state, is to describe them as they existed on a certain date, the latest date that can be had; hence July 1, [1910], has been chosen. In order to secure absolute accuracy drafts of the sections relating to the various judicial districts were sent to the district attorneys in the districts for correction, and as this method has been pursued for three successive years, the list is believed to be correct.

Further, in view of the number of districts and divisions existing in a number of the states, and of the large number of places of holding courts, all the provisions respecting the organization of the district, the fixing of the times and places of holding court, and the special provisions applicable thereto, in so far as they apply to each state, are brought together in one section. This is believed to be in the interest of simplicity and ready reference.

In the notes in detail on the sections of this chapter no further reference will be made respecting provisions of the character above referred to, the notes being limited to other provisions and changes, and to be considered in connection with the foregoing general statements.

Section 69.—This section is a re-enactment of R. S. sec. 530, 4 Fed. Stat. Annot. 16, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, the only change consisting in the use of the word "are" for the words "shall be."

SEC. 70. [Alabama.] The State of Alabama is divided into three judicial districts, to be known as the northern, middle, and southern districts of Alabama. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the north-eastern division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherokee, De Kalb, Etowah, Marshall, and Saint Clair, which shall constitute the middle division of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall constitute the Jasper division of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the western division of said district. Terms of the district court for the northeastern division shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February and the third Tuesday in October: *Provided*, That suitable rooms

and accommodations for holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gadsden on the first Tuesdays in February and August: *Provided*, That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the Government; for the southern division, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the Jasper division, at Jasper on the second Tuesdays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Coosa, Covington, Crenshaw, Elmore, Lee, Lowndes, Macon, Montgomery, Pike, Randolph, Russell, and Tallapoosa, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry, and Houston, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Montgomery on the first Tuesdays in May and December; and for the southern division, at Dothan on the first Mondays in June and December. The clerk for the middle district shall maintain an office, in charge of himself or a deputy, at Dothan, which shall be open at all times for the transaction of the business of said division. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the northern division of said district. Terms of the district court for the southern division shall be held at Mobile on the fourth Mondays in May and November; and for the northern division, at Selma on the first Mondays in May and November. [36 Stat. L. 1105.]

This section is drawn from R. S. sec. 532, 4 Fed. Stat. Annot. 17, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, and from various Acts cited in 4 Fed. Stat. Annot. 17, 10 Fed. Stat. Annot. 177, 178, and 1909 Supp. Fed. Stat. Annot. 298, 300.

An Act of Congress of March 3, 1905, ch. 1419, sec. 2, 33 Stat. L. 988, 10 Fed. Stat. Annot. 210, appointed a term of court to be held at Selma on the first Monday in May, the time previously fixed for a term at Mobile. Upon the suggestion of the judge of the district, the time for holding the

Mobile term is changed to the fourth Monday of May. That Act also provided that a place for holding court at Selma should be furnished free of expense to the government. That provision is omitted, as a federal building in which to hold the court has been erected at Selma. The provision in the Act of Feb. 16, 1903, ch. 554, sec. 3, 32 Stat. L. 832, 10 Fed. Stat. Annot. 177, requiring Calhoun county to furnish free of cost a building in which to hold court at Tuscaloosa is omitted as obsolete, as the court is now held in a federal building which has been constructed in that city.

SEC. 71. [Arkansas.] The State of Arkansas is divided into two districts, to be known as the eastern and western districts of Arkansas. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hemp-

stead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which shall constitute the Texarkana division of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which shall constitute the Fort Smith division of said district; also the territory embraced on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which shall constitute the Harrison division of said district. Terms of the district court for the Texarkana division shall be held at Texarkana on the second Mondays in May and November; for the Fort Smith division, at Fort Smith on the second Mondays in January and June; and for the Harrison division, at Harrison on the second Mondays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe, and Woodruff, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp, and Jackson, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which shall constitute the Jonesboro division of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, and White, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Helena on the second Monday in March and the first Monday in October; for the northern division, at Batesville on the fourth Monday in May and the second Monday in December; for the Jonesboro division, at Jonesboro on the second Mondays in May and November; and for the western division, at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Fort Smith, at Harrison, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court. [36 Stat. L. 1106.]

This section is drawn from R. S. secs. 533, 556, 4 Fed. Stat. Annot. 18, 166, which are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, and from various Acts cited in 4 Fed. Stat. Annot. 18, 19, 10 Fed. Stat. Annot. 211, 1909 Supp. Fed. Stat. Annot. 301.

Following the policy stated in the general notes at the beginning of this chapter, the number of clerks in the eastern district has

been reduced from three to one, and in lieu thereof deputy clerks provided for.

The substance of the Act of June 2, 1906, ch. 2569, 34 Stat. L. 206, 1909 Supp. Fed. Stat. Annot. 301, providing for the transfer of civil and criminal cases in the western district of Arkansas, is to be found in Judicial Code, secs. 53 and 58, *supra*, pp. 154, 156; otherwise the section was existing law concisely stated.

SEC. 72. [California.] The State of California is divided into two districts, to be known as the northern and southern districts of California. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties

of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Fresno on the first Monday in May and the second Monday in November; and for the southern division, at Los Angeles, on the second Monday in January and the second Monday in July, and at San Diego on the second Mondays in March and September. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba. Terms of the district court for the northern district shall be held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November; at Sacramento on the second Monday in April; and at Eureka on the third Monday in July. [36 Stat. L. 1107.]

This section is drawn from R. S. secs. 531, 572, 586, 4 Fed. Stat. Annot. 16, 665, 674, which are expressly repealed by Judicial Code, sec. 297, *supra*, p. 250, and from various Acts cited in 4 Fed. Stat. Annot. 20, 21, 695, and in 1909 Supp. Fed. Stat. Annot. 302.

A federal building in which to hold court has been erected at Fresno. Hence the provision in the Act of May 29, 1900, ch. 594,

31 Stat. L. 220, 4 Fed. Stat. Annot. 629, requiring free accommodations to be furnished for the court held at that place, is omitted as obsolete. The provision in the Act of Aug. 5, 1886, ch. 928, sec. 6, 24 Stat. L. 309, 4 Fed. Stat. Annot. 20, respecting liens, is carried into Judicial Code, sec. 60, *supra*, p. 157, and made general in its application. Otherwise the section states what was existing law.

SEC. 73. [*Colorado.*] The State of Colorado shall constitute one judicial district, to be known as the district of Colorado. Terms of the district court shall be held at Denver on the first Tuesdays in May and November; at Pueblo on the first Tuesday in April; and at Montrose on the second Tuesday in September. [36 Stat. L. 1108.]

This section states concisely what was the existing law.

SEC. 74. [*Connecticut.*] The State of Connecticut shall constitute one judicial district, to be known as the district of Connecticut. Terms of the district court shall be held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December. [36 Stat. L. 1108.]

This section was existing law except as to the time of holding court at New Haven.

SEC. 75. [*Delaware.*] The State of Delaware shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September, and December. [36 Stat. L. 1108.]

This section was existing law except as to some of the dates for holding court.

SEC. 76. [*Florida.*] The State of Florida is divided into two districts, to be known as the northern and southern districts of Florida. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach,

Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie, and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton, and Washington. Terms of the district court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December. [36 Stat. L. 1108.]

This section was existing law except as to some of the dates for holding court.

SEC. 77. [*Georgia.*] The State of Georgia is divided into two districts, to be known as the northern and southern districts of Georgia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, DeKalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, which shall constitute the northwestern division of said district. Terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October; for the eastern division, at Athens on the second Monday in April and the first Monday in November; for the western division, at Columbus on the first Mondays in May and December; and for the northwestern division, at Rome on the third Mondays in May and November. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Athens, at Columbus, and at Rome, which shall be kept open at all times for the transaction of the business of the court. The southern district shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson,

Wilcox, and Wilkinson, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren, which shall constitute the northeastern division; also the territory embraced on the date last mentioned in the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, and Ware, which shall constitute the southwestern division; and also the territory embraced on the date last mentioned in the counties of Baker, Ben Hill, Calhoun, Crisp, Colquitt, Dougherty, Lee, Miller, Mitchell, Thomas, Tift, Turner, and Worth, which shall constitute the Albany division. Terms of the district court for the western division shall be held at Macon on the first Mondays in May and October; for the eastern division, at Savannah on the second Tuesdays in February, May, August, and November; for the northeastern division, at Augusta on the first Monday in April and the third Monday in November; for the southwestern division, at Valdosta on the second Mondays in June and December; and for the Albany division, at Albany on the third Mondays in June and December. [36 Stat. L. 1108.]

In the several Acts authorizing the holding of terms of court at Athens, Albany, Rome, and Valdosta, there were provisions requiring free accommodations to be furnished for the purpose. Since then federal buildings have been erected in those cities, so that those provisions have become obsolete and are omitted. The Act of April 7, 1904, ch.

940, 33 Stat. L. 161, 10 Fed. Stat. Annot. 212, fixed the time for holding the spring term of the court at Athens on the fourth Monday in April. Upon the recommendation of the district judge and the district attorney this has been changed to the second Monday in April. Otherwise the section was substantially the existing law.

SEC. 78. [*Idaho.*] The State of Idaho shall constitute one judicial district, to be known as the district of Idaho. It is divided into four divisions, to be known as the northern, central, southern, and eastern divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bonner, Kootenai, and Shoshone, shall constitute the northern division of said district; and the territory embraced on the date last mentioned in the counties of Idaho, Latah, and Nez Perce, shall constitute the central division of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington, shall constitute the southern division of said district; and the territory embraced on the date last mentioned in the counties of Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi, and Oneida, shall constitute the eastern division of said district. Terms of the district court for the northern division of said district shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October. The clerk of the court shall maintain an office in charge of himself or a deputy at Coeur d'Alene City, at Moscow, at Boise City, and at Pocatello [*sic*], which shall be open at all times for the transaction of the business of the court. [36 Stat. L. 1109.]

This section, with some changes, is drawn from Acts set forth in 4 Fed. Stat. Annot. 26, 700, 701. The words "including any and all Indian reservations within such terri-

tory" in the Act of June 1, 1898, ch. 369, 30 Stat. L. 423, 4 Fed. Stat. Annot. 27, are omitted.

SEC. 79. [*Illinois.*] The State of Illinois is divided into three districts, to be known as the northern, southern, and eastern districts of Illinois. The

northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cook, DeKalb, Dupage, Grundy, Kane, Kendall, Lake, LaSalle, McHenry, and Will, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December; and for the western division, at Freeport on the third Mondays in April and October. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Chicago and at Freeport, which shall be kept open at all times for the transaction of the business of the court. The marshal for the northern district shall maintain an office in the division in which he himself does not reside and shall appoint at least one deputy who shall reside therein. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which shall constitute the southern division. Terms of the district court for the northern division shall be held at Peoria on the third Mondays in April and October; for the southern division, at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at Peoria, at Springfield, and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern division, who shall maintain an office at Peoria. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson. Terms of the district court for the eastern district shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East Saint Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo, and at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files, and documents pertaining to the court at that place. [*36 Stat. L. 1110.*]

Acting under the authority of R. S. sec. 918, 4 Fed. Stat. Annot. 585, the district judge for the northern district of Illinois appointed special terms of court to be held at Chicago on the first Mondays in February, March, April, May, June, September, October,

and November, in addition to the regular July and December terms. The district judge and the district attorney joined in recommending that these special terms be carried into the revision as regular terms, which has been done.

SEC. 80. [*Indiana.*] The State of Indiana shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep his office at New Albany, one at Evansville, one at Fort Wayne, and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place. [36 *Stat. L.* 1110.]

This section states in concise terms what was the existing law.

SEC. 81. [*Iowa.*] The State of Iowa is divided into two judicial districts, to be known as the northern and southern districts of Iowa. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which shall constitute the Cedar Rapids division; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division, at Fort Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the central division of said district; also the territory embraced on the date last mentioned in the counties of Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, and Clinton, which shall constitute the Davenport division of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the Ottumwa division of said district. Terms of the district court for the eastern division shall be held at

Keokuk on the second Tuesday in April and the third Tuesday in October; for the central division, at Des Moines on the second Tuesday in May and the third Tuesday in November; for the western division, at Council Bluffs on the second Tuesday in March and the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday in March and the first Tuesday in November; for the Davenport division, at Davenport on the fourth Tuesday in April and the first Tuesday in October; and for the Ottumwa division, at Ottumwa on the first Monday after the fourth Tuesday in March, and the first Monday after the third Tuesday in October. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa, for the transaction of the business of said divisions. [36 Stat. L. 1111.]

This section states concisely what was the existing law.

SEC. 82. [Kansas.] The State of Kansas shall constitute one judicial district, to be known as the district of Kansas. It is divided into three divisions, to be known as the first, second, and third divisions of the district of Kansas. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte. The second division shall include the territory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita. The third division shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson. Terms of the district court for the first division shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May; but no cause, action, or proceeding shall be tried or considered at any term held at Salina unless by consent of all the parties thereto, or by order of the court for cause. Terms of the district court for the second division shall be held at Wichita on the second Mondays in March and September; and for the third division, at Fort Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint two deputies, one of whom shall reside and keep his office at Fort Scott, and the other at Wichita; and the marshal shall appoint a deputy who shall reside and keep his office at Fort Scott. [36 Stat. L. 1112.]

The provision in the Act of Aug. 9, 1888, ch. 817, sec. 2, 25 Stat. L. 392, 4 Fed. Stat. Annot. 175, that the clerk and marshal shall each appoint a deputy who shall reside at Salina, upon the recommendation of the district attorney is omitted as obsolete, as court is very rarely held at Salina, and such deputies are not now maintained there. The provision in the Act of Feb. 19, 1903, ch. 709, 32 Stat.

L. 849, 10 Fed. Stat. Annot. 213, that "but a jury shall not attend said October term excepting upon the order of the court," is also omitted, the district attorney saying that the court always orders grand and petit juries for every term of court held at Kansas City, Kansas. Retention of the provision was therefore deemed useless.

SEC. 83. [*Kentucky.*] The State of Kentucky is divided into two districts, to be known as the eastern and western districts of Kentucky. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided*, That suitable rooms and accommodations are furnished for holding court at Jackson free of expense to the Government until such time as a public building shall be erected there. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey, Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalfe, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Grayson, Hardin, Meade, Breckinridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd, Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Frankfort, at Covington, at Richmond, at London, at Catlettsburg, and at Jackson; and the clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought. [*36 Stat. L. 1112.*]

With the exception of the reduction of the number of clerks of court in each of the judicial districts, as explained in the general

notes at the beginning of this chapter, this section states in concise language what was the existing law.

SEC. 84. [*Louisiana.*] The State of Louisiana is divided into two judicial districts, to be known as the eastern and western districts of Louisiana. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne, and Washington, which shall constitute the New Orleans division; also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana, which shall constitute the Baton Rouge division of said district. Terms of the district court for the New Orleans division shall be held at New Orleans on the third Mondays in February, May, and November; and for the Baton Rouge division, at Baton Rouge on the second Mondays in April and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which shall constitute the Opelousas division of said district; also the territory embraced on the date last mentioned in the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which shall constitute the Alexandria division of said district; also the territory embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which shall constitute the Shreveport division of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which shall constitute the Monroe division of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron, and Vernon, which shall constitute the Lake Charles division of said district. Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe, and at Lake Charles, which shall be kept open at all times for the transaction of the business of the court. [36 Stat. L. 1113.]

In the Act of Aug. 8, 1888, ch. 789, 25 Stat. L. 388, 4 Fed. Stat. Annot. 33, dividing the western district of Louisiana into divisions, and fixing the places at which process issued in cases arising in certain counties shall be returnable, and in later Acts of a similar character, no specific name is given the divisions created. Unless some specific name be

given them it is difficult to describe them. Since it is the general policy of Congress, as a matter of necessity for simple reference, to give some definite name to each division created, the name of the city at which the court for each division is held has been given the division.

SEC. 85. [*Maine.*] The State of Maine shall constitute one judicial district, to be known as the district of Maine. Terms of the district court shall be held at the times and places following: At Portland, on the first Tuesday in April, on the third Tuesday in September, and on the second Tuesday in De-

ember; at Bangor, on the first Tuesday in June: *Provided, however,* That in the year nineteen hundred and twelve a session shall be also held at Portland on the first Tuesday in February. [37 Stat. L. —.]

This section was amended to read as here given by the Act of Dec. 22, 1911.

SEC. 86. [*Maryland.*] The State of Maryland shall constitute one judicial district, to be known as the district of Maryland. Terms of the district court shall be held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May and the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy, who shall reside and maintain an office at Cumberland, unless he shall himself reside there. [36 Stat. L. 1114.]

This section states in concise terms what was the existing law.

SEC. 87. [*Massachusetts.*] The State of Massachusetts shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided,* That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the Government until such time as a Federal building shall be erected there for that purpose. The marshal and the clerk for said district shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place. [36 Stat. L. 1114.]

This section states in concise terms what was the existing law.

SEC. 88. [*Michigan.*] The State of Michigan is divided into two judicial districts, to be known as the eastern and western districts of Michigan. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscola, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Detroit on the first Tuesdays in March, June, and November; for the northern division, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of February in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which shall constitute the northern division; also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo,

Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Grand Rapids on the first Tuesdays in March and October; and for the northern division, at Marquette on the first Tuesdays in May and September. All issues of fact shall be tried at the terms held in the division where such suits shall be commenced. Actions in rem and admiralty may be brought in whichever division of the eastern district service can be had upon the res. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the western district shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court held at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the eastern district shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said district shall keep an office and a deputy marshal at Bay City, and mileage on service of process in said northern division shall be computed from Bay City. [*36 Stat. L. 1114.*]

This section states in concise terms what was the existing law.

SEC. 89. [*Minnesota.*] The State of Minnesota shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the first, second, third, fourth, fifth, and sixth divisions. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston. The second division shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac qui Parle. The third division shall include the territory embraced on the date last mentioned in the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The fourth division shall include the territory embraced on the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The fifth division shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The sixth division shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Wadena, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the first division shall be held at Winona on the third Tuesdays in May and November; for the second division, at Mankato on the fourth Tuesdays in April and October; for the third division, at Saint Paul on the first Tuesdays in June and December; for the fourth division, at Minneapolis on the first Tuesdays in April and October; for the fifth division, at Duluth on the second Tuesdays in January and July; and for the sixth division, at Fergus Falls on the first Tuesday in May and second Tuesday in

November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court. [36 Stat. L. 1115.]

This section states in concise terms what was the existing law.

SEC. 90. [*Mississippi.*] The State of Mississippi is divided into two judicial districts, to be known as the northern and southern districts of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Coahoma, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tiptah, Tunica, Union, Webster, and Yalobusha, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December, and at Clarksdale on the third Mondays in June and December: *Provided*, That suitable rooms and accommodations for holding court at Clarksdale are furnished free of expense to the United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned in the counties of Bolivar, Claiborne, Issaquena, Sharkey, Sunflower, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which constitutes the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held, at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district. [36 Stat. L. 1116.]

R. S. sec. 572, 4 Fed. Stat. Annot. 665, 668, fixed the times for holding terms of the District Court at Jackson on the fourth Mondays in June and November; while R. S. sec. 658, 4 Fed. Stat. Annot. 680, 683, fixed the times for holding terms of the Circuit Court at that place on the first Mondays in May and November. For more than twenty years (so the district attorney states) the court,

by order, has held the terms of the District Court on the dates fixed for holding the Circuit Court, so that both courts might be held at the same time. Since the dates fixed for holding terms of the Circuit Court seem to be the ones preferred by the court, the section has been amended to conform to that preference.

SEC. 91. [Missouri.] That the State of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrian, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the southeastern division of said district. Terms of the district court for the eastern division shall be held at Saint Louis on the third Mondays in March and September and at Rolla on the second Mondays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the northern division at Hannibal on the fourth Monday in May and the first Monday in December; and for the southeastern division, at Cape Girardeau on the second Mondays in April and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline, and Sullivan, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the southwestern division; also the territory embraced on the date last mentioned in the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the Saint Joseph division; also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which shall constitute the southern division. Terms of the district court for the western division shall be held at Kansas City on the fourth Monday in April and the first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided*, That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the southwestern division, at Joplin on the second Mondays in June and January; for the Saint Joseph division, at Saint Joseph on the first Monday in March and the third Monday in September; for the central division, at Jefferson City on the third Mondays in March and October; and for the southern division, at Springfield on the first Mondays in April and October. The clerk of the court at Saint Louis, in the eastern district, shall maintain an office in charge of himself or a deputy at Saint Louis and Hannibal and at such other places of holding court in said district as may be deemed necessary by the judge, which shall be kept open at all times for the transaction of the business of the court. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Joseph, at Chillicothe, at Joplin, and at Springfield, which shall be kept open at all times for the transaction of the business of the court. The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district. [37 Stat. L. —.]

The above section 91 was amended to read as here given by the Act of Dec. 22, 1911. The changes made by this amendment relate

to the dates for holding terms for the eastern division at St. Louis and to the maintenance of a clerk's office at St. Louis and Hannibal.

Section 3 of the Act of Feb. 28, 1887, ch. 271, 24 Stat. L. 425, 4 Fed. Stat. Annot. 649, note, provided that terms of the District Court should be held at Hannibal on the first Monday in May and November.

The Act of April 19, 1888, ch. 129, 25 Stat. L. 88, provided that terms of the District Court should be held at Hannibal on the fourth Monday in May and first Monday in December, and repealed all laws inconsistent therewith. No reference was made in this Act to the Act of 1887.

Then the Act of May 14, 1890, ch. 202, 26 Stat. L. 106, 4 Fed. Stat. Annot. 649, 713, specifically amended section 3 of the Act of 1887, above cited, without any reference to or repeal of the Act of 1888, and provided that

terms of the District Court should be held at Hannibal on the first Monday in May and November, those being the dates previously fixed for holding terms of court at St. Louis.

As a matter of fact, the court for that district has treated the Act of April 19, 1888, above cited, as being in force, irrespective of the Act of 1890, and regular terms of the court have been held at Hannibal at the times fixed in the Act of 1888 ever since that date, thus avoiding a conflict with the times fixed for holding court at St. Louis.

In view of the construction placed upon the Act of 1888 by the court, the times fixed by it for holding court at Hannibal have been carried into the Judicial Code section.

SEC. 92. [*Montana.*] The State of Montana shall constitute one judicial district, to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place. [*36 Stat. L. 1118.*]

Except for the addition of the provisions for holding court at Missoula and at Billings, this section states concisely what was the existing law.

SEC. 93. [*Nebraska.*] The State of Nebraska shall constitute one judicial district to be known as the district of Nebraska. Said district is divided into eight divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the Omaha division; the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the Norfolk division; the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Box Butte, and Sioux, shall constitute the Chadron division; the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the Grand Island division; the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's Bluff, shall constitute the North Platte division; the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the Lincoln division; the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the Hastings division; and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the McCook division. Terms of the district court

for the Omaha division shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the Norfolk division, at Norfolk on the third Monday in September; for the Chadron division, at Chadron on the second Monday in September; for the Grand Island division, at Grand Island on the second Monday in January; for the North Platte division, at North Platte on the second Monday in June; for the Lincoln division, at Lincoln on the second Monday in May and the first Monday in October; for the Hastings division, at Hastings on the second Monday in March; and for the McCook division, at McCook on the first Monday in March: *Provided*, That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed. [36 Stat. L. 1118.]

This section states concisely what was the existing law.

SEC. 94. [*Nevada*.] The State of Nevada shall constitute one judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October. [36 Stat. L. 1118.]

This section states concisely what was the existing law.

SEC. 95. [*New Hampshire*.] The State of New Hampshire shall constitute one judicial district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton on the last Tuesday in August. [36 Stat. L. 1119.]

This section states concisely what was the existing law.

SEC. 96. [*New Jersey*.] The State of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Trenton on the third Tuesdays in January, April, June, and September. At each term of the district court it shall be lawful for the judge holding such term, on consent of both parties, or on application therefor and good cause shown by either party to any civil cause set for trial or hearing at said term, to order such cause to be held or tried at the city of Newark, in said district, upon the day set for that purpose by said judge: *Provided*, That such application shall be made to said judge, either in vacation or term time, at least one week before the date set for trial of said cause, and on at least five days' notice to the opposite party or his or her attorney; and writs of subpoena to compel the attendance of witnesses at said city of Newark may issue, and jurors summoned to attend said term may be ordered by said judge to be in attendance upon said court in the city of Newark. [36 Stat. L. 1119.]

This section states concisely what was the existing law.

SEC. 97. [*New York*.] The State of New York is divided into four judicial districts, to be known as the northern, eastern, southern, and western districts of New York. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida,

Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions and for proceedings in bankruptcy and the trial of causes in admiralty, shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge. [36 Stat. L. 1119.]

R. S. secs. 597, 599, 4 Fed. Stat. Annot. 678, 716, are consolidated and so extended as to apply equally to the eastern and western districts, the object being that the judges of the four districts of New York, in view of local conditions, may interchange duties without an order from the circuit judge.

The navigable waters lying within Richmond county are also placed under the concurrent jurisdiction of the southern and eastern districts, that county comprising Staten Island.

SEC. 98. [North Carolina.] The State of North Carolina is divided into two districts, to be known as the eastern and western districts of North Carolina.

The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October: *Provided*, That the city of Washington shall provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, and at Washington, which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the western district shall be held at Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court. [36 Stat. L. 1120.]

As stated in the general notes at the beginning of this chapter, the number of clerks of the court for each of the districts of North Carolina has been reduced from five to four,

respectively, to one in each district. In lieu of the clerks so abolished deputy clerks are provided for.

SEC. 99. [North Dakota.] The State of North Dakota shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, and Sheridan, and all the territory in said State lying west of the Missouri River and south of the twelfth standard parallel, shall constitute the southwestern division of said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Dickey, Sargent, La-moure, Ransom, Griggs, and Steele, shall constitute the southeastern division; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, shall constitute the

northeastern division; and the territory embraced on the date last mentioned in the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry, shall constitute the northwestern division; and the territory embraced on the date last mentioned in the counties of Ward, Williams, and Montrail, and all the territory in said State lying west of the Missouri River and north of the twelfth standard parallel, shall constitute the western division. The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the southwestern division shall be held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo on the third Tuesday in May; for the northeastern division, at Grand Forks on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; and for the western division, at Minot on the second Tuesday in October. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district. [36 Stat. L. 1121.]

This section states concisely what was the existing law.

SEC. 100. [Ohio.] The State of Ohio is divided into two judicial districts, to be known as the northern and southern districts of Ohio. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandotte, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the western division, at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Cleveland, or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the eastern division of said district. Terms of the district court for the western division shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the eastern division, at Columbus on the first Tuesdays in June and December: *Provided*, That terms

of the district court for the southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the southern district, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton. [36 Stat. L. 1121.]

This section states concisely what was the existing law.

SEC. 101. [*Oklahoma.*] The State of Oklahoma is divided into two judicial districts, to be known as the eastern and the western districts of Oklahoma. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Ofuskee, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the eastern district shall be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; and at Chickasha on the first Monday in November in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the western district shall be held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June; at Lawton on the first Monday in September; and at Woodward on the first Monday in November: *Provided*, That suitable rooms and accommodations for holding court at Woodward are furnished free of expense to the United States. The clerk of the district court for the eastern district shall keep his office at Muskogee, and the clerk for the western district at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City. [36 Stat. L. 1122.]

In dividing the state of Oklahoma into counties, the constitutional convention did not pay any attention to the line dividing Oklahoma and Indian territories, the result being that three counties, Grady, Stephens, and Jefferson, were formed from territory lying within both of those territories. Since,

however, but a small portion of each county was taken from territory in the former territory of Oklahoma, following the suggestion of the district attorney, they are placed in the eastern, or Indian Territory division, in this section.

SEC. 102. [*Oregon.*] The State of Oregon shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the clerk for said district shall each appoint, in the manner provided by law, at least one deputy at Pendleton and one at Medford, who shall reside and maintain an office at each of said places. [36 Stat. L. 1122.]

This section states in concise terms what was the existing law; the provision respecting the division of business between the two

judges being found in Judicial Code, sec. 23, *supra*, p. 138, which is made general in its application.

SEC. 103. [*Pennsylvania.*] The State of Pennsylvania is divided into three judicial districts, to be known as the eastern, middle, and western districts of Pennsylvania. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the fourth Monday in February and the third Monday in October; at Harrisburg on the first Mondays in May and December; and at Williamsport on the second Mondays in January and June. The clerk of the court for the middle district shall maintain an office in charge of himself or a deputy at Harrisburg; and civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburg on the first Monday in May and the third Monday in October; and at Erie on the third Monday in July and the second Monday in January. [*36 Stat. L. 1123.*]

This section states in concise terms what was the existing law. The special provision respecting the number of jurors to be summoned is omitted as unnecessary, the provi-

sion respecting liens being provided for in Judicial Code, sec. 60, *supra*, p. 157, which is general in its application.

SEC. 104. [*Rhode Island.*] The State of Rhode Island shall constitute one judicial district, to be known as the district of Rhode Island. Terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November; and at Newport on the second Tuesday in May and the third Tuesday in October. [*36 Stat. L. 1123.*]

This section states in concise terms what was the existing law.

SEC. 105. [*South Carolina.*] The State of South Carolina is divided into two districts, to be known as the eastern and western districts of South Carolina. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the district court for the western district shall be held at Greenville on the third Tuesdays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro,

Orangeburg, Richland, Sumter, and Williamsburg. Terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville, and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other. [*36 Stat. L. 1123.*]

R. S. sec. 456, 4 Fed. Stat. Annot. 48, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, provided that certain counties (naming them) as they existed on Feb. 21, 1823, should constitute the western district of South Carolina, the remaining counties in the state the eastern district.

By Act of March 10, 1871 (14 Stat. S. C. 695), Aiken county was created from territory taken from Edgefield, Barwell, Lexington, and

Orangeburg counties. Of these counties, the first lies in the western district, the other three in the eastern district; hence Aiken county now lies partly within each district, the larger portion being in the eastern district. In view of this fact, and also of the further fact that Columbia, the place of holding court in the eastern district, is much more accessible, Aiken county has been put in the eastern district in this section.

SEC. 106. [*South Dakota.*] The State of South Dakota shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the southern division of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the northern division; the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the central division; and the territory embraced on the date last mentioned in the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the western division. Terms of the district court for the southern division shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the northern division, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the central division, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the western division, at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the district court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court. [*36 Stat. L. 1123.*]

This section states in concise terms what was the existing law.

SEC. 107. [*Tennessee.*] The State of Tennessee is divided into three districts, to be known as the eastern, middle, and western districts of Tennessee. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall constitute the southern division of said district; also the territory embraced on the

date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the northeastern division of said district. Terms of the district court for the southern division of said district shall be held at Chattanooga on the fourth Mondays in May and November; for the northern division, at Knoxville on the first Mondays in January and July; and for the northeastern division, at Greeneville on the last Mondays in March and September. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the Nashville division of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the northeastern division of said district. Terms of the district court for the Nashville division of said district shall be held at Nashville on the second Mondays in April and October; and for the northeastern division, at Cookeville on the second Mondays in May and November: *Provided*, That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the west bank of the river, which shall constitute the eastern division of said district. Terms of the district court for the western division of said district shall be held at Memphis on the fourth Mondays in May and November; and for the eastern division, at Jackson on the fourth Mondays in April and October. The clerk of the court for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the eastern district shall appoint a deputy who shall reside at Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greeneville, which shall be kept open at all times for the transaction of the business of the court. [36 Stat. L. 1124.]

The provision that the terms of court fixed for Greeneville shall be held in a building furnished free of expense to the government is omitted as obsolete, as the court is now held in a federal building in that city.

The Tennessee river, for the greater portion of the distance it traverses the state of Ten-

nessee, forms the dividing line between the western and middle judicial districts of that state. The legislature of that state, in defining the boundaries of some of the counties abutting on that river, fixed the line at low-water mark; consequently unless the river is specifically included in a district, certain

portions above low-water mark would not be in any district. As considerable commerce is carried upon that river, it is quite important that the dividing line between the two judicial districts should be clearly defined. To make the middle of the stream the dividing

line would make it almost impossible to prove in which district a crime committed upon its waters was committed. For this reason the western district is given jurisdiction over the waters of the river to low-water mark on the eastern shore thereof.

SEC. 108. [*Texas.*] The State of Texas is divided into four districts, to be known as the northern, eastern, western, and southern districts of Texas. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which shall constitute the Dallas division; also the territory embraced on the date last mentioned in the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which shall constitute the Fort Worth division; also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which shall constitute the Amarillo division; also the territory embraced on the date last mentioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton, and Yoakum, which shall constitute the Abilene division; also the territory embraced on the date last mentioned in the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and Upton, which shall constitute the San Angelo division of the said district. Terms of the district court for the Dallas division shall be held at Dallas on the second Monday in January and the first Monday in May; for the Fort Worth division, at Fort Worth on the first Monday in November and the second Monday in March; for the Amarillo division, at Amarillo on the third Monday in April and the fourth Monday in September; for the Abilene division, at Abilene on the first Monday in October and the second Monday in April; and for the San Angelo division, at San Angelo on the third Monday in October and the fourth Monday in April. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, and at San Angelo, which shall be kept open at all times for the transaction of the business of the court. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which shall constitute the Tyler division; also the territory embraced on the date last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall constitute the Beaumont division; also the territory embraced on the date last mentioned in the counties of Collin, Cook, Denton, Grayson, and Montague, which shall constitute the Sherman division; also the territory embraced on the date last mentioned in the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which shall constitute the Jefferson division; also the territory embraced on the date last mentioned in the counties of Delta, Fannin, Red River, and Lamar, which shall constitute the Paris division; also the territory em-

braced on the date last mentioned in the counties of Bowie, Franklin, and Titus, which shall constitute the Texarkana division. Terms of the district court for the Tyler division shall be held at Tyler on the fourth Mondays in January and April; for the Jefferson division, at Jefferson on the first Monday in October and the third Monday in February; for the Beaumont division, at Beaumont on the third Monday in November and the first Monday in April; for the Sherman division, at Sherman on the first Monday in January and the third Monday in May; for the Paris division, at Paris on the third Monday in October and the first Monday in March; and for the Texarkana division at Texarkana on the third Monday in March and the first Monday in November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Sherman, at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the Austin division; also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the San Antonio division; also the territory embraced on the date last mentioned in the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward, and Winkler, which shall constitute the El Paso division; also the territory embraced on the date last mentioned in the counties of Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell, which shall constitute the Waco division; also the territory embraced on the date last mentioned in the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the Del Rio division. Terms of the district court for the Austin division shall be held at Austin on the fourth Monday in January and the second Monday in June; for the Waco division, at Waco on the fourth Monday in February and the second Monday in November; for the San Antonio division, at San Antonio on the first Monday in May and the third Monday in December; for the El Paso division, at El Paso on the first Monday in April and the first Monday in October; and for the Del Rio division, at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Austin, at El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The southern district shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which shall constitute the Laredo division; also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the Brownsville division; also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the Galveston division; also the territory embraced on the date last mentioned, in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall constitute the Houston division; also the territory embraced on the date last mentioned, in the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio, and Victoria, which shall constitute the Victoria division. Terms

of the district court for the Galveston division shall be held at Galveston on the second Monday in January and the first Monday in June; for the Houston division, at Houston on the fourth Mondays in February and September; for the Laredo division, at Laredo on the third Monday in April and the second Monday in November; for the Brownsville division, at Brownsville on the second Monday in May and the first Monday in December; and for the Victoria division, at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at each of the places now designated for holding court in said district. [36 Stat. L. 1125.]

The Acts creating the Victoria division of the southern district, the Del Rio division of the western district, and the Texarkana division of the eastern district, authorized the judges to fix the times of holding court in those divisions. The times as fixed by the court have been carried into this section.

In several of the Acts creating new divisions, no name was given the divisions. For purposes of description or identification this is necessary. In view of this fact, names have been given to the divisions corresponding to the places at which the court is held therein.

SEC. 109. [Utah.] The State of Utah shall constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the northern and central divisions. The northern division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The central division shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne. Terms of the district court for the northern division shall be held at Ogden on the second Mondays in March and September; and for the central division, at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district. [36 Stat. L. 1127.]

This section states in concise terms what was the existing law.

SEC. 110. [Vermont.] The State of Vermont shall constitute one judicial district, to be known as the district of Vermont. Terms of the district court shall be held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier, and one at Newport. [36 Stat. L. 1127.]

This section states in concise terms what was the existing law.

SEC. 111. [Virginia.] The State of Virginia is divided into two districts, to be known as the eastern and western districts of Virginia. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greenville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spotsylvania, Stafford, Surry, Sussex, War-

wick, Westmoreland, and York. Terms of the district court shall be held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November; and at Alexandria on the first Mondays in January and July. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe. Terms of the district court shall be held at Lynchburg on the Tuesdays after the second Mondays in March and September; at Danville on the Tuesdays after the second Mondays in April and November; at Abingdon on the Tuesdays after the first Mondays in May and October; at Harrisonburg on the Tuesdays after the first Mondays in June and December; at Charlottesville on the second Monday in January and the first Monday in July; at Roanoke on the third Monday in February and the third Monday in June; and at Big Stone Gap on the fourth Monday in January and the second Monday in August. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Lynchburg, at Danville, at Charlottesville, at Roanoke, at Abingdon, and at Big Stone Gap, which shall be kept open at all times for the transaction of the business of the court. [36 Stat. L. 1127.]

Following the policy stated in the general note at the beginning of this chapter, the number of clerks in the western district has been reduced to one, and in lieu thereof deputy

clerks are provided for. Otherwise the section states in concise terms what was the existing law.

SEC. 112. [Washington.] The State of Washington is divided into two districts, to be known as the eastern and western districts of Washington. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Spokane on the first Tuesdays in April and September; for the southern division, at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Bellingham on the first Tuesdays in April and

October; at Seattle on the first Tuesdays in May and November; and for the southern division, at Tacoma on the first Tuesdays in February and July. The clerks of the courts for the eastern and western districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held. [36 Stat. L. 1128.]

This section states in concise terms what was the existing law.

SEC. 113. [*West Virginia.*] The State of West Virginia is divided into two districts, to be known as the northern and southern districts of West Virginia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzell, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof. Terms of the district court for the northern district shall be held at Martinsburg, the first Tuesday of April and the third Tuesday of September; at Clarksburg, the second Tuesday of April and the first Tuesday of October; at Wheeling, the first Tuesday of May and the third Tuesday of October; at Philippi, the fourth Tuesday of May and first Tuesday of November; at Parkersburg, the second Tuesday of January and second Tuesday of June: *Provided*, That a place for holding court at Philippi shall be furnished the Government free of cost by Barbour County until other provision is made therefor by law. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday in June and the third Tuesday in November; at Huntington, on the first Tuesday in April and the first Tuesday after the third Monday in September; at Bluefield on the first Tuesday in May and the third Tuesday in October; at Addison on the first Monday in September; and at Lewisburg on the second Tuesday in February: *Provided*, That accommodations for holding court at Addison shall be furnished without cost to the United States. [36 Stat. L. 1129.]

This section states in concise terms what was the existing law.

SEC. 114. [*Wisconsin.*] The State of Wisconsin is divided into two districts, to be known as the eastern and western districts of Wisconsin. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago. Terms of the district court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin,

Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood. Terms of the district court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The district court for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior, may be made returnable at Superior; and the clerk at that place shall keep in his office the original records of all actions, prosecutions, and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned, shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers and orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior, shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial. [36 Stat. L. 1129.]

Following the policy stated in the general note at the beginning of this chapter, the number of clerks in the western district has been reduced from three to one, and in lieu thereof deputy clerks provided for.

After the division of Wisconsin into judicial districts, certain new counties were cre-

ated by the legislature of that state, and the lines were so drawn that three counties were partly in one judicial district and partly in another. This has been corrected by the assignment of the counties concerned in one district or the other, as their geographical location seemed to indicate.

SEC. 115. [Wyoming.] The State of Wyoming and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided*, That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the Government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park. [36 Stat. L. 1130.]

The existing law provided that terms of the United States court for the district of Wyoming might be held in the Yellowstone National Park for the trial of offenses com-

mitted therein. In view of this fact it was considered that the park should be made distinctly a part of the district of Wyoming.

CHAPTER SIX.

CIRCUIT COURTS OF APPEALS.

- | | |
|---|--|
| <p>Sec. 116. Circuits. 117. Circuit courts of appeals. 118. Circuit judges. 119. Allotment of justices to the circuits. 120. Chief justice and associate justices of Supreme Court, and district judges, may sit in circuit court of appeals. 121. Justices allotted to circuits, how designated. 122. Seals, forms of process, and rules. 123. Marshals. 124. Clerks. 125. Deputy clerks; appointment and removal. 126. Terms. 127. Rooms for court, how provided. 128. Jurisdiction; when judgment final.</p> | <p>Sec. 129. Appeals in proceedings for injunctions and receivers. 130. Appellate and supervisory jurisdiction under the bankrupt act. 131. Appeals from the United States court for China. 132. Allowance of appeals, etc. 133. Writs of error and appeals from the supreme courts of Arizona and New Mexico. 134. Writs of error and appeals from district court for Alaska to circuit court of appeals for ninth circuit; court may certify questions to the Supreme Court. 135. Appeals and writs of error from Alaska; where heard.</p> |
|---|--|

SEC. 116. [*Circuits.*] There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii. [*36 Stat. L. 1131.*]

This section constitutes part of R. S. sec. 604, 4 Fed. Stat. Annot. 59, and includes parts of various Acts as quoted in 4 Fed. Stat. Annot. 60, and part of section 16 of the Act of June 16, 1906, ch. 3335, 34 Stat. L. 275, 1909 Supp. Fed. Stat. Annot. 641, relating to the district of Oklahoma.

R. S. sec. 604, above cited, is expressly re-

pealed by Judicial Code, sec. 297, *infra*, p. 250, which also repeals "all Acts and parts of Acts . . . creating or changing judicial circuits . . . enacted prior to February first, nineteen hundred and eleven."

For Acts enacted on or after Feb. 1, 1911, see the analysis to this title, *supra*, p. 131.

SEC. 117. [*Circuit Courts of Appeals.*] There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established. [*36 Stat. L. 1131.*]

This section was part of sec. 2 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 826, 4 Fed. Stat. Annot. 396.

SEC. 118. [*Circuit judges.*] There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges, in the fourth circuit, two circuit judges, and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year, each, payable monthly. Each circuit judge shall reside within his circuit. [36 Stat. L. 1131.]

This section was existing law except as to the number of judges in the fourth circuit. "All Acts and parts of Acts authorizing the appointment of United States circuit or dis-

trict judges . . . enacted prior to February first, nineteen hundred and eleven," are repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 119. [*Allotment of justices to the circuits.*] The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit. [36 Stat. L. 1131.]

This section is a combination and modification of R. S. sec. 606, 4 Fed. Stat. Annot. 238, and R. S. sec. 618, 4 Fed. Stat. Annot. 245,

both of which sections are expressly repealed in Judicial Code, sec. 297, *infra*, p. 250.

SEC. 120. [*Chief justice and associate justices of Supreme Court, and district judges, may sit in Circuit Court of Appeals.*] The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. [36 Stat. L. 1132.]

This section is but a re-enactment, with slight changes of language, of section 3 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 827, 4 Fed. Stat. Annot. 396, the changes consisting in the dropping of the word "that" at the begin-

ning of the section, in the substitution of the words "shall" for "should," and in the omission of the words "justice or" in the proviso, since it is not contemplated that the justices of the Supreme Court shall sit in the District Courts.

SEC. 121. [*Justices allotted to circuits, how designated.*] The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any

circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice. [*36 Stat. L. 1132.*]

This section was R. S. sec. 605, 4 Fed. Stat. Annot. 238, which is expressly repealed in Judicial Code, sec. 297, *infra*, p. 250.

The words "this title" mean this Act, *i. e.*, this Judicial Code. See sec. 293, *infra*, p. 250.

SEC. 122. [*Seals, forms of process, and rules.*] Each of said circuit courts of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. [*36 Stat. L. 1132.*]

This section consists of parts of section 2 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 826, 4 Fed. Stat.

Annot. 396, with slight changes necessary for purposes of revision.

SEC. 123. [*Marshals.*] The United States marshals in and for the several districts of said courts shall be the marshals of said circuit courts of appeals, and shall exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable. [*36 Stat. L. 1132.*]

The language of the two provisions revised in this section has been transposed, in order to state in concise language the existing law.

The two provisions referred to are in the

Act of July 16, 1892, ch. 196, 4 Fed. Stat. Annot. 74, and in section 2 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 826, 4 Fed. Stat. Annot. 396.

SEC. 124. [*Clerks.*] Each court shall appoint a clerk, who shall exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable. [*36 Stat. L. 1132.*]

This section states what was the existing law, which was in sec. 2 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 826, 4 Fed. Stat. Annot. 396.

SEC. 125. [*Deputy clerks; appointment and removal.*] The clerk of the circuit court of appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. [*36 Stat. L. 1132.*]

This section is new, there being no previous authority for the appointment of a deputy clerk. The provisions of the section are

similar to those in the Judicial Code, sec. 4, *supra*, p. 133.

SEC. 126. [*Terms.*] A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia;

in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: *Provided*, That terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the district court of the United States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans: *Provided*, That nothing herein shall prevent the court from hearing appeals or writs of error wherever the said courts shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the States of Colorado, Utah, and Wyoming, and the supreme court of the Territory of New Mexico to the circuit court of appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said States or Territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne. [36 Stat. L. 1132.]

This section sets out in concise language the terms and places of holding terms of the Circuit Court of Appeals in the various circuits, and was existing law.

"All Acts and parts of Acts . . . fixing

or changing the times or places of holding court, . . . enacted prior to February first, nineteen hundred and eleven," are repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 127. [*Rooms for court, how provided.*] The marshals for the several districts in which said circuit courts of appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided*, That in case proper rooms can not be provided in such buildings, then the marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for such courts. [36 Stat. L. 1133.]

This section states what was existing law. The section is from sec. 9 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 4 Fed. Stat. Annot. 427.

SEC. 128. [*Jurisdiction; when judgment final.*] The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases. [36 Stat. L. 1133.]

This section is drawn from the appropriate provisions of section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, the remaining provisions being revised in sections 238, 239, 240, *infra*, pp. 231, 232. The section states what was existing law. Under section 86 of the Organic Act for Hawaii, as last amended, Act of March 3, 1909, ch. 269, 35 Stat. L. 838, 1909 Supp. Fed. Stat. Annot. 152, appeals and writs of error could be taken to the Circuit Court of Appeals for the ninth circuit in the same classes of cases as from a District Court of the United States. For

that reason Hawaii was included in this section.

As to appeals and writs of error direct to the United States Supreme Court from the United States District Court for Hawaii see Judicial Code, sec. 238, *infra*, p. 231.

As to appeals and writs of error direct to the United States Supreme Court from the Supreme Court of the territory of Hawaii see Judicial Code, sec. 246, *infra*, p. 233.

The entire concluding clause, "in all cases arising under," etc., appears in Judicial Code, sec. 250, *infra*, p. 235.

SEC. 129. [*Appeals in proceedings for injunctions and receivers.*] Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond. [36 Stat. L. 1134.]

* Section 7 of the Act of March 3, 1891 (4 Fed. Stat. Annot. 423, note), provided that appeals might be taken to the Circuit Court of Appeals from interlocutory orders 'granting or continuing an injunction.' This was found to be unsatisfactory, and by the Act of Feb. 18, 1895 (4 Fed. Stat. Annot. 423, note), the section was amended so as to cover orders by which an injunction 'is granted, continued, refused, or dissolved, or an application to dissolve an injunction is refused.' Later it was desired to extend the appeal to orders in receivership cases, and this was done by the Act of June 6, 1900 (4 Fed. Stat. Annot. 422). This law was so drawn, however, that it operated to repeal the Act

of 1895, which, it is to be presumed, was not intended. (Columbia Wire Co. v. Boyce, (1900) 104 Fed. 172, 44 C. C. A. 588; Rowan v. Ide, (1901) 107 Fed. 161, 46 C. C. A. 214.) This resulted from the fact that the Act of 1900 amended the Act of 1891 and overlooked the Act of 1895. In view of this, the committee has restored the provisions of the Act of 1895 permitting an appeal from an interlocutory order 'refusing or dissolving,' or 'refusing to dissolve an injunction.' In this connection, it may be noted that by the Acts of 1891, 1895, and 1900 the cases in which appeals might be taken were those in which an appeal might be taken from a final decree to the Circuit Court of Appeals. The Act of

1906 (1909 Supp. Fed. Stat. Annot. 291) removed this limitation by providing that the appeals might be taken in *any* case from any such order or decree, although the case might be one which upon final decree would go directly to the Supreme Court. To remove any doubt upon this point, the committee has added, immediately preceding the first proviso, the words 'notwithstanding an appeal in such case might upon final decree, under the statutes regulating the same, be taken di-

rectly to the Supreme Court.'" *Report of Committee on Revision.*

The Act of 1906 mentioned in the foregoing report is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

Appeals direct to the Supreme Court from orders granting or denying interlocutory injunctions restraining enforcement of state statutes, see Judicial Code, sec. 266, *infra*, p. 242.

SEC. 130. [*Appellate and supervisory jurisdiction under the bankrupt act.*] The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed. [36 Stat. L. 1134.]

This section merely declares the appellate jurisdiction vested in the Circuit Court of Appeals by the Bankruptcy Act of 1898 and the Acts amendatory thereof, and the manner of its exercise.

"The appellate and supervisory jurisdiction" to which this section refers is found in sections 24 and 25 of the Bankruptcy Act of 1898, which appear, copiously annotated, in this Supplement, *post*, title BANKRUPTCY, and 1 Fed. Stat. Annot. 593-604.

SEC. 131. [*Appeals from the United States court for China.*] The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the Act entitled "An Act creating a United States court for China and prescribing the jurisdiction thereof," approved June thirtieth, nineteen hundred and six. [36 Stat. L. 1134.]

This section is merely declaratory of the appellate jurisdiction vested in the Circuit Court of Appeals for the ninth circuit by the Act creating a United States court for China. The reference in the text section is to section

3 of the Act of June 30, 1906, ch. 3934, 34 Stat. L. 815, 1909 Supp. Fed. Stat. Annot. 294, also annotated *post*, title JUDICIARY, in this Supplement.

SEC. 132. [*Allowance of appeals, etc.*] Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively. [36 Stat. L. 1134.]

This section states what was the existing law, the changes made in the language being minor in character. The existing law was

the last part of section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428.

SEC. 133. [*Writs of error and appeals from the supreme courts of Arizona and New Mexico.*] The circuit courts of appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders, and decrees of the district courts; and for that purpose said Territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits. [36 Stat. L. 1134.]

This section is but a re-enactment of section 15 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 431, the changes made in the language used being necessary for the purposes of revision. The section states what was existing law.

The words "this title" in the text section mean "this Act," i. e., this Judicial Code. See sec. 293, *infra*, p. 250.

Writs of error and appeal direct to the United States Supreme Court from the Supreme Courts of the territories of Arizona and New Mexico, see sec. 245, *infra*, p. 233.

Alaska. — See the following sections 134 and 135, and sec. 247, *infra*, p. 234.

Hawaii. — See secs. 238, 246, *infra*, pp. 231, 233.

Philippines. — See sec. 248, *infra*, p. 234.

Porto Rico. — See sec. 244, *infra*, p. 233.

"Final by this title . . . of the district courts." — These words in the text section evidently indicate that the test of finality is to be found in section 128, *supra*, p. 195; for in section 15 of the Circuit Court of Appeals Act, 4 Fed. Stat. Annot. 431, the phrase was "final by this act," which could have referred only to section 6 of that act, and the appropriate provisions of the latter are now embodied in section 128, above cited.

SEC. 134. [*Writs of error and appeals from district court for Alaska to circuit court of appeals for ninth circuit; court may certify questions to the Supreme Court.*] In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals. [*36 Stat. L. 1134.*]

This section is drawn from section 202 of the Criminal Code for Alaska, 1 Fed. Stat. Annot. 370, and from sections 504 and 505 of the Civil Code, 1 Fed. Stat. Annot. 147, 148.

Judicial Code, sec. 247, referred to in the text is given *infra*, p. 234.

"The court may certify such question or proposition," etc. — The leading provision for certification to the Supreme Court is in Judi-

cial Code, sec. 239, *infra*, p. 231, which was in section 6 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 409. Similar provision is found in Judicial Code, sec. 251, *infra*, p. 236, and in the last clause of Judicial Code, sec. 252, *infra*, p. 237, which also appears in this Supplement, *post*, title BANKRUPTCY, as section 25*d* of the Bankruptcy Act of 1898, and is there annotated.

SEC. 135. [*Appeals and writs of error from Alaska; where heard.*] All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided*, That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there. [*36 Stat. L. 1135.*]

This is a re-enactment of the Act of Jan. 11, 1909, ch. 15, 35 St. L. 585, 1909 Supp. Fed. Stat. Annot. 30.

CHAPTER SEVEN.

THE COURT OF CLAIMS.

- | | |
|--|--|
| <p>Sec. 136. Appointment, oath, and salary of judges. 137. Seal. 138. Session; quorum. 139. Officers of the court. 140. Salaries of officers. 141. Clerk's bond. 142. Contingent fund. 143. Reports to Congress; copies for departments, etc. 144. Members of Congress not to practice in the court. 145. Jurisdiction. Par. 1. Claims against the United States. 2. Set-offs. 3. Disbursing officers. 146. Judgments for set-off or counterclaims; how enforced. 147. Decree on accounts of disbursing officers. 148. Claims referred by departments. 149. Procedure in cases transmitted by departments. 150. Judgments in cases transmitted by departments; how paid. 151. Either House of Congress may refer certain claims to court. 152. Costs may be allowed prevailing party. 153. Claims growing out of treaties not cognizable therein. 154. Claims pending in other courts. 155. Aliens. 156. All claims to be filed within six years; exceptions. 157. Rules of practice; may punish contempt. 158. Oaths and acknowledgments. 159. Petitions and verification.</p> | <p>Sec. 160. Petition dismissed, when. 161. Burden of proof and evidence as to loyalty. 162. Claims for proceeds arising from sales of abandoned property. 163. Commissioners to take testimony. 164. Power to call upon departments for information. 165. When testimony not to be taken. 166. Examination of claimant. 167. Testimony; where taken. 168. Witnesses before commissioners. 169. Cross-examinations. 170. Witnesses; how sworn. 171. Fees of commissioners, by whom paid. 172. Claims forfeited for fraud. 173. Claims under act of June 16, 1874. 174. New trial on motion of claimant. 175. New trial on motion of United States. 176. Cost of printing record. 177. No interest on claims. 178. Effect of payment of judgment. 179. Final judgments a bar. 180. Debtors to the United States may have amount due ascertained. 181. Appeals. 182. Appeals in Indian cases. 183. Attorney General's report to Congress. 184. Loyalty a jurisdictional fact in certain cases. 185. Attorney General to appear for the defense. 186. Persons not to be excluded as witnesses on account of color or because of interest; plaintiff may be witness for Government. 187. Reports of court to Congress.</p> |
|--|--|

SEC. 136. [*Appointment, oath, and salary of judges.*] The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury. [36 Stat. L. 1135.]

This section is a re-enactment of R. S. sec. 1049, 2 Fed. Stat. Annot. 53, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, the increase in the salaries of

the judges provided in the Act of Feb. 12, 1903, ch. 547, 32 Stat. L. 825, 10 Fed. Stat. Annot. 198, being carried into the section.

SEC. 137. [*Seal.*] The Court of Claims shall have a seal, with such device as it may order. [36 Stat. L. 1136.]

This section is a re-enactment, without change, of R. S. sec. 1050, 2 Fed. Stat. Annot. 53.

SEC. 138. [*Session; quorum.*] The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December

and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided*, That the concurrence of three judges shall be necessary to the decision of any case. [36 Stat. L. 1136.]

This section is a re-enactment of R. S. sec. 1052, 2 Fed. Stat. Annot. 54 (which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250), as amended by the Act of June 23, 1874, ch. 468, 18 Stat. L. 252, 1 Fed. Stat. Annot. 54.

SEC. 139. [*Officers of the court.*] The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a chief messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause. [36 Stat. L. 1136.]

This section is a re-enactment of R. S. sec. 1053, 2 Fed. Stat. Annot. 54, with no change except that, as in recent Appropriation Acts the messenger provided for in the Revised Statutes section is termed a *chief*, for the reason that additional messengers are now provided for the court, he is therefore so termed in the Judicial Code section. R. S. sec. 1053, above cited, is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 140. [*Salaries of officers.*] The salary of the chief clerk shall be three thousand five hundred dollars a year; of the assistant clerk two thousand five hundred dollars a year; of the bailiff one thousand five hundred dollars a year, and of the chief messenger one thousand dollars a year, payable monthly from the Treasury. [36 Stat. L. 1136.]

Section 140 states the salaries provided in the last three or four Appropriation Acts for the officers authorized by R. S. sec. 1054, 2 Fed. Stat. Annot. 54, the latter section being expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. See, for example, the Appropriation Acts of May 22, 1908, ch. 186, 35 Stat. L. 244; of March 4, 1909, ch. 297, 35 Stat. L. 906, and of June 22, 1906, ch. 3514, 34 Stat. L. 448.

SEC. 141. [*Clerk's bond.*] The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury. [36 Stat. L. 1136.]

This section is a re-enactment, without change, of R. S. sec. 1056, 2 Fed. Stat. Annot. 54, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 142. [*Contingent fund.*] The said clerk shall have authority when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the Government are settled. [36 Stat. L. 1136.]

This section is a re-enactment, without change, of R. S. sec. 1056, 2 Fed. Stat. Annot. 54, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 143. [*Reports to Congress; copies for departments, etc.*] On the first day of every regular session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads

of departments; to the Solicitor, the Comptroller, and the Auditors of the Treasury; to the Commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States. [36 Stat. L. 1136.]

This section is a re-enactment of R. S. sec. 1057, 2 Fed. Stat. Annot. 55, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; the only change consisting in

the use of the word "regular" for "December" in the first line of the section, and in the omission of the word "and" at the beginning of the last sentence.

SEC. 144. [*Members of Congress not to practice in the court.*] Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in the Court of Claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States. [36 Stat. L. 1136.]

This section is a re-enactment and expansion of R. S. sec. 1058, 2 Fed. Stat. Annot. 55, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 145. [*Jurisdiction.*] The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. [*Claims against the United States.*] All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. [*Set-offs.*] All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. [*Disbursing officers.*] The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. [36 Stat. L. 1136.]

This section states in concise language the jurisdiction of the Court of Claims as conferred by R. S. secs. 1059, 1060, 2 Fed. Stat.

Annot. 55, 65, and the Tucker Act of March 3, 1887, ch. 359, sec. 1, 24 Stat. L. 505, 2 Fed. Stat. Annot. 80, all of which sections, to-

gether with the Act of June 27, 1898, ch. 503, 30 Stat. L. 494, 2 Fed. Stat. Annot. 82, are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

See also the provisions as to the jurisdiction of the Court of Claims in paragraph "Twentieth" of Judicial Code, sec. 24, *supra*, p. 140.

The Act of Jan. 20, 1885, ch. 25, 23 Stat. L. 283, 2 Fed. Stat. Annot. 88, commonly known as the French Spoliation Claims Act, and the Act of March 3, 1891, ch. 538, 26 Stat. L. 851, 3 Fed. Stat. Annot. 91, commonly known as the Indian Depredation Claims Act, have not been carried into this

section, for the reason that neither Act is "one of a general nature, permanent in character." Section 2 of the former Act requires that suit shall be brought within two years after its passage, or the claims shall be forever barred. The latter Act not only requires that all claims shall be put in suit within three years after its passage or be barred, but there is a further provision that no suit shall be maintained for any depredation thereafter committed. The Acts will therefore remain in force outside of this section, without repeal, until all pending cases are finally disposed of, when they will become obsolete.

SEC. 146. [*Judgments for set-off or counterclaims; how enforced.*] Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced. [*36 Stat. L. 1137.*]

Except for omission of reference to the Circuit Court, Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249, this section is a re-enactment, without change,

of R. S. sec. 1061, 2 Fed. Stat. Annot. 61, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 147. [*Decree on accounts of disbursing officers.*] Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts. [*36 Stat. L. 1137.*]

This section is a re-enactment, without change, of R. S. sec. 1062, 2 Fed. Stat. Annot. 61, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 148. [*Claims referred by departments.*] When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto, to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to

said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication. [36 Stat. L. 1137.]

This section is drawn from R. S. sec. 1063, 2 Fed. Stat. Annot. 62, sections 12 and 13 of the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 507, 2 Fed. Stat. Annot. 86, 87, and section 2 of the Bowman Act of March

3, 1883, ch. 116, 22 Stat. L. 485, 2 Fed. Stat. Annot. 77; all of which provisions are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 149. [*Procedure in cases transmitted by departments.*] All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations. [36 Stat. L. 1138.]

This section is a re-enactment, without material change, of R. S. sec. 1064, 2 Fed. Stat. Annot. 63, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 150. [*Judgments in cases transmitted by departments; how paid.*] The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court. [36 Stat. L. 1138.]

This section is a re-enactment, without change, of R. S. sec. 1065, 2 Fed. Stat. Annot. 64, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 151. [*Either House of Congress may refer certain claims to court.*] Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. [36 Stat. L. 1138.]

This section is a re-enactment, without material change, of the Act of June 25, 1910, 36 Stat. L. 409, which amended the Tucker Act of March 3, 1887, ch. 359, sec. 14, 24 Stat. L. 507, 2 Fed. Stat. Annot. 87, the latter section being also expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

The Act given below is probably superseded by this section, but it is not mentioned among the Acts repealed in section 297, although that section does repeal, among others, section 14 of the Act of March 3, 1887, which is amended by the Act here set forth.

An Act To amend section fourteen of "An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven.

[Act of June 25, 1910, ch. 409.]

[Reference to Court of Claims of claims pending in Congress.] That section fourteen of the Act of March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the bringing of suits against the Government of the United States," be, and the same is hereby, amended by adding at the end thereof the words "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity, against the United States," so that when amended it shall read as follows:

"SEC. 14: That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the Act approved March third, eighteen hundred and eighty-three, entitled 'An Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim, or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed, or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity, against the United States and the amount if any legally or equitably due from the United States to the claimant." [36 Stat. L. 837.]

See 2 Fed. Stat. Annot. 87, for the above section as originally enacted.

SEC. 152. [*Costs may be allowed prevailing party.*] If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. [36 Stat. L. 1138.]

Section 152 is a re-enactment, without change, of section 15 of the Tucker Act of March 3, 1889, ch. 359, 24 Stat. L. 508, 2

Fed. Stat. Annot. 88, the latter section being expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 153. [*Claims growing out of treaties not cognizable therein.*] The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. [36 Stat. L. 1138.]

This section is a re-enactment, without change, of R. S. sec. 1066, 2 Fed. Stat. Annot. 64, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 154. [*Claims pending in other courts.*] No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. [36 Stat. L. 1138.]

This section is a re-enactment, without change, of R. S. sec. 1067, 2 Fed. Stat. Annot. 64, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 155. [*Aliens.*] Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1068, 2 Fed. Stat. Annot. 64, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 156. [*All claims to be filed within six years; exceptions.*] Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1069, 2 Fed. Stat. Annot. 65, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

See a repetition of some of the provisions in this section in paragraph "Twentieth" of Judicial Code, sec. 24, *supra*, p. 140.

SEC. 157. [*Rules of practice; may punish contempts.*] The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1070, 2 Fed. Stat. Annot. 67, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 158. [*Oaths and acknowledgments.*] The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1071, 2 Fed. Stat. Annot. 67, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 159. [*Petitions and verification.*] The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he

believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1072, 2 Fed. Stat. Annot. 67, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 160. [*Petition dismissed, when.*] The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed. [36 Stat. L. 1139.]

This section is a re-enactment, without change, of R. S. sec. 1073, 2 Fed. Stat. Annot. 68, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 161. [*Burden of proof and evidence as to loyalty.*] Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during such Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said Civil War. [36 Stat. L. 1139.]

This section is a re-enactment of provisions in R. S. sec. 1074, 2 Fed. Stat. Annot. 68, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only changes are

in the substitution of the words "Civil War" for the word "rebellion," and the omission of the provision making certain facts *prima facie* evidence of disloyalty.

SEC. 162. [*Claims for proceeds arising from sales of abandoned property.*] The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled "An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding. [36 Stat. L. 1139.]

This section is evidently drawn from paragraph "Fourth" of R. S. sec. 1059, 2 Fed. Stat. Annot. 60, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 163. [*Commissioners to take testimony.*] The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1075, 2 Fed. Stat. Annot. 68, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 164. [*Power to call upon departments for information.*] The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded

and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1076, 2 Fed. Stat. Annot. 69, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 165. [*When testimony not to be taken.*] When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein. [36 Stat. L. 1140.]

This section is a re-enactment of R. S. sec. 1077, 2 Fed. Stat. Annot. 69, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, the words "be the duty of the court to" being omitted, with the effect of

prohibiting the court from authorizing the taking of testimony when the petition of the claimant does not furnish any ground for relief.

SEC. 166. [*Examination of claimant.*] The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1080, 2 Fed. Stat. Annot. 70, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 167. [*Testimony; where taken.*] The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1081, 2 Fed. Stat. Annot. 70, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 168. [*Witnesses before commissioners.*] The Court of Claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1082, 2 Fed. Stat. Annot. 70, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 169. [*Cross-examinations.*] In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in

cases where testimony is taken on behalf of the United States, under like regulations. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1083, 2 Fed. Stat. Annot. 71, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 170. [*Witnesses; how sworn.*] The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination. [36 Stat. L. 1140.]

This section is a re-enactment, without change, of R. S. sec. 1084, 2 Fed. Stat. Annot. 71, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 171. [*Fees of commissioners, by whom paid.*] When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the Government, such fees shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose. [36 Stat. L. 1141.]

This section is a re-enactment of R. S. sec. 1085, 2 Fed. Stat. Annot. 71, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; the words "together with all postage incurred by the Assistant Attorney

General" being omitted as obsolete, since all such business is entitled to be sent through the mails under the official frank of the department.

SEC. 172. [*Claims forfeited for fraud.*] Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1086, 2 Fed. Stat. Annot. 71, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 173. [*Claims under Act of June 16, 1874.*] No claim shall be allowed by the accounting officers under the provisions of the Act of Congress approved June sixteenth, eighteen hundred and seventy-four, or by the Court of Claims, or by Congress, to any person where such claimant, or those under whom he claims, shall willfully, knowingly, and with intent to defraud the United States, have claimed more than was justly due in respect of such claim, or presented any false evidence to Congress, or to any department or court, in support thereof. [36 Stat. L. 1141.]

This section is a re-enactment of section 2 of the Act of April 30, 1878, ch. 77, 20 Stat. L. 524, 2 Fed. Stat. Annot. 19, the only

change being the omission of the word "hereafter" in the first line as redundant.

SEC. 174. [*New trial on motion of claimant.*] When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1087, 2 Fed. Stat. Annot. 71, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 175. [*New trial on motion of United States.*] The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within

two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1088, 2 Fed. Stat. Annot. 72, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 176. [*Cost of printing record.*] There shall be taxed against the losing party in each and every cause pending in the Court of Claims the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States. [36 Stat. L. 1141.]

This section is drawn from a provision in the Act of March 3, 1877, ch. 105, 2 Fed. Stat. Annot. 293, modified so as to apply only to the taxing of costs and the printing of records in the Court of Claims. In so far as that provision applies to the Supreme Court, it has been revised in Judicial Code, sec. 254, *infra*, p. 238.

SEC. 177. [*No interest on claims.*] No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1091, 2 Fed. Stat. Annot. 73, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 178. [*Effect of payment of judgment.*] The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1092, 2 Fed. Stat. Annot. 74, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 179. [*Final judgments a bar.*] Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. [36 Stat. L. 1141.]

This section is a re-enactment, without change, of R. S. sec. 1093, 2 Fed. Stat. Annot. 74, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 180. [*Debtors to the United States may have amount due ascertained.*] Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and

unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section. [36 Stat. L. 1141.]

This section is drawn from sections 3 and 8 of the Tucker Act of March 3, 1887, ch. 359, 2 Fed. Stat. Annot. 83, 85, which sections are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; the last sentence of this section being derived from section 8 of

the Act, which makes applicable to suits brought under the Act the provisions of R. S. sec. 1080, 2 Fed. Stat. Annot. 70, which is revised in Judicial Code, sec. 166, *supra*, p. 206.

SEC. 181. [*Appeals.*] The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed. [36 Stat. L. 1142.]

This section is drawn from section 9 of the Tucker Act of March 3, 1887, ch. 359, 2 Fed. Stat. Annot. 85, which is expressly repealed

by Judicial Code, sec. 297, *infra*, p. 250. Only such changes are made as were necessary for proper revision.

SEC. 182. [*Appeals in Indian cases.*] In any case brought in the Court of Claims under any Act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed. [36 Stat. L. 1142.]

This section is evidently a re-enactment of section 10 of the Act of March 3, 1891, ch. 538, 26 Stat. L. 854, 2 Fed. Stat. Annot. 100,

with only such changes as were necessary for proper revision. See the note to Judicial Code, sec. 145, *supra*, p. 200.

SEC. 183. [*Attorney General's report to Congress.*] The Attorney General shall report to Congress, at the beginning of each regular session, the suits under section one hundred and eighty, in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case. [36 Stat. L. 1142.]

This section is substantially a re-enactment of section 11 of the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 507, 2 Fed. Stat. Annot. 86, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The word "regular" before the word "session" has been added, in the belief that

Congress did not mean to require a report at the beginning of a special session. The dropping of the words "of Congress" and the substitution of the words "section one hundred and eighty" for "this act" make no change in the meaning of the section.

SEC. 184. [*Loyalty a jurisdictional fact in certain cases.*] In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late Civil War, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the Government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the Government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed. [36 Stat. L. 1142.]

This section is a re-enactment of section 4 of the Bowman Act of March 3, 1883, ch. 116, 22 Stat. L. 486, 2 Fed. Stat. Annot. 79, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change made is in

the substitution of the words "Civil War" for the words "war for the suppression of the rebellion," a similar change being made in Judicial Code, sec. 161, *supra*, p. 205.

SEC. 185. [*Attorney General to appear for the defense.*] The Attorney-General, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under the provisions of this chapter, with the same power to interpose counter claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is required to defend the United States in said court. [36 Stat. L. 1142.]

This section is drawn from section 5 of the Bowman Act of March 3, 1883, ch. 116, 22 Stat. L. 486, 2 Fed. Stat. Annot. 79, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The changes consist in the omission of the word "now" before the word "required," and in the substitution of

the words "the provisions of this chapter" for the words "this act." The effect of this substitution is to require the Attorney General to appear in all cases arising under the provisions of this chapter instead of cases arising under the Bowman Act, and to interpose the proper defenses to suit.

SEC. 186. [*Persons not to be excluded as witnesses on account of color or because of interest; plaintiff may be witness for government.*] No person shall be excluded as a witness in the Court of Claims on account of color, [or] because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government. [36 Stat. L. 1143.]

This section is a combination of R. S. sec. 1078, 2 Fed. Stat. Annot. 69; of section 6 of the Bowman Act of March 3, 1883, ch. 116, 22 Stat. L. 486, 2 Fed. Stat. Annot. 79; and of section 8 of the Tucker Act of March 3,

1887, ch. 359, 24 Stat. L. 506, 2 Fed. Stat. Annot. 85. All of those statutes are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. And the text section is made applicable to all cases in the Court of Claims.

SEC. 187. [*Reports of court to Congress.*] Reports of the Court of Claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon. [36 Stat. L. 1143.]

This section is drawn from sec. 7 of the Bowman Act of March 3, 1883, ch. 116, 22 Stat. L. 486, 2 Fed. Stat. Annot. 79, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

CHAPTER EIGHT.¹

THE COURT OF CUSTOMS APPEALS.

Sec.

188. Court of Customs Appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.
189. Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid.
190. Marshal of the court; appointment, salary, and duties.
191. Clerk of the court; appointment, salary, and duties.
192. Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties.
193. Rooms for holding court to be provided; bailiffs and messengers.
194. To be a court of record; to prescribe form and style of seal, and establish

Sec.

- rules and regulations; may affirm, modify, or reverse and remand case, etc.
195. Final decisions of Board of General Appraisers to be reviewed only by Customs Court.
196. Other courts deprived of jurisdiction in customs cases; pending cases excepted.
197. Transfer to Customs Court of pending cases; completion of testimony.
198. Appeals from Board of General Appraisers; time within which to be taken; record to be transmitted to customs court.
199. Records filed in Customs Court to be at once placed on calendar; calendar to be called every sixty days.

SEC. 188. [*Court of Customs Appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.*] There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act. [36 Stat. L. 1143.]

This section states in concise terms what was the existing law, although the provisions of the section are not in the order in which they appear in the original section 28 cited

in the footnote on this page. The salaries of the judges are as fixed by the Deficiencies Appropriation Act of Feb. 25, 1910, ch. 62, 36 Stat. L. 214.

SEC. 189. [*Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid.*] The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the

¹ This chapter is drawn from that part of section 28 of the Tariff Act of Aug. 5, 1909, ch. 6, 36 Stat. L. 105, 1909 Supp. Fed. Stat. Annot. 821, which amends section 29 of the Act of June 10, 1890, ch. 407, 26 Stat. L. 141, 2 Fed. Stat. Annot. 635. It is here broken up into twelve sections for purposes of a proper revision. In some sections, kindred provisions appearing in different parts of the original section 28 have been brought together for the purpose of a more logical arrangement of the subject-matter.

court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual necessary expenses of one stenographic clerk who may accompany him; and such payments shall be allowed the marshal in the settlement of his accounts with the United States. [36 Stat: L. 1143.]

This section is made up of two provisions of the original law, the only change being in the substitution of the word "chapter" for the word "act."

SEC. 190. [*Marshal of the court; appointment, salary, and duties.*] Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be the marshals of said court. The marshal of said court, for the District of Columbia, is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge. [36 Stat. L. 1144.]

This section transposes some of the clauses in the original law, and the word "shall" is substituted for the word "to."

SEC. 191. [*Clerk of the court; appointment, salary, and duties.*] The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which sum shall be in full payment for all service rendered by such clerk; and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. [36 Stat. L. 1144.]

The salary of the clerk is as fixed by the Deficiencies Appropriation Act of Feb. 25, 1910, ch. 62, 36 Stat. L. 214.

SEC. 192. [*Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties.*] In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the

Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. [36 Stat. L. 1144.]

The salaries of the various officers and clerks have been revised in accordance with the changes made therein by the Deficiencies Appropriation Act cited in the last preceding note.

SEC. 193. [*Rooms for holding court to be provided; bailiffs and messengers.*] The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided*, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals. [36 Stat. L. 1144.]

The only changes made by this section are the omission of the words "of the United States" after the words "Attorney General" and the breaking of the section into more sentences.

SEC. 194. [*To be a court of record; to prescribe form and style of seal, and establish rules and regulations; may affirm, modify, or reverse and remand case, etc.*] The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. [36 Stat. L. 1145.]

The repeating of the name of the court at the beginning of the section, the substitution of the words "in this chapter" for the word "hereinafter," and the breaking of the section into more sentences make no change in the existing law.

SEC. 195. [*Final decisions of Board of General Appraisers to be reviewed only by Customs Court.*] The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judg-

ments and decrees of said Court of Customs Appeals shall be final in all such cases. [36 Stat. L. 1145.]

The changes consist in the substitution of the word "chapter" for "act" and the word "herein" for the words "in this act."

SEC. 196. [*Other courts deprived of jurisdiction in customs cases; pending cases excepted.*] After the organization of said court, no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: *Provided*, That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine: *Provided further*, That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed. [36 Stat. L. 1145.]

The changes made by this section consist in the substitution of the word "chapter" for "act" and the words "August fifth, nineteen hundred and nine," for the words "the

passage of this act." This was deemed necessary in order to limit, as provided in the original Act, the time within which cases might go to the Supreme Court.

SEC. 197. [*Transfer to Customs Court of pending cases; completion of testimony.*] Immediately upon the organization of the Court of Customs Appeals, all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification. [36 Stat. L. 1145.]

This section makes no change in the amendatory Act cited in the foot note at the beginning of this chapter, *supra*, p. 211.

SEC. 198. [*Appeals from Board of General Appraisers; time within which to be taken; record to be transmitted to Customs Court.*] If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such

decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination. [36 Stat. L. 1146.]

See note to the last preceding section.

SEC. 199. [*Records filed in Customs Court to be at once placed on calendar; calendar to be called every sixty days.*] Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided*, That such calendar need not be called during the months of July and August of any year. [36 Stat. L. 1146.]

See note to sec. 197, *supra*.

CHAPTER NINE.

THE COMMERCE COURT.¹

- | Sec. | Sec. |
|---|--|
| 200. Commerce Court created; judges of, appointment and designation; expense allowance to judges. | 208. Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States; restraining orders, when granted without notice. |
| 201. Additional circuit judges; appointment and assignment. | 209. Jurisdiction of the court, how invoked; practice and procedure. |
| 202. Officers of the court; clerk, marshal, etc.; salaries, etc. | 210. Final judgments and decrees reviewable in Supreme Court. |
| 203. Court to be always open for business; sessions of, to be held in Washington and elsewhere. | 211. Suits to be against United States; when United States may intervene. |
| 204. Marshals to provide rooms for holding court outside of Washington. | 212. Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc. |
| 205. Assignment of judges to other duty; vacancies, how filled. | 213. Complainants may appear and be made parties to case. |
| 206. Powers of court and judges; writs, process, procedure, etc. | 214. Pending cases to be transferred to Commerce Court; exception; status of transferred cases. |
| 207. Jurisdiction of the court. | |

SEC. 200. [*Commerce Court created; judges of, appointment and designation; expense allowance to judges.*] There shall be a court of the United States to be known as the Commerce Court, which shall be a court of record, and shall

¹ The Court of Commerce was originally created and its jurisdiction defined by the Act of June 18, 1910, ch. 309, 36 Stat. L. 539. Sections 1-5 and the first paragraph of sec. 6 and sec. 17 of that Act are superseded by this chapter, which substantially re-enacts their provisions. The remaining portions of such Act of June 18, 1910, are set forth *ante*, p. 111, under the title INTERSTATE COMMERCE.

have a seal of such form and style as the court may prescribe. The said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges referred to in the next succeeding section, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the Commerce Court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five-year period shall be the presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge. The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions. Each of the judges during the period of his service in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum. [36 Stat. L. 1146.]

SEC. 201. [*Additional circuit judges; appointment and assignment.*] The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit. [36 Stat. L. 1147.]

SEC. 202. [*Officers of the court; clerk, marshal, etc.; salaries, etc.*] The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal, shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the court; but such costs and fees shall in no

case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States. [36 Stat. L. 1147.]

SEC. 203. [*Court to be always open for business; sessions of, to be held in Washington and elsewhere.*] The Commerce Court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal, may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal, by the marshal of the court, and shall be allowed to him in the settlement of his accounts with the United States. [36 Stat. L. 1147.]

SEC. 204. [*Marshals to provide rooms for holding court outside of Washington.*] The United States marshals of the several districts outside of the city of Washington in which the Commerce Court may hold its sessions shall provide, under the direction and with the approval of the Attorney General, such rooms in the public buildings of the United States as may be necessary for the court's use; but in case proper rooms can not be provided in such public buildings, said marshals, with the approval of the Attorney General, may then lease from time to time other necessary rooms for the court. [36 Stat. L. 1148.]

SEC. 205. [*Assignment of judges to other duty; vacancies, how filled.*] If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any district court or circuit court of appeals. In case of illness or other disability of any judge assigned to the Commerce Court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge. [36 Stat. L. 1148.]

SEC. 206. [*Powers of court and judges; writs, process, procedure, etc.*] In all cases within its jurisdiction the Commerce Court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The Commerce Court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the

United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the district courts of the United States. [36 Stat. L. 1148.]

Power of single federal judge.— Construing this section, in *Ex p. Metropolitan Water Co.*, (1911) 220 U. S. 539, 544, 31 S. Ct. 600, 603, Chief Justice White said: "Limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are, a, to receive an application for an interlocutory injunction in the character of case stated in the section; b, within the period specified in the section to grant a temporary restraining order 'if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted;' and, c, to 'immediately call to his assistance to hear and determine the application [for an interlocutory injunction] two other judges.' It is to the hearing thus provided for that the notice must relate which is to be given to the Governor and to the Attorney General of the State and 'such other persons as may be defendants in the suit.' It is the hearing before the court thus constituted also that is required to be expedited; and the appeal authorized by the section to be taken directly to this court 'from the order granting or denying, after notice and hearing, an interlocutory injunction' is manifestly an appeal from the expedited hearing had before the court consisting of three judges. We find no expression of or implication anywhere in the section justifying the assumption that there was an intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the applica-

tion, in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court; whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction. Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction." Hence, where a district judge acting as a circuit judge had issued a restraining order in a case where an interlocutory injunction was sought under the text section, and had subsequently vacated the restraining order and denied the application for injunction, refusing a request to call to his assistance two other judges, the Supreme Court, in the case above cited, granted a writ of mandamus, at the instance of the complainant in the suit, directing the judge to annul his order vacating the restraining order and denying the injunction, "and that said judge or such other judge of the said Circuit Court as may hear and determine the application for an interlocutory injunction call to his assistance two other judges, as provided by" the text section.

SEC. 207. [Jurisdiction of the court.] The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes. [36 Stat. L. 1148.]

The first opinion rendered by the Commerce Court is in the case of *Procter, etc., Co. v. U. S.*, (1911) 188 Fed. 221, which was a petition by Procter & Gamble Co. against the United States and others to set aside an order of the Interstate Commerce Commission (19 Int. Com. Rep. 556), dismissing the petitioner's complaint which sought to have the commission annul a provision of the Uniform Demurrage Code, requiring privately owned cars while standing on private tracks to pay demurrage under certain circumstances. The petitioner also prayed the court to enjoin the respondent railroads from collecting the demurrage charge, and that they be required to repay to the petitioner the sums which had been wrongfully collected from it under the rule.

The United States moved to dismiss the petition on the ground that the Commerce Court had no jurisdiction in the premises; or that, if it had, no cause of action was made out which entitled the petitioner to relief. And in this motion the Interstate Commerce Commission and the several railroads summoned as respondents joined.

On the jurisdictional question, Judge Archbald, speaking for the court, said: "The jurisdiction of this court is denied on the ground that the petitioner is a shipper, and the Interstate Commerce Commission having merely dismissed the complaint which was made to it, and granted no affirmative relief, that there is nothing in the order of dismissal which it entered that affords any basis for action here. Or, in other words, that it is only the carrier against which an order is made in favor of the shipper that can bring the case for review into this court; the shipper being concluded by the action of the commission, whatever it may chance to be. This is a serious question, which merits careful consideration and is not altogether easy to solve.

"By the Act by which the Commerce Court was created (Act June 18, 1910, ch. 309, 36 Stat. L. 539), it was given 'the jurisdiction now possessed by Circuit Courts of the United States and the judges thereof' of, *inter alia*, 'cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' It was also therein further provided that 'in all cases within its jurisdiction the Commerce Court and each of the judges assigned thereto shall respectively have and may exercise any and all the powers of a Circuit Court of the United States, and of the judges of said court respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred;' and, conversely, that nothing in the Act should be

construed as enlarging the jurisdiction at the time possessed by said Circuit Courts, or the judges thereof, thereby transferred to and vested in the Commerce Court; the jurisdiction, however, so far as conferred, to be exclusive, and so far as not conferred being reserved. The question, then, is whether upon any recognized ground of equity practice the present petitioner, under the law as it previously stood, would have had the right to apply by bill to a Circuit Court of the United States to set aside the action of the Interstate Commerce Commission dismissing its complaint, and to enjoin the enforcement by the railroads of the demurrage charge which in effect was thereby approved.

"It is of no significance in this connection, nor of any assistance in the solution of the question, that suits in this court to enjoin, set aside, annul, or suspend any order of the commission are required to be brought against the United States. It is just as consistent that the United States should be the respondent in cases brought for this purpose by the shipper as in cases brought by the carrier; the government in each case standing for the order of the commission which it is thus appointed to justify and defend.

"Neither does it detract from the jurisdiction of this court that, under the law as it previously stood, the venue of suits brought in the Circuit Courts of the United States against the commission to set aside its orders was fixed in each case in the district where the carrier against which the order was made had its principal operating office; jurisdiction to hear and determine such suits being in terms vested in the courts of such district. Act June 29, 1906, ch. 3591, sec. 16, 34 Stat. L. 592, 1909 Supp. Fed. Stat. Annot. 268. This was a favor to the carrier adversely affected by the order. And according to the law at the time, the commission being the respondent, provision had to be made for jurisdiction over it by the courts of the various districts throughout the country where it was liable to be summoned. It was to meet this situation that jurisdiction was given in terms over suits of the character mentioned to the courts of the district where the carrier against which the order was made had its principal office. Nothing more was intended, and nothing more is to be made out of this provision of the law. Certainly nothing adverse to possible suits by others than the carrier is to be thereby implied.

"The real argument against the right of suit, where the complaint of a shipper has been dismissed, is that the denial of relief by the commission is not an order of which the courts can lay hold. Such an order, it is urged, must be one specifically requiring that

something shall or shall not be done before this is the case. In *Peavey v. Union Pac. R. Co.*, (1910) 176 Fed. 409, it is said:

"A careful search of the Interstate Commerce Act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission, to those who were parties to the proceedings before it, upon which the order was based. The proceeding in court is not an appeal; it is a plenary suit in equity. . . . The determination of the question what parties may maintain such suits is left by the . . . Act to the general rules and practice in equity, and under them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court in equity for relief."

"There was an order of the commission in that case, however, which prohibited the railroads from paying to complainants, and others who were owners of elevators located upon their lines, any compensation for the elevation of grain in transit, so that the law was unquestionably met so far as there being an order is concerned; and the case therefore decided nothing more than that the right to resort to the courts is not confined to the carrier, but extends to every one injuriously affected by the order of the commission, even though not a party to the proceedings before it in which the order was made. To that extent, but no further, it is pertinent here."

"Putting aside, however, for the moment, the provisions of the statute, and considering the case as though it had not been passed, it is clear that a shipper would have been entitled, in one form or another, to redress in court against an unjust and unlawful charge or practice imposed by a carrier, such as the one here is alleged to be. And it would have been permissible, therefore, for the *Procter & Gamble Company* denying the right of the carrier to make this demurrage charge, to have refused to pay it and compel the carriers to bring suit therefor; or in view of the complications to which this would give rise, to say nothing of the multiplicity of suits with different carriers which would be likely to ensue, and in order to settle the matter as to all parties once for all, it would have had the undoubted right to go into a court of equity by bill and have the legality of the practice tested, and, if found to be unjustified, enjoined. *Donovan v. Pennsylvania Co.*, (1905) 199 U. S. 279, 26 S. Ct. 91, 50 U. S. (L. ed.) 192. Indeed, the only question would seem to be whether this was not the course which the company, even considering the provisions of the statute, was required to pursue; the legality of the demurrage charge being the only thing involved, and that being a matter for the courts and not for the commission to decide. *Hite v. New Jersey Cent. R. Co.*, (1909) 171 Fed. 370, 96 C. C. A. 326. See also *Danciger v. Wells*, (1907) 154 Fed. 379, and *Langdon v. Pennsylvania R. Co.*, (1911) 186 Fed. 237. It was decided, however, in *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426, 9 Ann. Cas. 3075, 27 S. Ct. 350, 51 U. S. (L. ed.) 553,

that redress by a carrier against an unjust and unreasonable rate must be sought in the first instance by proceedings before the commission, and that only after that could an action be maintained against the carrier for reparation based on the result. This conclusion was reached, and the common-law right of action otherwise existing held to be abrogated by implication, in view of the system established by the enactments with regard to rate regulation by the Interstate Commerce Commission, and as necessary to the efficiency of that system, which otherwise would be subverted and made nugatory. And this was repeated in *Baltimore, etc., R. Co. v. Pittcairn Coal Co.*, (1910) 215 U. S. 481, 30 S. Ct. 164, 54 U. S. (L. ed.) 292, where it was held that, for the correction of an unequal distribution of cars, a shipper was similarly required to go to the commission, and could not in advance of its action seek to remedy by mandamus the discrimination alleged. And *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1910) 183 Fed. 929, 106 C. C. A. 269, also, is to the same effect. But, if that be so, there can be no serious question as to the propriety, if not the necessity, for the present petitioner going first to the commission to have determined whether the demurrage charge in controversy was a just and reasonable requirement. And it cannot be that the implication by which this is brought about is to be carried so far as to make the action of the commission conclusive where relief is denied. There is no such compelling necessity in order to save the system; nor is the statute to be construed as requiring exclusive resort to a tribunal where the rights of the party can only be partially determined at the sacrifice of other rights which the courts of the land are appointed to consider and defend. This is not to deny that in questions of fact, or where judgment or expediency is involved, the action of the commission in denying relief, the same as in granting it, may not be final. But where, as here, it is not the amount that is in dispute—one dollar a day per car being recognized as reasonable if there is to be any charge—but the right of the carrier, under the circumstances, to make any charge at all, it is not to be implied, unless there is no escape from it, that the decision of the commission adverse to the shipper is to foreclose the question. And while the dismissal of a complaint by the commission in a case like the present one may not in strictness be an order, in that it does not require or prohibit that anything shall or shall not be done, it is so in substance and effect, in that, by refusing to interfere with the practice or the charge complained of, it virtually approves it and makes it operative. If it was required by the Act to hold that a court could not interfere with such an order however confiscatory to the shipper it might be, the shipper being thus without legal redress, the Act might well be declared unconstitutional as wanting in due process of law.

"The action of the commission, if to be given any force, having thus the effect of an adverse decision with respect to the question

involved, must be regarded, even though negative in character, as an order within the meaning of the statute, which the courts may enjoin or set aside if legal or equitable grounds for doing so are found to exist. The petitioner therefore correctly came into this court, as it could previously have gone into a Circuit Court of the United States—the requisite amount being involved and the case being one arising under the federal law—to

have the action of the commission dismissing its complaint set aside and the demurrage charge disallowed, if that should be the conclusion reached with regard to it, either by direct decree or by remanding the case to the commission with directions to sustain the complaint."

But the petition was finally dismissed on the merits, with costs.

SEC. 208: [*Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States; restraining orders, when granted without notice.*] Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application. [36 Stat. L. 1149.]

SEC. 209. [*Jurisdiction of the court, how invoked; practice and procedure.*] The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may,

by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States. [36 Stat. L. 1149.]

"Motion to dismiss the petition."—Motions to dismiss, as authorized by this section, were made in *Procter, etc., Co. v. U. S.*, (1911) 188 Fed. 221; *Southern Pac. Co. v. Interstate Commerce Commission*, (1911) 188 Fed. 241; and *Atchison, etc., R. Co. v. Inter-*

state Commerce Commission, (1911) 188 Fed. 229, where the court said: "As determinative of these motions, our view is necessarily limited to the facts which are well pleaded in the petition."

SEC. 210. [*Final judgments and decrees reviewable in Supreme Court.*] A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court. [36 Stat. L. 1150.]

SEC. 211. [*Suits to be against United States; when United States may intervene.*] All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved. [36 Stat. L. 1150.]

SEC. 212. [*Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.*] The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties

in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein. [36 Stat. L. 1150.]

SEC. 213. [*Complainants may appear and be made parties to case.*] Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. [36 Stat. L. 1151.]

SEC. 214. [*Pending cases to be transferred to Commerce Court; exception; status of transferred cases.*] Until the opening of the Commerce Court, all cases and proceedings of which from that time the Commerce Court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the Commerce Court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the Commerce Court which may have been begun in any other court as hereby allowed, before the said date, shall be forthwith transferred to the Commerce Court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the Supreme Court; and if remanded, such cause may be sent back to the court from which the appeal was taken or to the Commerce Court for further proceeding as the Supreme Court shall direct. All previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the Commerce Court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the Commerce Court. The clerk of the court from which any case or proceeding is so transferred to the Commerce Court shall transmit to and file in the Commerce Court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer. [36 Stat. L. 1151.]

This section supersedes section 6 of the Act of June 18, 1910, ch. 309, 36 Stat. L. 544, with the exception of the last paragraph of such section 6 relating to an agent in Washington to be designated for the service of process. Such last paragraph is given *supra*, p. 111, under the title INTERSTATE COMMERCE, where the portions of the Act of June 18, 1910, not dealing with the Court of Commerce are set forth.

Pending cases transferred to Commerce Court. — *Hooker v. Interstate Commerce Commission*, (1911) 188 Fed. 242, and *Eagle White Lead Co. v. Interstate Commerce Commission*, (1911) 188 Fed. 256, were cases transferred to the Commerce Court from a federal Circuit Court where they were originally instituted, and heard in the Commerce Court upon bill and demurrers, the latter having been filed before the transfer.

CHAPTER TEN.

THE SUPREME COURT.

- Sec.
 215. Number of justices.
 216. Precedents [*sic*] of the associate justices.
 217. Vacancy in the office of Chief Justice.
 218. Salaries of justices.
 219. Clerk, marshal, and reporter.
 220. The clerk to give bond.
 221. Deputies of the clerk.
 222. Records of the old court of appeals.
 223. Tables of fees.
 224. Marshal of the Supreme Court.
 225. Duties of the reporter.
 226. Reporter's salary and allowances.
 227. Distribution of reports and digests.
 228. Additional reports and digests; limitation upon cost; estimates to be submitted to Congress annually.
 229. Distribution of Federal Reporter, etc., and Digests.
 230. Terms.
 231. Adjournment for want of a quorum.
 232. Certain orders made by less than quorum.
 233. Original disposition.
 234. Writs of prohibition and mandamus.
 235. Issues of fact.
 236. Appellate jurisdiction.
 237. Writs of error from judgments and decrees of State courts.
 238. Appeals and writs of error from United States district courts.
 239. Circuit court of appeals may certify questions to Supreme Court for instructions.

- Sec.
 240. Certiorari to circuit court of appeals.
 241. Appeals and writs of error in other cases.
 242. Appeals from Court of Claims.
 243. Time and manner of appeals from the Court of Claims.
 244. Writs of error and appeals from supreme court of and United States district court for Porto Rico.
 245. Writs of error and appeals from the Supreme Courts of Arizona and New Mexico.
 246. Writs of error and appeals from the Supreme Court of Hawaii.
 247. Appeals and writs of error from the district court for Alaska direct to Supreme Court in certain cases.
 248. Appeals and writs of error from the Supreme Court of the Philippine Islands.
 249. Appeals and writs of error when a Territory becomes a State.
 250. Appeals and writs of error from the Court of Appeals of the District of Columbia.
 251. Certiorari to Court of Appeals, District of Columbia.
 252. Appellate jurisdiction under the bankruptcy act.
 253. Precedence of writs of error to State courts.
 254. Cost of printing records.
 255. Women may be admitted to practice.

SEC. 215. [*Number of justices.*] The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum. [*36 Stat. L. 1152.*]

This section is a re-enactment, without change, of R. S. sec. 673, 4 Fed. Stat. Annot. 434, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 216. [*Precedence of the associate justices.*] The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages. [*36 Stat. L. 1152.*]

This section is a re-enactment, without change, of R. S. sec. 674, 4 Fed. Stat. Annot. 434, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 217. [*Vacancy in the office of Chief Justice.*] In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and

powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice. [36 Stat. L. 1152.]

This section is a re-enactment, without change, of R. S. sec. 675, 4 Fed. Stat. Annot. 435, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 218. [*Salaries of justices.*] The Chief Justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly. [36 Stat. L. 1152.]

This section is a re-enactment of the provision in the Act of Feb. 12, 1903, ch. 547, 32 Stat. L. 825, 10 Fed. Stat. Annot. 198, which superseded R. S. sec. 676, 4 Fed. Stat. Annot. 435, the latter being also expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 219. [*Clerk, marshal, and reporter.*] The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions. [36 Stat. L. 1152.]

This section is a re-enactment, without change, of R. S. sec. 677, 4 Fed. Stat. Annot. 73, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 220. [*The clerk to give bond.*] The clerk of the Supreme Court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars, to be determined and regulated by the Attorney General, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The Supreme Court may at any time, upon the motion of the Attorney General, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice. [36 Stat. L. 1152.]

This section was drawn from section 3 of the Act of Feb. 22, 1875, ch. 95, 4 Fed. Stat. Annot. 83. The law revised in this section has been so modified as to apply only to the bond to be given by the clerk of the Supreme Court. All reference to the duties of the district attorneys is omitted from this section,

as those provisions can only apply in the case of bonds to be given by clerks of the District Courts. The further change is made that a new bond, or a bond for an increased amount, may be ordered by the court upon the motion of the attorney general.

SEC. 221. [*Deputies of the clerk.*] One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime. [36 Stat. L. 1153.]

This section is a re-enactment, without change, of R. S. sec. 678, 4 Fed. Stat. Annot. 73, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 222. [*Records of the old court of appeals.*] The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court. [36 Stat. L. 1153.]

This section is a re-enactment, without change, of R. S. sec. 679, 4 Fed. Stat. Annot. 435, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 223. [*Tables of fees.*] The Supreme Court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof. [36 Stat. L. 1153.]

This section is a re-enactment of the unexecuted part of a provision in Sundry Civil Appropriation Act of March 3, 1883, ch. 143, 22 Stat. L. 631, 4 Fed. Stat. Annot. 139.

SEC. 224. [*Marshal of the Supreme Court.*] The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade. [36 Stat. L. 1153.]

This section is a re-enactment of R. S. sec. 680, 4 Fed. Stat. Annot. 159, with no change except by increasing the salary of the mar-

shal from \$3,500 a year to \$4,500 a year. R. S. sec. 680 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 225. [*Duties of the reporter.*] The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made; and within the same time he shall deliver three hundred copies of the volumes of said reports to the Attorney General. The reporter shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time. [36 Stat. L. 1153.]

This section is a re-enactment, with some changes in language, of R. S. sec. 681, 6 Fed. Stat. Annot. 767, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 226. [*Reporter's salary and allowances.*] The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars: *Provided*, That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the Attorney General shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the man-

ner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume. [36 Stat. L. 1153.]

This section is from R. S. sec. 682, as amended by the Act of Aug. 5, 1882, 22 Stat. L. 254, 6 Fed. Stat. Annot. 768, with some

changes. R. S. sec. 682 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 227. [*Distribution of reports and digests.*] The Attorney General shall distribute copies of the Supreme Court reports, as follows: To the President, the justices of the Supreme Court, the judges of the Commerce Court, the judges of the Court of Customs Appeals, the judges of the circuit courts of appeals, the judges of the district courts, the judges of the Court of Claims, the judges of the Court of Appeals and of the Supreme Court of the District of Columbia, the judges of the several Territorial courts, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Postmaster General, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce and Labor, the Solicitor General, the Assistant to the Attorney General, each Assistant Attorney General, each United States district attorney, each Assistant Secretary of each Executive Department, the Assistant Postmasters General, the Secretary of the Senate for the use of the Senate, the Clerk of the House of Representatives for the use of the House of Representatives, the Governors of the Territories, the Solicitor for the Department of State, the Treasurer of the United States, the Solicitor of the Treasury, the Register of the Treasury, the Comptroller of the Treasury, the Comptroller of the Currency, the Commissioner of Internal Revenue, the Director of the Mint, each of the six Auditors in the Treasury Department, the Judge Advocate General, War Department, the Paymaster General, War Department, the Judge Advocate General, Navy Department, the Commissioner of Indian Affairs, the Commissioner of Pensions, the Commissioner of the General Land Office, the Commissioner of Patents, the Commissioner of Education, the Commissioner of Labor, the Commissioner of Navigation, the Commissioner of Corporations, the Commissioner General of Immigration, the Chief of the Bureau of Manufactures, the Director of the Geological Survey, the Director of the Census, the Forester, Department of Agriculture, the Purchasing Agent, Post Office Department, the Interstate Commerce Commission, the Clerk of the Supreme Court of the United States, the Marshal of the Supreme Court of the United States, the Attorney for the District of Columbia, the Naval Academy at Annapolis, the Military Academy at West Point, and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; to the Law Library of the Supreme Court, twenty-five copies; to the Law Library of the Department of the Interior, two copies; to the Law Library of the Department of Justice, two copies; to the Secretary of the Senate for the use of the committees of the Senate, twenty-five copies; to the Clerk of the House of Representatives for the use of the committees of the House, thirty copies; to the Marshal of the Supreme Court of the United States, as custodian of the public property used by the court, for the use of the justices thereof in the conference room, robing room, and court room, three copies; to the Secretary of War for the use of the proper courts and officers of the Philippine Islands and for the headquarters of military departments in the United States, twelve copies; and to each of the places where district courts of the United States are now holden, including Hawaii, and Porto Rico, one copy. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such

executive officers as are entitled to receive said reports under this section and have not already received them, to each United States judge and to each United States district attorney who has not received a set, to each of the places where district courts are now held to which said reports have not been distributed, and to each of the places at which a district court may hereafter be held, the edition of said reports and digests to be selected by the judge or officer receiving them. No distribution of reports and digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of said courts (except the Supreme Court) shall in all cases keep said reports and digests for the use of the courts and of the officers thereof. Such reports and digest[s] shall remain the property of the United States, and shall be preserved by the officers above named and by them turned over to their successors in office. [36 Stat. L. 1154.]

This section is drawn from the Act of Feb. 12, 1889, ch. 135, 25 Stat. L. 661, 6 Fed. Stat. Annot. 769, which amended R. S. sec. 683, 6 Fed. Stat. Annot. 768, the latter being re-

pealed by Judicial Code, sec. 297, *infra*, p. 250; and from the Act of July 1, 1902, 32 Stat. L. 630, 631, 6 Fed. Stat. Annot. 770, 771.

SEC. 228. [*Additional reports and digests; limitation upon cost; estimates to be submitted to Congress annually.*] The publishers of the decisions of the Supreme Court shall deliver to the Attorney General, in addition to the three hundred copies delivered by the Reporter, such number of copies of each report heretofore published, as the Attorney General may require, for which he shall pay not more than two dollars per volume, and such number of copies of each report hereafter published as he may require, for which he shall pay not more than one dollar and seventy-five cents per volume. The Attorney General shall include in his annual estimates submitted to Congress, an estimate for the current volumes of such reports, and also for the additional sets of reports and digests required for distribution under the section last preceding. [36 Stat. L. 1155.]

Under the Act of Feb. 12, 1889, ch. 135, 25 Stat. L. 661, 6 Fed. Stat. Annot. 769, the court reporter was required to furnish the Secretary of the Interior, in addition to the number "heretofore required by law" (300 copies; R. S. sec. 681, 6 Fed. Stat. Annot. 767), 76 copies, at not exceeding two dollars per volume, beginning with volume 123. The Act of July 1, 1902, 32 Stat. L. 631, 6 Fed. Stat. Annot. 771, required the publishers to

furnish the secretary 104 copies, in addition to 300 to be furnished by the reporter; and further imposed upon them the duty of furnishing the 76 copies theretofore, by the Act of 1889, required to be furnished by the reporter, at a cost not to exceed two dollars per volume.

Besides other changes, this section substitutes the attorney general for the secretary of the interior.

SEC. 229. [*Distribution of Federal Reporter, etc., and Digests.*] The Attorney General is authorized to procure complete sets of the Federal Reporter or, in his discretion, other publication containing the decisions of the circuit courts of appeals, circuit courts, and district courts, and digests thereof, and also future volumes of the same as issued, and distribute a copy of each such reports and digests to each place where a circuit Court of appeals, or a district court, is now or may hereafter regularly be held, and to the Supreme Court of the United States, the Court of Claims, the court of Customs Appeals, the Commerce Court, the Court of Appeals and the Supreme Court of the District of Columbia, the Attorney General, the Solicitor General, the Solicitor of the Treasury, the Assistant Attorney General for the Department of the Interior, the Commissioner of Patents, and the Interstate Commerce Commission; and to the Secretary of the Senate, for the use of the Senate, and to the Clerk of the House of Representatives, for the use of the House of Representatives, not

more than three sets each. Whenever any such court room, office, or officer shall have a partial or complete set of any such reports, or digests, already purchased or owned by the United States, the Attorney General shall distribute to such court room, office, or officer, only sufficient volumes to make a complete set thereof. No distribution of reports or digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of the courts (except the Supreme Court) to which the reports and digests are distributed under this section, shall keep such reports and digests for the use of the courts and the officers thereof. All reports and digests distributed under the provisions of this section shall be and remain the property of the United States and, before distribution, shall be plainly marked on their covers with the words "The Property of the United States," and shall be transmitted by the officers receiving them to their successors in office. Not to exceed two dollars per volume shall be paid for the back and current volumes of the Federal Reporter or other publication purchased under the provisions of this section, and not to exceed five dollars per volume for the digest, the said money to be disbursed under the direction of the Attorney General; and the Attorney General shall include in his annual estimates submitted to Congress, an estimate for the back and current volumes of such reports and digests, the distribution of which is provided for in this section. [36 Stat. L. 1155.]

This section is new legislation.

SEC. 230. [*Terms.*] The Supreme Court shall hold at the seat of government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business. [36 Stat. L. 1156.]

This section is a re-enactment, omitting the obsolete part, of R. S. sec. 684, 4 Fed. Stat. Annot. 692, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 231. [*Adjournment for want of a quorum.*] If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 685, 4 Fed. Stat. Annot. 693, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 232. [*Certain orders made by less than quorum.*] The justices attending at any term, when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 686, 4 Fed. Stat. Annot. 693, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 233. [*Original disposition.*] The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other

States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 687, 4 Fed. Stat. Annot. 436, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 234. [*Writs of prohibition and mandamus.*] The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party. [36 Stat. L. 1156.]

This section is a re-enactment of R. S. sec. 688, 4 Fed. Stat. Annot. 439, the only change being in the substitution of the word "to" after the word "prohibition" for the word "in." Writs of prohibition run to and not in the District Courts. R. S. sec. 688 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 235. [*Issues of fact.*] The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 689, 4 Fed. Stat. Annot. 443, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 236. [*Appellate jurisdiction.*] The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 690, 4 Fed. Stat. Annot. 443, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 237. [*Writs of error from judgments and decrees of State courts.*] A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ. [36 Stat. L. 1156.]

This section is a re-enactment, without change, of R. S. sec. 709, 4 Fed. Stat. Annot. 467, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 238. [*Appeals and writs of error from United States district courts.*] Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. [36 Stat. L. 1157.]

In respect of appeals and writs of error from the District Courts within the United States this section is drawn from section 5 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 827, 4 Fed. Stat. Annot. 398, as amended by the Act of Jan. 20, 1897, ch. 68, 29 Stat. L. 492, 4 Fed. Stat. Annot. 433, omitting, however, the provision for appellate review in criminal cases, appellate jurisdiction as to the latter being conferred upon the Circuit Courts of Appeals by Judicial Code, sec. 128, *infra*, p. 195, and the Act of Jan. 20, 1897, above cited, being expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

The last clause of section 5 of the Circuit Court of Appeals Act, above cited, is omitted, since it can now serve no useful purpose, the law referred to being set out in Judicial Code, sec. 237, *supra*, p. 230.

The classes of cases described in this section are the same as those described in Judicial Code, sec. 247, *infra*, p. 234, except as to cases in which the jurisdiction of the court is in issue, and the same as several of the classes described in Judicial Code, sec. 250, *infra*, p. 235.

Hawaii. — Section 86 of the Organic Act for

Hawaii, as last amended in Act of March 3, 1909, ch. 269, 35 Stat. L. 838, 1909 Supp. Fed. Stat. Annot. 152, authorized the taking of appeals and writs of error from the United States District Court for that territory direct to the Supreme Court, in the same manner and in the same class of cases as from a Circuit or District Court of the United States. For this reason the District Court for Hawaii is included with the District Courts. It is specially mentioned from the fact that while it is called a United States District Court, it is not a constitutional court. *McAllister v. U. S.*, (1891) 141 U. S. 174, 11 S. Ct. 949, 35 U. S. (L. ed.) 693. The special reference is to remove any doubt as to its inclusion.

Appellate jurisdiction of the Circuit Court of Appeals in respect of decisions of the United States District Court for Hawaii and of decisions of the District Courts within the United States, see Judicial Code, sec. 128, *supra*, p. 195.

Appellate jurisdiction of the United States Supreme Court over judgments and decrees of the Supreme Court of the territory of Hawaii, see Judicial Code, sec. 246, *infra*, p. 233.

SEC. 239. [*Circuit court of appeals may certify questions to Supreme Court for instructions.*] In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. [36 Stat. L. 1157.]

The appellate jurisdiction of the Circuit Courts of Appeals is to be determined by a reference to Judicial Code, sec. 128, *supra*, p. 195, in connection with Judicial Code, sec. 238, *supra*. This section 239 represents that portion of section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, which authorizes the certification of questions to the Supreme Court, and recites the action

which may be taken by the Supreme Court in case of such certification.

Similar provisions for certification are in Judicial Code, sec. 134, *supra*, p. 197, Judicial Code, sec. 251, *infra*, p. 236, and in the last clause of Judicial Code, sec. 252, *infra*, p. 237, which also appears in this Supplement, *post*, title BANKRUPTCY, as section 25d of the Bankruptcy Act of 1898, and is there annotated.

SEC. 240. [*Certiorari to circuit court of appeals.*] In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. [36 Stat. L. 1157.]

This section is drawn from section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, and contains that provision thereof which authorizes the Supreme Court to require the certification to it of cases made final in the Circuit Courts of Appeals.

There is a similar provision in Judicial Code, sec. 251, *infra*, p. 236, and a general power to issue writs of certiorari is embraced in the provisions of Judicial Code, sec. 262, *infra*, p. 241.

In the phrase "final by the provisions of this Title" the words "this Title" mean this Act, *i. e.*, this Judicial Code. See Judicial Code, sec. 293, *infra*, p. 250. And the "pro-

visions" referred to are in Judicial Code, sec. 128, *supra*, p. 195.

The phrase "upon the petition of any party thereto" is new legislation. It was not in section 6 of the Circuit Court of Appeals Act from which this section was drawn, nor was it in the section of the Judicial Code as submitted to Congress March 15, 1910, in the report of the committee on revision.

"With the same power and authority," etc., in this section evidently alludes to a provision in section 10 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428, also annotated in volume 2 of this Supplement, title JUDICIARY.

SEC. 241. [*Appeals and writs of error in other cases.*] In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. [36 Stat. L. 1157.]

This section is drawn from the last paragraph of section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409.

"Final by the provisions of this Title," see note to this phrase in the last preceding section 240.

As to the time limit for appeals under this section, see the last sentence of section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, still in force, and also annotated in volume 2 of this Supplement, title JUDICIARY.

SEC. 242. [*Appeals from Court of Claims.*] An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two. [36 Stat. L. 1157.]

This section is a re-enactment of R. S. sec. 707, 4 Fed. Stat. Annot. 467, with no change except by substituting "section one hundred and seventy-two" for "one thousand and eighty-nine." Reference to the latter in R. S. sec. 707 was a mistake; the reference should have been to R. S. sec. 1086, 2 Fed. Stat. Annot. 71, which is revised in Judicial

Code, sec. 172, *supra*, p. 207. Being the only change in the language of the section, no change is made in the law.

R. S. secs. 707, 1086, are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

See also as to the right of appeal and the procedure therein, Judicial Code, secs. 181, 182, *supra*, p. 209.

SEC. 243. [*Time and manner of appeals from the Court of Claims.*] All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct. [36 Stat. L. 1157.]

This section is a re-enactment, without change, of R. S. sec. 708, 4 Fed. Stat. Annot. 467, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

See the reference to this section in Judicial Code, secs. 181, 182, *supra*, p. 209.

SEC. 244. [*Writs of error and appeals from supreme court of and United States district court for Porto Rico.*] Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts. [36 Stat. L. 1157.]

This section revises and re-enacts, with material changes, the larger part of section 35 of the Organic Act of Porto Rico, viz., the Foraker Act, so called, of April 12, 1900, ch. 191, 31 Stat. L. 77, 5 Fed. Stat. Annot. 773, which section 35 to that extent is superseded by force of the last paragraph of Judicial Code, sec. 297, *infra*, p. 250.

The most material change is in the last sentence of this section, conforming the appellate procedure to the regulations for writs of error and appeals to the Supreme Court of the United States from the District Courts; section 35 of the Foraker Act, above cited, providing that they should be taken "in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the territories of the United

States." In view of this and other changes, and because all of the cases taken from Porto Rico to the Supreme Court and reported prior to the publication of this Supplement were decided under the provisions of section 35, above cited, those cases are set forth in the note to that section, *infra*, volume 2 of this Supplement, title PORTO RICO.

The jurisdictional amount of \$5,000, with the provision for "oath," etc., attached thereto, was evidently taken from R. S. sec. 1909, 7 Fed. Stat. Annot. 231, as amended by the first section of the Act of March 3, 1885, ch. 355, 23 Stat. L. 443, 4 Fed. Stat. Annot. 463, and now appearing in Judicial Code, sec. 245, *infra*, this page. A like provision as to the oath appears in Judicial Code, secs. 246, 248, *infra*.

SEC. 245. [*Writs of error and appeals from the Supreme Courts of Arizona and New Mexico.*] Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. [36 Stat. L. 1158.]

This section is drawn from R. S. sec. 702, 4 Fed. Stat. Annot. 459, expressly repealed in Judicial Code, sec. 297, *infra*, p. 250, and from sections 1 and 2 of the Act of March 3, 1885, ch. 355, 23 Stat. L. 443, 4 Fed. Stat. Annot. 463, also expressly repealed in the same section of the Judicial Code. The section was revised in accordance with the opinion of the Supreme Court in *Simms v. Simms*, (1899) 175 U. S. 162, 166, 20 S. Ct. 58, 44 U. S. (L. ed.) 115, and cited 7 Fed. Stat. Annot. 231, note, wherein the court points out

the classes of cases in which writs of error and appeals may be taken from the Supreme Courts of Arizona and New Mexico to the Supreme Court of the United States. See also *Folsom v. U. S.*, (1895) 160 U. S. 121, 125, 16 S. Ct. 222, 40 U. S. (L. ed.) 363.

The phrase "to be ascertained by the oath," etc., appears in Judicial Code, sec. 244, *supra*, and secs. 246, 248, *infra*.

Time and manner of taking appeal or writ of error, see Judicial Code, sec. 249, *infra*, p. 235.

SEC. 246. [*Writs of error and appeals from the Supreme Court of Hawaii.*] Writs of error and appeals from the final judgments and decrees of the supreme

court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. [36 Stat. L. 1158.]

Section 86 of the Organic Act for Hawaii, Act of April 30, 1900, ch. 339, 31 Stat. L. 158, 3 Fed. Stat. Annot. 206, as amended by the Act of March 3, 1908, 35 Stat. L. 838, 1909 Supp. Fed. Stat. Annot. 152, provided for the taking of appeals and writs of error from the Supreme Court of that territory to the Supreme Court of the United States, in the same manner and in the same classes of cases in which they may be taken to that court from the Supreme Court of a state; and also in all cases in which the amount involved exceeded \$5,000. This section of the Judicial Code was so drawn as to state those facts,

and was existing law. See cases cited 3 Fed. Stat. Annot. 207.

Appellate jurisdiction of the Circuit Court of Appeals in respect of decisions of the United States District Court for Hawaii, see Judicial Code, sec. 128, *supra*, p. 195.

Appeals and writs of error direct to the United States Supreme Court from the United States District Court for Hawaii, see Judicial Code, sec. 238, *supra*, p. 231.

The phrase "to be ascertained by the oath," etc., appears in Judicial Code, secs. 244, 245, *supra*, and sec. 248, *infra*.

SEC. 247. [*Appeals and writs of error from the district court for Alaska direct to Supreme Court in certain cases.*] Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court. [36 Stat. L. 1158.]

The cases in which writs of error and appeals could be taken from the District Court for Alaska to the United States Supreme Court were stated in section 202 of the Criminal Code for Alaska, 1 Fed. Stat. Annot. 370, and in section 504 of the Civil Code, 1 Fed. Stat. Annot. 147. Following the policy of divesting the Supreme Court of its appellate jurisdiction in capital cases, this section 247 as revised was so modified as to vest appellate jurisdiction of that class of cases in the Circuit Court of Appeals for the ninth

circuit. See Judicial Code, sec. 134, *supra*, p. 197. Aside from that change, the section stated what was existing law.

The classes of cases described in this section are precisely the same as those described in Judicial Code, sec. 238, *supra*, p. 231, except as to cases in which the jurisdiction of the court is in issue, and the same as the "Second," "Third," and "Fourth" classes described in Judicial Code, sec. 250, *infra*, p. 235.

SEC. 248. [*Appeals and writs of error from the Supreme Court of the Philippine Islands.*] The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate

exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States. [36 Stat. L. 1158.]

This section is a re-enactment of section 10 of the Act of July 1, 1902, ch. 1369, 32 Stat. L. 691, 5 Fed. Stat. Annot. 722. The change made is by insertion of the words "within the same time" before the words "in the same manner." By reason of the varied character of the courts of our territorial and insular possessions, it was deemed best to insert this provision, not leaving it to each practitioner to solve the problem. In section 10 of the Act above cited the manner of procedure, as far as applicable, was to be that employed in appellate proceedings from the Circuit Courts. But the Circuit Courts are

abolished by Judicial Code, sec. 289, *infra*, p. 249. Therefore, the word "district" has been substituted for the word "circuit." Aside from these changes the section was existing law.

The phrase "to be ascertained by the oath," etc., appears in Judicial Code, secs. 244, 245, 246, *supra*.

"Within the same time."—The time is two years. See II. Review by United States Supreme Court direct from United States District Court, in the note to section 24a of the Bankruptcy Act of 1898, *infra*, this Supplement, title BANKRUPTCY.

SEC. 249. [*Appeals and writs of error when a Territory becomes a State.*] In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires. [36 Stat. L. 1158.]

This section is a re-enactment, without change, of R. S. sec. 703, 4 Fed. Stat. Annot. 461, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 250. [*Appeals and writs of error from the Court of Appeals of the District of Columbia.*] Any final judgment or decree of the court of appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

Second. In prize cases.

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

Fourth. In cases in which the constitution, or any law of a State, is claimed to be in contravention of the Constitution of the United States.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in

admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States. [36 Stat. L. 1159.]

R. S. sec. 705, 4 Fed. Stat. Annot. 462, expressly repealed by Judicial Code, sec. 297, *supra*, p. 250, authorized the taking of appeals and writs of error from final judgments and decrees of the Supreme Court of the District of Columbia to the Supreme Court of the United States "in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a circuit court." Section 846 of the Revised Statutes (1875) of the District of Columbia provided: "Any final judgment, order, or decree of the Supreme Court of the District of Columbia may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to final judgments, orders, and decrees of the Circuit Courts of the United States." That section appears in the Compiled Statutes of the District of Columbia, published in 1894, as section 43 of chapter 35, title Judiciary. These sections stated the law upon the subject of appeals and writs of error at the time the Act of Feb. 9, 1893, ch. 74, sec. 8. 27 Stat. L. 436, 4 Fed. Stat. Annot. 466, establishing a Court of Appeals for the District of Columbia, was passed. That Act authorized writs of error and appeals from the Supreme Court to the Court of Appeals, and from the latter court to the Supreme Court of the United States in certain instances, section 8 thereof providing that writs of error and appeals from the Court of Appeals were to be taken "in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia." That section 8 appears, with slight changes of phraseology, as section 233 of the District of Columbia Code, Act of March 3, 1901, ch. 854, 31 Stat. L. 1227, which provides as follows: "Any final judgment or decree of the Court of Appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and

under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

From the foregoing review of the law it will be seen that the manner of taking writs of error and appeals from the Court of Appeals to the Supreme Court of the United States was the same as that by which they were taken from the Circuit Courts of the United States to the Supreme Court. Section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428, provides that: "All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals." The effect of this provision was to continue the then existing method by which appeals and writs of error were taken from the Circuit Courts to the Supreme Court and make it applicable to the Circuit Courts of Appeals.

In view of the foregoing facts, Judicial Code, sec. 250, as revised, correctly stated the existing law as to the procedure by which writs of error and appeals were taken from the Court of Appeals for the District of Columbia to the Supreme Court of the United States.

The "First," "Second," "Third," and "Fourth" classes of cases described in this section are likewise described in Judicial Code, sec. 238, *supra*, p. 231; and the "Second," "Third," and "Fourth" classes are the same as those found in Judicial Code, sec. 247, *supra*, p. 234.

The clause "in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases" appears in Judicial Code, sec. 128, *supra*, p. 195.

SEC. 251. [Certiorari to Court of Appeals, District of Columbia.] In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme

Court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. [36 Stat. L. 1159.]

The part of this section which authorizes certiorari was drawn from the Act of March 3, 1897, ch. 390, 29 Stat. L. 692, embodied in section 234 of the District of Columbia Code in the Act of March 3, 1901, ch. 854, 31 Stat. L. 1227, which provided as follows: "In any case heretofore made final in the court of appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court." The leading provision for review by the Supreme Court on certiorari is in Judi-

cial Code, sec. 240, *supra*, p. 232. See also Judicial Code, sec. 262, *infra*, p. 241.

The part of this section which authorizes certification of questions to the Supreme Court is new legislation as respects the relation of the Court of Appeals of the District of Columbia to the Supreme Court. The leading provision for certification is in Judicial Code, sec. 239, *supra*, p. 231. Similar provisions for certification are in Judicial Code, sec. 134, *supra*, p. 197 and in the last clause of Judicial Code, sec. 252, which also appears as section 25d of the Bankruptcy Act of 1898, *post*, title BANKRUPTCY, in this Supplement, and is there annotated.

SEC. 252. [*Appellate jurisdiction under the bankruptcy act.*] The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

An appeal may be taken to the Supreme Court of the United States from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said Supreme Court, in the following cases and no other:

First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. [36 Stat. L. 1159.]

This section states concisely the appellate jurisdiction of the Supreme Court conferred upon it by sections 24 and 25 of the Bankruptcy Act of July 1, 1898, 1 Fed. Stat. Annot. 593-604, and *post*, title BANKRUPTCY, in this Supplement. The only changes in phraseology are those necessary to separate

the provisions relating to the Supreme Court from those relating to other courts.

Appellate and supervisory jurisdiction of the Circuit Court of Appeals under the Bankruptcy Act of 1898, see Judicial Code, sec. 130, *supra*, p. 196.

SEC. 253. [*Precedence of writs of error to state courts.*] Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance. [36 Stat. L. 1160.]

This section is a re-enactment, without change, of R. S. sec. 710, 4 Fed. Stat. Annot. 490.

SEC. 254. [*Cost of printing records.*] There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States. [36 Stat. L. 1160.]

The Sundry Civil Appropriation Act of March 3, 1877, ch. 105, 19 Stat. L. 344, 2 Fed. Stat. Annot. 293, required the clerk of the Supreme Court to collect from the losing party in any case the cost of printing the record, and to pay it into the Treasury; the cost of printing the records in the first instance being paid out of appropriations made by the Congress. As Congress quite regularly failed to appropriate a sufficient sum to pay for such printing, thus stopping the work of the court, the court, about the year 1883,

changed its rules and required the party filing a case in that court to deposit a sum sufficient to pay the cost of printing the record, this sum ultimately being paid by the losing party. This has been the practice of the court since that time, and the Act of 1877 is modified accordingly in this section.

In so far as the Act revised in this section applies to the Court of Claims, it has been revised in Judicial Code, sec. 176, *supra*, p. 208.

SEC. 255. [*Women may be admitted to practice.*] Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the court of appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States. [36 Stat. L. 1160.]

This section is a re-enactment, without change, of the Act of Feb. 15, 1879, ch. 81, 20 Stat. L. 292, 1 Fed. Stat. Annot. 518.

CHAPTER ELEVEN.

PROVISIONS COMMON TO MORE THAN ONE COURT.

Sec.
256. Cases in which jurisdiction of United States courts shall be exclusive of State courts.
257. Oath of United States judges.
258. Judges prohibited from practicing law.
259. Traveling expenses, etc., of circuit justices and circuit and district judges.
260. Salary of judges after resignation.
261. Writs of ne exeat.
262. Power to issue writs.
263. Temporary restraining orders.
264. Injunctions; in what cases judge may grant.
265. Injunctions to stay proceedings in State courts.

Sec.
266. Injunctions based upon alleged unconstitutionality of State statutes; when and by whom may be granted.
267. When suits in equity may be maintained.
268. Power to administer oaths and punish contempt.
269. New trials.
270. Power to hold to security for the peace and good behavior.
271. Power to enforce awards of foreign consuls, etc., in certain cases.
272. Parties may manage their causes personally or by counsel.
273. Certain officers forbidden to act as attorneys.
274. Penalty for violating preceding section.

SEC. 256. [*Cases in which jurisdiction of United States courts shall be exclusive of state courts.*] The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls. [36 Stat. L. 1160.]

The "original jurisdiction" of the District Courts is prescribed in Judicial Code, sec. 24, *supra*, p. 139.

The first three lines of this section are the language of the introductory paragraph of R. S. sec. 711, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

First. This paragraph is a re-enactment, without change, of paragraph "First" of R. S. sec. 711, 4 Fed. Stat. Annot. 493, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the District Courts in this class of cases see paragraph "Second" of Judicial Code, sec. 24, *supra*, p. 139.

Second. This paragraph is a re-enactment, without change, of paragraph "Second" of R. S. sec. 711, 4 Fed. Stat. Annot. 493, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the District Courts in this class of cases see paragraph "Ninth" of Judicial Code, sec. 24, *supra*, p. 139.

Third. This paragraph is a re-enactment, without change, of paragraph "Third" of R. S. sec. 711, 4 Fed. Stat. Annot. 494, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the District Courts in this class of cases see paragraph "Third" of Judicial Code, sec. 24, *supra*, p. 139.

Fourth. This paragraph is a re-enactment, without change, of paragraph "Fourth" of R. S. sec. 711, 4 Fed. Stat. Annot. 494; of part of paragraph "Eighth" of R. S. sec. 563, 4 Fed. Stat. Annot. 220; and of paragraph "Sixth" of R. S. sec. 629, 4 Fed. Stat. Annot. 247; all of which Revised Statutes sections are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the Dis-

trict Courts in these classes of cases see paragraph "Third" of Judicial Code, sec. 24, *supra*, p. 139.

Fifth. This paragraph is a re-enactment, without change, of paragraph "Fifth" of R. S. sec. 711, 4 Fed. Stat. Annot. 494, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the District Courts in this class of cases see paragraph "Seventh" of Judicial Code, sec. 24, *supra*, p. 139.

Sixth. This paragraph is a re-enactment, without change, of paragraph "Sixth" of R. S. sec. 711, 4 Fed. Stat. Annot. 497, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

As to the original jurisdiction of the District Courts in this class of cases see paragraph "Nineteenth" of Judicial Code, sec. 24, *supra*, p. 140.

Seventh. This paragraph is a re-enactment, without change, of paragraph "Seventh" of R. S. sec. 711, 4 Fed. Stat. Annot. 497, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

Eighth. This paragraph is a re-enactment of paragraph "Eighth" of R. S. sec. 711, 4 Fed. Stat. Annot. 497, which was expressly repealed by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318. Just why this clause was repealed the Committee on Revision is unable to state. In *In re Iasigi*, (1897) 79 Fed. 751, 753, the court, discussing the repeal of the Revised Statutes paragraph, said: "As respects any actual intention of Congress, the repeal of paragraph 8 of section 711, by the Act of 1875, affords no light. The explanation of that repeal is difficult, if not impossible. The Act is entitled 'An Act to correct errors and supply omissions' in the Revised Statutes of the United States. It embraces over seventy different subjects; and the first section of the Act declares that the amendments

therein made are made 'for the purpose of correcting errors and supplying omissions' in the Revised Statutes 'so as to make the same truly express' the laws in force on December 1, 1873. There is no doubt that on December 1, 1873, the jurisdiction of the federal courts over consular offenses was exclusive. In both houses of Congress when the bill was presented, as appears from the Congressional Record, members were induced to withdraw proposed amendments on the positive assurance that this Act contained no new

legislation and was solely for the purposes above expressed."

Believing that the jurisdiction of the federal courts of suits against ambassadors, public ministers, and consuls should be exclusive, the committee restored the paragraph and recommended its re-enactment.

As to the original jurisdiction of the District Courts of suits against consuls and vice-consuls, see paragraph "Eighteenth" of Judicial Code, sec. 24, *supra*, p. 140.

SEC. 257. [*Oath of United States judges.*] The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God." [36 Stat. L. 1161.]

This section is a re-enactment, without change, of R. S. sec. 712, 4 Fed. Stat. Annot. 497, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 258. [*Judges prohibited from practicing law.*] It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor. [36 Stat. L. 1161.]

This section is a re-enactment, without change, of R. S. sec. 713, 4 Fed. Stat. Annot. 497, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 259. [*Traveling expenses, etc., of circuit justices and circuit and district judges.*] The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the Commerce Court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence. [36 Stat. L. 1161.]

For provisions relating to payment of a judge's expenses see R. S. sec. 554, 4 Fed. Stat. Annot. 217, repealed in part by the Sundry Civil Appropriation Act of March 3, 1881, ch. 133, 21 Stat. L. 454, 4 Fed. Stat. Annot. 677, and repealed *in toto* by Judicial Code, sec. 297, *infra*, p. 250.

In making appropriations for the traveling expenses of United States judges when holding court outside of their respective districts, the Act of March 3, 1905, ch. 1483, 33 Stat. L. 1208, imposed the restriction that the expenses should be "actually incurred." This restriction has appeared in each Act making

appropriations for such purpose since that time; for example, in the Act of March 4, 1907, ch. 2919, 34 Stat. L. 1390.

R. S. sec. 551, 4 Fed. Stat. Annot. 216, provided that a district judge "shall reside in the district for which he is appointed;"

and R. S. sec. 607, 4 Fed. Stat. Annot. 239, that "every circuit judge shall reside within his circuit." Both of those sections are expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 260. [*Salary of judges after resignation.*] When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation. [36 Stat. L. 1161.]

This section is a re-enactment, without change, of R. S. sec. 714, 4 Fed. Stat. Annot. 498, as amended by the Act of Feb. 15, 1909,

ch. 127, 35 Stat. L. 619, 1909 Supp. 294. R. S. sec. 714 is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 261. [*Writs of ne exeat.*] Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States. [36 Stat. L. 1162.]

This section is a re-enactment of R. S. sec. 717, 5 Fed. Stat. Annot. 353, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. Since Circuit Courts are abolished by Judicial Code, sec. 289, *infra*, p. 249, the words "circuit justice or circuit judge" are omitted and the words "district judge"

substituted, so that the jurisdiction heretofore exercised by these officers will be exercised by the District Court and the district judge. The writ being ancillary to the exercise of original jurisdiction only, the power to issue it is confined to the Supreme Court and the District Courts and their judges.

SEC. 262. [*Power to issue writs.*] The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. [36 Stat. L. 1162.]

This section is drawn from R. S. sec. 716, 4 Fed. Stat. Annot. 498, expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, and from section 12 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 430. Reference to the Circuit Courts is omitted for reasons

stated in the note to section 261, *supra*; that omission making necessary the specification of the courts in the second sentence in order to preserve in them the power to issue other writs necessary for the exercise of their respective jurisdictions.

SEC. 263. [*Temporary restraining orders.*] Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge. [36 Stat. L. 1162.]

This section is a re-enactment of R. S. sec. 718, 4 Fed. Stat. Annot. 506, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change is by omitting

reference to the Circuit Court, Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 264. [*Injunctions; in what cases judge may grant.*] Writs of injunction may be granted by any justice of the Supreme Court in cases where they

might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it can not be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge. [36 Stat. L. 1162.]

This section is drawn from R. S. sec. 719, 4 Fed. Stat. Annot. 508, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

In view of the abolition of Circuit Courts by Judicial Code, sec. 289, *infra*, p. 249, the provision conferring authority upon a circuit judge to grant injunctions in cases where they might be granted by such court is omitted and a similar provision vesting in district judges

a similar power has been inserted. For the same reason the last paragraph of R. S. sec. 719, above cited, is omitted.

To meet a condition that might arise in a district, a provision has been added for a case of absence or disability of the district judge. This is but an extension of the power conferred upon the circuit judges by Judicial Code, sec. 18, *supra*, p. 137.

SEC. 265. [*Injunctions to stay proceedings in State courts.*] The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. [36 Stat. L. 1162.]

This section is a re-enactment, without change, of R. S. sec. 720, 4 Fed. Stat. Annot. 509, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 266. [*Injunctions based upon alleged unconstitutionality of State statutes; when and by whom may be granted.*] No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining

order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. [36 Stat. L. 1162.]

This section is a re-enactment of section 17 of the Act of June 18, 1910, ch. 309, 36 Stat. L. 557, expressly repealed in Judicial Code, sec. 297, *infra*, p. 250, with only such changes in language as are necessitated by the abolition of Circuit Courts effected by Judicial Code, sec. 289, *infra*, p. 249.

Appeals to the Circuit Courts of Appeals from orders on applications for interlocutory injunctions in general, see Judicial Code, sec. 129, *supra*, p. 195.

See note to Act of April 14, 1906, ch. 1627, 34 Stat. L. 116, 1909 Supp. Fed. Stat. Annot. 291, and at the corresponding place, *post*, vol. 2 of this Supplement.

SEC. 267. [*When suits in equity may be maintained.*] Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. [36 Stat. L. 1163.]

With only the substitution of the words "in any court" for the words "in either of the courts," since by Judicial Code, sec. 289, *infra*, p. 249, Circuit Courts are abolished,

this section is a re-enactment of R. S. sec. 723, 4 Fed. Stat. Annot. 530, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 268. [*Power to administer oaths and punish contempts.*] The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. [36 Stat. L. 1163.]

This section is a re-enactment, without change, of R. S. sec. 725, 4 Fed. Stat. Annot. 534, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 269. [*New trials.*] All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. [36 Stat. L. 1163.]

This section is a re-enactment, without change, of R. S. sec. 726, 4 Fed. Stat. Annot. 549, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 270. [*Power to hold to security for the peace and good behavior.*] The judges of the Supreme Court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them. [36 Stat. L. 1163.]

This section is drawn from R. S. sec. 727, 1 Fed. Stat. Annot. 519, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. Circuit Courts having been abolished by Judicial Code, sec. 289, *infra*, p. 249, the

words "circuit courts of appeals" have been inserted for the words "circuit courts," although the same judges are authorized to hold persons to security of the peace, etc. Commissioners of Circuit Courts were abol-

ished by the Act of May 28, 1896, ch. 184, sec. 19, 4 Fed. Stat. Annot. 79, and in lieu thereof United States commissioners were

provided for, and the latter term has been substituted for the former in the text section. These changes make no change in the law.

SEC. 271. [*Power to enforce awards of foreign consuls, etc., in certain cases.*] The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners. [36 Stat. L. 1163.]

This section is a re-enactment of R. S. sec. 728, 4 Fed. Stat. Annot. 551, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The words "and circuit" before the word "courts" have been omitted, Circuit Courts being abolished by Judicial

Code, sec. 289, *infra*, p. 249, and the words "United States commissioners" substituted for "commissioners of circuit courts," for the reason stated in the note to the last section, sec. 270, *supra*.

SEC. 272. [*Parties may manage their causes personally or by counsel.*] In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein. [36 Stat. L. 1164.]

This section is a re-enactment, without change, of R. S. sec. 747, 4 Fed. Stat. Annot. 556, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 273. [*Certain officers forbidden to act as attorneys.*] No clerk, or assistant or deputy clerk, of any Territorial, district, or circuit court of appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer. [36 Stat. L. 1164.]

This section is a re-enactment of R. S. sec. 748, 4 Fed. Stat. Annot. 153, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change made is by adding the words "of appeals" after the words "circuit court," thus making the clerks and deputies of those courts subject

to its provisions, and dropping clerks of Circuit Courts, since these courts and their clerks are abolished by Judicial Code, sec. 289, *infra*, p. 249. Near the end of the section the word "any" is substituted for "either," since more than two courts are referred to.

SEC. 274. [*Penalty for violating preceding section.*] Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office. [36 Stat. L. 1164.]

This section is a re-enactment of R. S. sec. 749, 4 Fed. Stat. Annot. 153, which is expressly repealed by Judicial Code, sec. 297,

infra, p. 250. The slight changes made in the language are for the purpose of correcting the text, and make no change in the law.

CHAPTER TWELVE.

JURIES.

Sec.
275. Qualifications and exemptions of jurors.
276. Jurors, how drawn.
277. Jurors, how to be apportioned in the district.
278. Race or color not to exclude.
279. Venire, how issued and served.
280. Talesmen for petit juries.
281. Special juries.
282. Number of grand jurors.

Sec.
283. Foreman of grand jury.
284. Grand juries, when summoned.
285. Discharge of grand juries.
286. Jurors not to serve more than once a year.
287. Challenges.
288. Persons disqualified for service on jury in prosecution for polygamy, etc.

SEC. 275. [*Qualifications and exemptions of jurors.*] Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned. [36 Stat. L. 1164.]

This section is drawn from that portion of R. S. sec. 800, 4 Fed. Stat. Annot. 737, which was not superseded or repealed by the Act of June 30, 1879, ch. 52, sec. 2, 21 Stat. L. 43,

4 Fed. Stat. Annot. 749, which is revised in the next succeeding section, sec. 276. R. S. sec. 800, above cited, is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 276. [*Jurors, how drawn.*] All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein. [36 Stat. L. 1164.]

This is a re-enactment of a provision in section 2 of the Act of June 30, 1879, ch. 52, 21 Stat. L. 43, 4 Fed. Stat. Annot. 749, the change consisting in the substitution of the words "the section last preceding" for the words "in section eight hundred of the Re-

vised Statutes," that being the correct reference of this Judicial Code; and the added provision vesting in the judge senior in commission in districts having more than one judge the power to appoint the court commissioner.

SEC. 277. [*Jurors, how to be apportioned in the district.*] Jurors shall be returned from such parts of the district, from time to time, as the court shall

direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service. [36 Stat. L. 1164.]

This section is a re-enactment, without change, of R. S. sec. 802, 4 Fed. Stat. Annot. 741, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 278. [*Race or color not to exclude.*] No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude. [36 Stat. L. 1165.]

This section is a re-enactment, without change, of the proviso in sec. 2 of the Act of June 30, 1879, ch. 52, 21 Stat. L. 43, 4 Fed. Stat. Annot. 749.

SEC. 279. [*Venire, how issued and served.*] Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post office addressed to such person at his usual post-office address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts. [36 Stat. L. 1165.]

This section, down to the first period, is a re-enactment of R. S. sec. 803, 4 Fed. Stat. Annot. 742, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The re-

mainder of the section is new legislation, the saving of expense being the main consideration in support of it.

SEC. 280. [*Talesmen for petit juries.*] When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section. [36 Stat. L. 1165.]

This section is a re-enactment, without change, of R. S. sec. 804, 4 Fed. Stat. Annot. 742, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 281. [*Special juries.*] When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States. [36 Stat. L. 1165.]

This section is a re-enactment of R. S. sec. 805, 4 Fed. Stat. Annot. 743, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; the only change being the substitution

of the word "district" for the word "circuit." Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 282. [*Number of grand jurors.*] Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-

three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose. [36 Stat. L. 1165.]

This section is a re-enactment of R. S. sec. 808, 4 Fed. Stat. Annot. 743, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change is by omis-

sion of the words "or circuit" before the word "court," since Circuit Courts are abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 283. [*Foreman of grand jury.*] From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury. [36 Stat. L. 1165.]

This section is a re-enactment, without change, of R. S. sec. 809, 4 Fed. Stat. Annot. 744, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 284. [*Grand juries, when summoned.*] No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. [36 Stat. L. 1165.]

This section is a re-enactment of R. S. sec. 810, 4 Fed. Stat. Annot. 744, as amended by the Act of March 28, 1910, 36 Stat. L. 267, with such changes in language as were neces-

sitated by the abolition of Circuit Courts by Judicial Code, sec. 289, *infra*, p. 249. R. S. sec. 810, above cited, is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250.

SEC. 285. [*Discharge of grand juries.*] The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary. [36 Stat. L. 1166.]

This section is a re-enactment of R. S. sec. 811, 4 Fed. Stat. Annot. 744, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250. The only change made is by

omitting the words "circuit and," the Circuit Courts being abolished by Judicial Code, sec. 289, *infra*, p. 249.

SEC. 286. [*Jurors not to serve more than once a year.*] No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term

of said court held within one year prior to the time of such challenge. [36 Stat. L. 1166.]

This section is drawn from R. S. sec. 812, 4 Fed. Stat. Annot. 744, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; and from a provision in section 2 of the

Act of June 30, 1879, ch. 52, 21 Stat. L. 43, 4 Fed. Stat. Annot. 749, which reduced from two years to one year the period in which a person could not be again summoned as a juror.

SEC. 287. [*Challenges.*] When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers. [36 Stat. L. 1166.]

This section is drawn from R. S. sec. 819, 4 Fed. Stat. Annot. 745, which is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250; and from R. S. sec. 4303, 7 Fed. Stat.

Annot. 53. The number of peremptory challenges on the part of the government in trials for treason or other felony is increased to six.

SEC. 288. [*Persons disqualified for service on jury in prosecutions for polygamy, etc.*] In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman —

First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two, entitled "An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain Acts of the legislative assembly of the territory of Utah"; or

Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.

Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent. [36 Stat. L. 1166.]

This section is a re-enactment, with only such slight changes as were necessary for the purpose of revision, of section 5 of the Act

of March 22, 1882, ch. 47, 22 Stat. L. 31, 1 Fed. Stat. Annot. 706.

CHAPTER THIRTEEN.

GENERAL PROVISIONS.

- | | |
|--|---|
| <p>Sec. 289. Circuit courts abolished; records of to be transferred to district courts.</p> <p>290. Suits pending in circuit courts to be disposed of in district courts.</p> <p>291. Powers and duties of circuit courts imposed upon district courts.</p> <p>292. References to laws revised in this act deemed to refer to sections of act.</p> | <p>Sec. 293. Sections 1 to 5, Revised Statutes, to govern construction of this act.</p> <p>294. Laws revised in this act to be construed as continuations of existing laws.</p> <p>295. Inference of legislative construction not to be drawn by reason of arrangement of sections.</p> <p>296. Act may be designated as "The Judicial Code."</p> |
|--|---|

SEC. 289. [*Circuit courts abolished; records of to be transferred to district courts.*] The circuit courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this Act. [36 Stat. L. 1167.]

The provisions in the sections contained in this chapter are new legislation.

SEC. 290. [*Suits pending in circuit courts to be disposed of in district courts.*] All suits and proceedings pending in said circuit courts on the date of the taking effect of this Act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided. [36 Stat. L. 1167.]

SEC. 291. [*Powers and duties of circuit courts imposed upon district courts.*] Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts. [36 Stat. L. 1167.]

SEC. 292. [*References to laws revised in this Act deemed to refer to sections of Act.*] Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has

been carried or revised the provision of law to which reference is so made. [36 Stat. L. 1167.]

SEC. 293. [*Sections 1 to 5, Revised Statutes, to govern construction of this Act.*] The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this Act. The words "this title," wherever they occur herein, shall be construed to mean this Act. [36 Stat. L. 1167.]

SEC. 294. [*Laws revised in this Act to be construed as continuations of existing laws.*] The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest. [36 Stat. L. 1167.]

SEC. 295. [*Inference of legislative construction not to be drawn by reason of arrangement of sections.*] The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed. [36 Stat. L. 1167.]

SEC. 296. [*Act may be designated as "The Judicial Code."*] This Act may be designated and cited as "The Judicial Code." [36 Stat. L. 1168.]

CHAPTER FOURTEEN.

REPEALING PROVISIONS.

Sec.

297. Sections, acts, and parts of acts repealed.

298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.

299. Accrued rights, etc., not affected.

Sec.

300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.

301. Date this act shall be effective.

SEC. 297. [*Sections, Acts, and parts of Acts repealed.*] The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; sections five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An Act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five.

Section five of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven, and eight of said Act, and sections one, two, and twenty-six of an Act entitled "An Act to amend an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," approved March third, eighteen hundred and eighty-seven, are hereby continued in force.

"An Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories," approved March third, eighteen hundred and eighty-five.

"An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven, and ten thereof.

Sections one, two, three, four, six, and seven of an Act entitled "An Act to correct the enrollment of an Act approved March third, eighteen hundred and eighty-seven, entitled 'An Act to amend sections one, two, three, and ten of an Act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five," approved August thirteenth, eighteen hundred and eighty-eight.

"An Act to withdraw from the Supreme Court jurisdiction of criminal cases not capital and confer the same on the circuit courts of appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An Act to amend sections one and two of the Act of March third, eighteen hundred and eighty-seven, Twenty-fourth Statutes at Large, chapter three hundred and fifty-nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An Act to amend the seventh section of the Act entitled 'An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, and the several Acts amendatory thereto," approved April fourteenth, nineteen hundred and six.

All Acts and parts of Acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an Act entitled "An Act to create a commerce court, and to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten.

Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed. [36 Stat. L. 1168.]

See the table at the close of this Act giving the location in Federal Statutes, Annotated, of the Revised Statutes sections and the Acts and parts of Acts repealed.

SEC. 298. [*Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.*] The repeal of existing laws providing for the appointment of judges and other officers mentioned in this Act, or affecting the organization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished) shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law. [36 Stat. L. 1169.]

SEC. 299. [*Accrued rights, etc., not affected.*] The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made. [36 Stat. L. 1169.]

SEC. 300. [*Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.*] All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this Act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this Act had not been passed. [36 Stat. L. 1169.]

SEC. 301. [*Date this Act shall be effective.*] This Act shall take effect and be in force on and after January first, nineteen hundred and twelve. [36 Stat. L. 1169.]

The sections of the Revised Statutes and the Acts and parts of Acts repealed by section 297 are given in Federal Statutes, Annotated, as indicated below:

| R. S. sec. | Vol. | Page | R. S. sec. | Vol. | Page |
|------------|------|------|------------|------|------|
| 530..... | 4 | 16 | 556..... | 4 | 166 |
| 531..... | 4 | 16 | 557..... | 4 | 176 |
| 532..... | 4 | 17 | 558..... | 4 | 74 |
| 533..... | 4 | 18 | 559..... | 4 | 172 |
| 534..... | 4 | 22 | 560..... | 4 | 173 |
| 535..... | 4 | 23 | 562..... | 4 | 218 |
| 536..... | 4 | 27 | 563..... | 4 | 218 |
| 537..... | 4 | 28 | 564..... | 4 | 236 |
| 538..... | 4 | 34 | 567..... | 4 | 237 |
| 539..... | 4 | 37 | 568..... | 4 | 238 |
| 540..... | 4 | 40 | 569..... | 4 | 238 |
| 541..... | 4 | 42 | 570..... | 4 | 79 |
| 542..... | 4 | 44 | 571..... | 4 | 238 |
| 543..... | 4 | 44 | 572..... | 4 | 665 |
| 544..... | 4 | 46 | 573..... | 4 | 671 |
| 545..... | 4 | 47 | 574..... | 4 | 671 |
| 546..... | 4 | 48 | 575..... | 4 | 697 |
| 547..... | 4 | 50 | 576..... | 4 | 732 |
| 548..... | 4 | 53 | 577..... | 4 | 672 |
| 549..... | 4 | 57 | 578..... | 4 | 672 |
| 550..... | 4 | 59 | 579..... | 4 | 672 |
| 551..... | 4 | 216 | 580..... | 4 | 672 |
| 552..... | 4 | 216 | 581..... | 4 | 672 |
| 553..... | 4 | 217 | 582..... | 4 | 725 |
| 554..... | 4 | 217 | 583..... | 4 | 673 |
| 555..... | 4 | 74 | 584..... | 4 | 673 |

| R. S. sec. | Vol. | Page | R. S. sec. | Vol. | Page |
|------------|------|------|------------|------|------|
| 585 | 4 | 673 | 658 | 4 | 680 |
| 586 | 4 | 674 | 659 | 1 | 519 |
| 587 | 4 | 674 | 660 | 4 | 685 |
| 588 | 4 | 674 | 661 | 4 | 686 |
| 589 | 4 | 675 | 662 | 4 | 686 |
| 590 | 4 | 675 | 663 | 4 | 713 |
| 591 | 4 | 675 | 664 | 4 | 686 |
| 592 | 4 | 676 | 665 | 4 | 687 |
| 593 | 4 | 676 | 666 | 4 | 725 |
| 594 | 4 | 676 | 667 | 4 | 718 |
| 595 | 4 | 676 | 668 | 4 | 687 |
| 596 | 4 | 677 | 669 | 4 | 687 |
| 597 | 4 | 678 | 670 | 4 | 687 |
| 598 | 4 | 697 | 671 | 4 | 688 |
| 599 | 4 | 716 | 672 | 4 | 688 |
| 600 | 4 | 717 | 673 | 4 | 434 |
| 601 | 4 | 678 | 674 | 4 | 434 |
| 602 | 4 | 679 | 675 | 4 | 435 |
| 603 | 4 | 680 | 676 | 4 | 435 |
| 604 | 4 | 59 | 677 | 4 | 73 |
| 605 | 4 | 238 | 678 | 4 | 73 |
| 606 | 4 | 238 | 679 | 4 | 435 |
| 607 | 4 | 239 | 680 | 4 | 159 |
| 608 | 4 | 241 | 681 | 6 | 767 |
| 609 | 4 | 243 | 682 | 6 | 767 |
| 610 | 4 | 243 | 683 | 6 | 768 |
| 611 | 4 | 243 | 684 | 4 | 692 |
| 612 | 4 | 243 | 685 | 4 | 693 |
| 613 | 4 | 243 | 686 | 4 | 693 |
| 614 | 4 | 244 | 687 | 4 | 436 |
| 615 | 4 | 244 | 688 | 4 | 439 |
| 616 | 4 | 245 | 689 | 4 | 443 |
| 617 | 4 | 245 | 690 | 4 | 443 |
| 618 | 4 | 245 | 691 | 4 | 443 |
| 619 | 4 | 74 | 692 | 4 | 444 |
| 620 | 4 | 176 | 693 | 4 | 445 |
| 621 | 4 | 184 | 694 | 4 | 445 |
| 622 | 4 | 191 | 695 | 4 | 445 |
| 623 | 4 | 193 | 696 | 6 | 80 |
| 624 | 4 | 75 | 697 | 4 | 445 |
| 625 | 4 | 172 | 699 | 4 | 448 |
| 626 | 4 | 88 | 702 | 4 | 459 |
| 627 | 4 | 79 | 703 | 4 | 461 |
| 629 | 5 | 245 | 704 | 4 | 462 |
| 630 | 4 | 251 | 705 | 4 | 462 |
| 631 | 4 | 251 | 706 | 4 | 462 |
| 632 | 4 | 253 | 707 | 4 | 467 |
| 633 | 4 | 253 | 708 | 4 | 467 |
| 634 | 4 | 255 | 709 | 4 | 467 |
| 635 | 4 | 255 | 710 | 4 | 490 |
| 636 | 4 | 256 | 711 | 4 | 493 |
| 637 | 4 | 256 | 712 | 4 | 497 |
| 638 | 4 | 257 | 713 | 4 | 497 |
| 639 | 4 | 257 | 714 | 4 | 498 |
| 640 | 4 | 258 | 716 | 4 | 498 |
| 641 | 4 | 258 | 717 | 5 | 353 |
| 642 | 4 | 260 | 718 | 4 | 506 |
| 643 | 4 | 260 | 719 | 4 | 508 |
| 644 | 4 | 264 | 720 | 4 | 509 |
| 645 | 4 | 264 | 723 | 4 | 530 |
| 646 | 4 | 264 | 725 | 4 | 534 |
| 647 | 4 | 265 | 726 | 4 | 549 |
| 650 | 4 | 393 | 727 | 1 | 519 |
| 651 | 4 | 394 | 728 | 4 | 551 |
| 652 | 4 | 394 | 729 | 6 | 892 |
| 653 | 4 | 394 | 730 | 2 | 345 |
| 654 | 4 | 394 | 731 | 2 | 347 |
| 655 | 4 | 395 | 732 | 3 | 94 |
| 656 | 4 | 395 | | | |
| 657 | 4 | 395 | | | |

| R. S. sec. | Vol. | Page | R. S. sec. | Vol. | Page |
|------------|------|------|--|------|----------|
| 733..... | 3 | 595 | 1079..... | 2 | 69 |
| 734..... | 3 | 95 | 1080..... | 2 | 70 |
| 735..... | 6 | 70 | 1081..... | 2 | 70 |
| 736..... | 5 | 197 | 1082..... | 2 | 70 |
| 737..... | 4 | 552 | 1083..... | 2 | 71 |
| 738..... | 4 | 554 | 1084..... | 2 | 71 |
| 739..... | 4 | 554 | 1085..... | 2 | 71 |
| 740..... | 4 | 554 | 1086..... | 2 | 71 |
| 741..... | 4 | 555 | 1087..... | 2 | 71 |
| 742..... | 4 | 555 | 1088..... | 2 | 72 |
| 743..... | 4 | 636 | 1091..... | 2 | 73 |
| 744..... | 4 | 636 | 1092..... | 2 | 74 |
| 745..... | 4 | 639 | 1093..... | 2 | 74 |
| 746..... | 4 | 556 | | | |
| 747..... | 4 | 556 | Act of | Vol. | Page |
| 748..... | 4 | 153 | 1875 Mar. 3, c. 137, § 1-10... | 4 | 265-385 |
| 749..... | 4 | 153 | 1882 Mar. 22, c. 47, § 5..... | 1 | 706 |
| 800..... | 4 | 737 | 1883 Mar. 3, c. 116, § 1-7.... | 2 | 75-79 |
| 801..... | 4 | 758 | 1885 Mar. 3, c. 356, § 1, 2.... | 4 | 463 |
| 802..... | 4 | 741 | 1887 Mar. 3, c. 359, § 1-3.... | 2 | 80-83 |
| 803..... | 4 | 742 | 8, 9.... | 2 | 85 |
| 804..... | 4 | 742 | 11-16.. | 2 | 86-88 |
| 805..... | 4 | 743 | 1888 Aug. 13, c. 866, § 1..... | 4 | 265, 312 |
| 806..... | 4 | 757 | | | 349, 386 |
| 807..... | 4 | 760 | § 2, 3.... | 4 | 386 |
| 808..... | 4 | 743 | § 4..... | 5 | 193 |
| 809..... | 4 | 744 | § 6, 7.... | 4 | 389 |
| 810..... | 4 | 744 | 1897 Jan. 20, c. 68, § 1..... | 4 | 433 |
| 811..... | 4 | 744 | 1898 June 27, c. 503, § 1, 2.... | 2 | 82 |
| 812..... | 4 | 744 | 1906 Apr. 14, c. 1627, § 1, 1909 Supp. | | 291 |
| 813..... | 4 | 745 | | | |
| 814..... | 4 | 752 | | | |
| 815..... | 4 | 754 | | | |
| 816..... | 4 | 757 | | | |
| 817..... | 4 | 759 | | | |
| 818..... | 4 | 760 | | | |
| 819..... | 4 | 745 | | | |
| 820..... | 4 | 747 | | | |
| 821..... | 4 | 748 | | | |
| 822..... | 4 | 748 | | | |
| 1049..... | 2 | 53 | | | |
| 1050..... | 2 | 53 | | | |
| | 6 | 841 | | | |
| 1051..... | 2 | 53 | | | |
| 1052..... | 2 | 54 | | | |
| 1053..... | 2 | 54 | | | |
| 1054..... | 2 | 54 | | | |
| 1055..... | 2 | 54 | | | |
| 1056..... | 2 | 54 | | | |
| 1057..... | 2 | 55 | | | |
| 1058..... | 2 | 55 | | | |
| 1059..... | 2 | 55 | | | |
| 1060..... | 2 | 61 | | | |
| 1061..... | 2 | 61 | | | |
| 1062..... | 2 | 61 | | | |
| 1063..... | 2 | 62 | | | |
| 1064..... | 2 | 63 | | | |
| 1065..... | 2 | 64 | | | |
| 1066..... | 2 | 64 | | | |
| 1067..... | 2 | 64 | | | |
| 1068..... | 2 | 64 | | | |
| 1069..... | 2 | 65 | | | |
| 1070..... | 2 | 67 | | | |
| 1071..... | 2 | 67 | | | |
| 1072..... | 2 | 67 | | | |
| 1073..... | 2 | 68 | | | |
| 1074..... | 2 | 68 | | | |
| 1075..... | 2 | 68 | | | |
| 1076..... | 2 | 69 | | | |
| 1077..... | 2 | 69 | | | |
| 1078..... | 2 | 69 | | | |

Repeal of Acts prior to Feb. 1, 1911. — Under the provision above for the repeal of "all Acts and parts of Acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven," the following Acts of the Sixty-first Congress, which would otherwise have appeared in this Supplement, have been omitted:

Act of June 23, 1910, ch. 371. "To provide for sittings of the United States circuit and district courts of the eastern division of the eastern district of Arkansas at the city of Jonesboro in said district." 36 Stat. L. 603.

Act of June 22, 1910, ch. 328. "Establishing regular terms of the United States circuit and district courts of the northern district of California at Sacramento, California, and of the southern division of the southern district of California at San Diego, California." 36 Stat. L. 539.

Act of June 11, 1910, ch. 286. "To change and fix the terms of the circuit and district courts of the United States in the district of Delaware." 36 Stat. L. 466.

Act of Feb. 24, 1910, ch. 56. "To provide for the appointment of an additional district judge in and for the district of Maryland." 36 Stat. L. 201.

Act of Feb. 24, 1911, ch. 160. "To provide for sittings of the United States circuit and district courts of the northern district of Mississippi at the city of Clarksdale, in said district." 36 Stat. L. 932.

Act of May 16, 1910, ch. 241. "Transferring Oregon county to the southern division

of the western judicial district of Missouri." 36 Stat. L. 370.

Act of June 22, 1910, ch. 321. "To provide for sittings of the United States circuit and district courts of the eastern division of the eastern district of Missouri at the city of Rolla, in said district." 36 Stat. L. 585.

Act of June 22, 1910, ch. 323. "To provide for sittings of the United States circuit and district courts of the western division of the western district of Missouri at the city of Chillicothe, in said district." 36 Stat. L. 587.

Act of April 12, 1910, ch. 153. "To amend an Act entitled 'An Act to divide the judicial district of Nebraska into divisions and to provide for an additional district judge in said district.'" 36 Stat. L. 294.

Act of March 3, 1910, ch. 76. "To amend in part section six hundred and fifty-eight of the Revised Statutes." 36 Stat. L. 232.

Act of June 25, 1910, ch. 410. "To provide for an additional judge of the district court for the eastern district of New York." 36 Stat. L. 838.

Act of Jan. 26, 1910, ch. 4. "To change the times for holding the regular terms of the circuit and district courts of the United States at Greensboro and at Charlotte, in the western district of North Carolina." 36 Stat. L. 186.

Act of Feb. 24, 1910, ch. 57. "Providing for the appointment of an additional district judge in and for the northern judicial district of the State of Ohio, and an additional district judge in and for the southern judicial district of the State of Ohio." 36 Stat. L. 202.

Act of June 25, 1910, ch. 394. "To provide for the time and places for holding of the regular terms of the United States circuit and district courts for the western district of the State of Oklahoma, and for other purposes." 36 Stat. L. 825.

Act of March 2, 1911, ch. 197. "To fix the time of holding the circuit and district courts for the northern district of West Virginia." 36 Stat. L. 1013.

[II. APPEALS TO CIRCUIT COURT OF APPEALS AND TO SUPREME COURT.]

An Act To diminish the expense of proceedings on appeal and writ of error or of certiorari.

[Act of Feb. 13, 1911, ch. 47.]

[SEC. 1.] *[United States courts — appeal, etc., to circuit courts of appeals — printed transcript of record to be filed — original documents.]* That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided*, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required. [36 Stat. L. 901.]

Fee for indexing.—In *Colt's Patent Firearms Mfg. Co. v. New York Sporting Goods Co.*, 186 Fed. 625, it was held that as this section makes no provision for indexes, they should be prepared by the clerk of the Circuit Court of Appeals, and since his fee for preparing and indexing the record under the

fee bill in force is fixed at a stated sum per page of the whole, and is indivisible, until such fee bill is changed or further legislation enacted parties would be required to pay the full fee thereby prescribed, to be held by the clerk until its return was authorized.

SEC. 2. *[Appeals, etc., to Supreme Court — use of printed record in court below as part of transcript — use of uncertified copies of record — clerk's fee — no written transcript of printed record required.]* That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on ap-

peal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required. [36 Stat. L. 901.]

[III. EXPEDITING TRUST, ETC., CASES.]

An Act To amend an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted," approved February eleventh, nineteen hundred and three.

[Act of June 25, 1910, ch. 428.]

[*Expediting hearings of trust, etc., cases.*] That section one of the Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted," approved February eleventh, nineteen hundred and three, be, and the same is hereby, amended so as to read as follows:

"That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges

of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought. [36 Stat. L. 854.]

For the Act of Feb. 11, 1903, hereby amended, see 10 Fed. Stat. Annot. 199.

[IV. UNITED STATES COURT FOR CHINA.]

[*United States court for China — judge and district attorney — sessions other than at Shanghai.*] The judge of the said court [United States court for China] and the district attorney shall, when the sessions of the court are held at other cities than Shanghai, receive in addition to their salaries their actual expenses during such sessions, not to exceed ten dollars per day for the judge and five dollars per day for the district attorney. [36 Stat. L. 343.]

This is from the Diplomatic and Consular Appropriation Act of May 6, 1910, ch. 199.

[V. COURTS IN ARKANSAS, IDAHO, AND MISSOURI.]

An Act To amend section two of an Act entitled "An Act to regulate the practice in certain civil and criminal cases in the western district of Arkansas."

[Act of March 5, 1910, ch. 32.]

[*Arkansas western judicial district — transfer of certain criminal cases to Fort Smith division — trials on transfer — certified copies of record entries, etc. — compensation to be paid by United States.*] That section two of an Act entitled "An Act to regulate the practice in certain civil and criminal cases in the western district of Arkansas," approved June second, nineteen hundred and six, be, and the same is hereby, amended so as to read as follows:

"SEC. 2. That the defendants in criminal cases now or hereafter pending in the district courts of the Harrison or Texarkana divisions of the western district of Arkansas and who are incarcerated at Fort Smith to await trial because of their inability to furnish bail and who desire to plead 'guilty' may,

on their written motion showing those facts and filed in the case, in vacation, and upon the order of the judge, duly signed and filed in the case, have their cases transferred to the Fort Smith division of the western district of Arkansas, to the end that trials may be had and sentences imposed as in other cases of like nature; and prisoners bound over to answer to indictments in the Harrison or Texarkana divisions of the western district of Arkansas for offenses committed in those divisions and who are incarcerated in the jail at Fort Smith, Arkansas, for inability to furnish bail, and who desire to plead 'guilty' to such offenses, may on their own motions have their cases submitted to a grand jury of the Fort Smith division for indictment and final disposition in the courts of that division, or in proper cases may plead to informations filed in the proper court in said division and have their cases disposed of as other cases of like nature when the offense was committed in the Fort Smith division. When a transfer is ordered, as provided in this section, the clerk shall make out and forthwith send a certified copy of the record entries, together with the indictment and all the original papers, to the clerk of the court to which such case is transferred, who shall file the same, and thereupon the case shall be proceeded with as other cases of like nature pending in such court. For making out said transcript and forwarding the same, together with the original papers in said case, the clerk of the court shall have the usual compensation for making out transcripts and for filing the petition and order and entering the order, and two dollars additional, all such compensation to be taxed and paid by the United States as other costs taxed against the United States are paid." [36 Stat. L. 233.]

Sec. 2 of the Act of June 2, 1906, ch. 2569, above amended, is set forth in the 1909 Supp. Fed. Stat. Annot., p. 301.

An Act Amending an Act entitled "An Act to amend an Act to provide the times and places for holding terms of the United States court in the States of Idaho and Wyoming," approved June first, eighteen hundred and ninety-eight.

[Act of Feb. 23, 1911, ch. 148.]

[SEC. 1.] [*Idaho judicial district — divisions of district.*] That section three of "An Act to provide the times and places for holding terms of the United States courts in the States of Idaho and Wyoming," approved July fifth, eighteen hundred and ninety-two, as amended by the amendatory Act approved June first, eighteen hundred and ninety-eight, be amended so as to read as follows:

"SEC. 3. That for the purpose of holding terms of the district court said district shall be divided into four divisions, to be known as the northern, central, southern, and eastern divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Shoshone, Kootenai, and Bonner shall constitute the northern division of said district; and the territory embraced on the date last mentioned in the counties of Latah, Nez Perce, and Idaho shall constitute the central division of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington shall constitute the southern division of said district; and the territory embraced on the date last mentioned in the counties of Bingham, Bear Lake, Custer, Fremont, Bannock, Lemhi, and Oneida shall constitute the eastern division of said district." [36 Stat. L. 927.]

See 4 Fed. Stat. Annot. 27.

SEC. 2. [*Terms — transfer of pending suits, etc. — offices of clerk, etc. — deputy clerk at Coeur d'Alene City.*] That section six of said Act as amended by the Act approved June first, eighteen hundred and ninety-eight, be amended so as to read as follows:

"SEC. 6. That the terms of the district court for the northern division of the State of Idaho shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October; and the provision of any statute now existing providing for the holding of said terms on any day contrary to this Act is hereby repealed; and all suits, prosecutions, process, recognizance, bail bonds, and other things pending in or returnable to said court are hereby transferred to, and shall be made returnable to, and have force in the said respective terms in this Act provided in the same manner and with the same effect as they would have had had said existing statute not been passed.

"That the clerk of the district and circuit courts for the district of Idaho and the marshal and district attorney for said district shall perform the duties appertaining to their offices, respectively, for said courts of the said several divisions of said judicial district. Whenever in the judgment of the district and circuit judges the business of said courts hereafter shall warrant the employment of a deputy clerk at Coeur d'Alene City, new books and records may be opened for the said court, and a deputy clerk appointed to reside and keep his office at Coeur d'Alene City." [36 Stat. L. 928.]

For this section as it read prior to this amendment, see 4 Fed. Stat. Annot. 701.

An Act Transferring Maries County to the eastern division of the eastern judicial district of Missouri.

[Act of Feb. 7, 1911, ch. 39.]

[*Missouri eastern judicial district — Maries county transferred to — pending causes.*] That the county of Maries, in the State of Missouri, be detached from the western judicial district and attached to the eastern division of the eastern judicial district of the State of Missouri: *Provided*, That courts of the western district shall retain and exercise jurisdiction over all causes and proceedings, civil and criminal, arising in or coming from said county and begun and pending at the date of the taking effect of this Act, and of all criminal offenses committed in said county prior to the date this Act goes into effect, the prosecution of which has not been begun, as completely as if this Act were not passed. [36 Stat. L. 897.]

JURIES.

See JUDICIARY.

LABOR.

Act of March 4, 1911, Ch. 285, 260.

Sec. 1. Interstate Commerce Commission—Member to Act at Arbitrations, 260.

CROSS-REFERENCES.

Miners' Labor Lien in Alaska, see ALASKA.

And see generally, COMMERCE AND LABOR; RAILROADS.

[SEC. 1.] [*Interstate Commerce Commission—member to act at arbitrations.*] * * * The President of the United States from and after the passage of this Act is authorized to designate from time to time any member of the Interstate Commerce Commission or of the Court of Commerce to exercise the powers conferred and the duties imposed upon the chairman of the Interstate Commerce Commission by the provisions of the "Act concerning carriers engaged in interstate commerce and their employees," approved June first, eighteen hundred and ninety-eight; and the member so designated, during the period for which he is designated, shall have the powers now conferred by said Act on the chairman of the Interstate Commerce Commission. [*36 Stat. L. 1397.*]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.
For the Act of June 1, 1898, above referred to, see 4 Fed. Stat. Annot. 784.

LADING AND UNLADING.

See *CUSTOMS DUTIES*.

LAKE MICHIGAN.

Dumping Refuse in, see WATERS.

Jurisdiction of Crimes Committed on, see CRIMES AND OFFENSES.

LAND DISTRICTS AND OFFICES.

See *PUBLIC LANDS*.

LETTER CARRIERS.

See *POSTAL SERVICE*.

LIBRARY.

Of Agricultural Department, see AGRICULTURE.

LICENSES.

Custom-house Brokers, see CUSTOMS DUTIES.

LIENS.

Maritime Liens, see SHIPPING AND NAVIGATION.
Miners' Labor Lien in Alaska, see ALASKA.

LIGHT-HOUSES.

See LIGHTS AND BUOYS.

LIGHTS AND BUOYS.

Act of June 17, 1910, Ch. 301, 262.

Secs. 1-2. Additional Aids to Navigation — Contracts Authorised. (Temporary), 262.

3. Light-vessels — Restriction of Changing Stations of Repealed, 262.

4. Bureau of Light-houses — Commissioner — Appointment and Salary — Deputy, Chief Clerk, Inspectors, etc. — Chief Constructing Engineer, and Superintendent of Naval Construction — Annual Report — Damages from Collisions with — Adjustment of Claims, 262.

5. Employees Transferred, 262.

6. Light-house Board — Duties Transferred, 263.

7. Light-house Service — Control, etc., of, Transferred — Light-house Establishment — Custody of Records, etc., Transferred, 263.

8. Contracts Required for Materials, etc. — Open Market Purchases, 263.

9. Purchase of Sites, 263.

10. Administrative Regulations, 263.

11. Light-house Districts — Rearrangement — Inspectors — Salaries — Temporary Assignment of Army and Navy Officers — Engineer Officer for Mississippi River Districts — Detail for Construction, etc., 264.

12. Appropriations Transferred, 264.

13. Laws Repealed, 264.

14. Effect, 264.

CROSS-REFERENCES.

Estimates for Support of, see *ESTIMATES, APPROPRIATIONS, AND REPORTS*.

And see generally, *TONNAGE DUTIES*.

An Act To authorize additional aids to navigation in the Light-House Establishment, and to provide for a Bureau of Light-Houses in the Department of Commerce and Labor, and for other purposes.

[Act of June 17, 1910, ch. 301.]

[SECS. 1-2.] [*Additional aids to navigation—contracts authorized.*]
[*Temporary.*]

SEC. 3. [*Light-vessels—restriction of changing stations of repealed.*]
That the provision in the Act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and nine, and for other purposes," approved May twenty-seventh, nineteen hundred and eight, reading as follows, to wit: "Hereafter no light-ship shall be removed from the place designated for its station in the Act authorizing its construction and be stationed elsewhere except upon express authority of Congress," is hereby repealed. [36 Stat. L. 537.]

SEC. 4. [*Bureau of light-houses—commissioner—appointment and salary—deputy, chief clerk, inspectors, etc.—chief constructing engineer, and superintendent of naval construction—annual report—damages from collisions with—adjustment of claims.*] That hereafter there shall be in the Department of Commerce and Labor a bureau of light-houses and a commissioner of light-houses, who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in the bureau a deputy commissioner, to be appointed by the President, who shall receive a salary of four thousand dollars per annum, and a chief clerk, who shall perform the duties of chief clerk and such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the commissioner. There shall also be in the bureau such inspectors, clerical assistants, and other employees as may from time to time be authorized by Congress, and there shall also be employed one chief constructing engineer at a salary of four thousand dollars per annum and one superintendent of naval construction at a salary of three thousand dollars per annum, both to be appointed by the President. The commissioner of light-houses shall make an annual report to the Secretary of Commerce and Labor, who shall transmit the same to Congress at the beginning of each regular session thereof; and such commissioner, subject to the approval of the Secretary of Commerce and Labor, is hereby authorized to consider, ascertain, adjust, and determine all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collisions, for which collisions vessels of the Light-House Service shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [35 Stat. L. 537.]

SEC. 5. [*Employees transferred.*] That all employees of or in the Light-House Board or the Light-House Establishment are hereby transferred to the

bureau of light-houses, excepting, however, army and navy officers. [36 Stat. L. 537.]

SEC. 6. [*Light-House Board — duties transferred.*] That all duties performed and all power and authority now possessed or exercised by the Light-House Board, under any provision of law not hereby repealed, are hereby transferred to and imposed and conferred upon and vested in the commissioner of light-houses, under the direction and control of the Secretary of Commerce and Labor. [36 Stat. L. 538.]

SEC. 7. [*Light-House Service — control, etc., of, transferred — Light-House Establishment — custody of records, etc., transferred.*] That the commissioner of light-houses shall, under the direction and control of the Secretary of Commerce and Labor, have charge and control of the construction, maintenance, repair, illumination, inspection, and superintendence of light-house depots, supply stations, light and signal stations, light-houses, light-vessels, light-house tenders, fog signals, submarine signals, beacons, buoys, day marks, post-lantern lights, and seamarks and their appendages, and generally of the Light-House Service; and the charge and custody of all the archives, books, documents, drawings, models, returns, apparatus, and other things appertaining to the Light-House Establishment. [36 Stat. L. 538.]

SEC. 8. [*Contracts required for materials, etc. — open market purchases.*] That all materials for construction, maintenance, repair, and operation shall be procured by public contracts, under such regulations as may from time to time be prescribed by the commissioner, subject to the approval of the Secretary of Commerce and Labor, and no contract shall be made except after public advertisement for proposals in such form and manner as to secure general notice thereof, and the same shall only be made with the lowest and best bidder therefor, upon security deemed sufficient in the judgment of the commissioner of light-houses, but all bids may at any time be rejected by the commissioner: *Provided, however,* That the commissioner of light-houses may purchase illuminating oil, wicks, and chimneys for lights, and ground tackle for light-vessels and buoys, and to an amount not exceeding five hundred dollars at any one time, other materials and supplies when immediate delivery is required by an exigency, by private contract or in the open market, if he deems it for the best interests of the service so to do; but such purchases shall be set forth in the annual report of the commissioner with the reasons for purchasing other than upon bids after public advertisement. [36 Stat. L. 538.]

SEC. 9. [*Purchase of sites.*] That the commissioner, under the direction of the Secretary of Commerce and Labor, is authorized, whenever an appropriation is made by Congress for a new light-house, the proper site for which does not belong to the United States, to purchase the necessary land for such site, provided the purchase money be paid from the amount appropriated for such light-house without exceeding the limit of cost, if any, fixed in such case; and the commissioner of light-houses is authorized to employ temporarily draftsmen for the preparation of plans for tenders and light-vessels which may be authorized by Congress, to be paid from the respective appropriations therefor. [36 Stat. L. 538.]

SEC. 10. [*Administrative regulations.*] That the commissioner of light-houses, under the direction and control of the Secretary of Commerce and Labor, shall, from time to time, prescribe and distribute such regulations as he

may deem proper for securing an efficient, uniform, and economic administration of the Light-House Service. [36 Stat. L. 538.]

SEC. 11. [*Light-house districts — rearrangement — inspectors — salaries — temporary assignment of Army and Navy officers — engineer officer for Mississippi river districts — detail for construction, etc.*] That the commissioner of light-houses, subject to the approval of the Secretary of Commerce and Labor, as soon as practicable, shall rearrange the ocean, gulf, and lake coasts and the rivers of the United States, Porto Rico, and the naval station in Cuba into not exceeding nineteen light-house districts, and a light-house inspector shall be assigned in charge of each district. The light-house inspectors shall each receive a salary of two thousand four hundred dollars per annum, except the inspector of the third district, whose salary shall be three thousand six hundred dollars per annum. The President may, for a period not exceeding three years from the taking effect of this section, assign army and navy officers to act in lieu of the appointment of civilian light-house inspectors, but such army and navy officers shall not receive any salary or compensation in addition to the salary or compensation they are entitled to as such army or navy officers: *Provided*, That in the districts which include the Mississippi River and its tributaries the President may designate army engineers to perform the duties of and act as inspectors. The President may detail officers of the Engineer Corps of the United States Army for consultation or to superintend the construction or repair of any aid to navigation authorized by Congress. [36 Stat. L. 538.]

SEC. 12. [*Appropriations transferred.*] That all unexpended appropriations which shall be available at the time when this Act takes effect, in relation to the Light-House Board, the Light-House Establishment, and the Light-House Service, shall be available from the time that this Act takes effect for expenditures in and by the bureau of light-houses, and shall be treated the same as though the bureau of light-houses had been named directly in the Acts making said appropriations. [36 Stat. L. 539.]

SEC. 13. [*Laws repealed.*] That sections forty-six hundred and fifty-three, forty-six hundred and fifty-four, forty-six hundred and fifty-five, forty-six hundred and fifty-six, forty-six hundred and fifty-seven, forty-six hundred and fifty-eight, forty-six hundred and fifty-nine, forty-six hundred and sixty, forty-six hundred and sixty-three, forty-six hundred and sixty-four, forty-six hundred and sixty-five, forty-six hundred and sixty-six, forty-six hundred and sixty-seven, forty-six hundred and sixty-nine, forty-six hundred and seventy, and forty-six hundred and seventy-one of the Revised Statutes of the United States are hereby repealed. [36 Stat. L. 539.]

For the sections of the Revised Statutes hereby repealed, see the title LIGHTS AND BUOYS, 4 Fed. Stat. Annot. 829-834.

SEC. 14. [*Effect.*] That sections four to thirteen, inclusive, of this Act, shall take effect on the first day of July next succeeding its passage. [36 Stat. L. 539.]

LOCOMOTIVES.

See RAILROADS.

LONG AND SHORT HAUL.

See INTERSTATE COMMERCE.

MAIL.

'See POSTAL SERVICE—POST-OFFICE DEPARTMENT.

MARINE CORPS.

Discrimination against United States Uniform, see UNIFORMS.

MARINE SCHOOLS.

See EDUCATION.

MARITIME LIENS.

See SHIPPING AND NAVIGATION.

MARSHALS.

See JUDICIAL OFFICERS.

MASTER AND SERVANT.

Employers' Liability, see RAILROADS.

MILITARY ACADEMY.

Act of April 19, 1910, Ch. 174, 266.

Sec. 1. Senior Medical Officer to Be Professor of Military Hygiene, 266.

Cadets — Admission of Successors after Three Years' Course, 266.

Hazing — Regulations to Prescribe Penalty for — Court-martial Trials — Effect of Dismissal — Inconsistent Laws Repealed — Disposal of Pending Cases, 266.

Act of March 3, 1911, Ch. 207, 267.

Sec. 1. Pay of Acting First Sergeant of Detachment of Engineers, 267.

An Act Making appropriations for the support of the Military Academy for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes.

[Act of April 19, 1910, ch. 174.]

[SEC. 1.] [*Senior medical officer to be professor of military hygiene.*]

* * * Hereafter any officer detailed from the Medical Corps of the army as senior medical officer of the post at the Military Academy, whose rank shall not be below that of lieutenant-colonel, shall be the professor of military hygiene. [36 Stat. L. 312.]

[*Cadets — admission of successors, after three years' course.*] * * *

Hereafter, for six years from July first, anno Domini, nineteen hundred and ten, whenever any cadet shall have finished three years of his course at the United States Military Academy, his successor may be admitted to the Academy; and the corps of cadets is hereby increased to meet this provision. [36 Stat. L. 323.]

[*Hazing — regulations to prescribe penalty for — court-martial trials — effect of dismissal — inconsistent laws repealed — disposal of pending cases.*]

* * * The portion of the Act of Congress entitled "An Act making appropriations for the support of the Military Academy for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," approved March second, nineteen hundred and one, prescribing penalty for hazing, is hereby amended to read as follows:

"That the superintendent of the United States Military Academy, subject to the approval of the Secretary of War, shall make appropriate regulations for putting a stop to the practice of hazing, such regulations to prescribe dismissal, suspension, or other adequate punishments for infractions of the same, and to embody a clear definition of hazing.

"That any cadet who shall be charged with offenses under such regulations which would involve his dismissal from the academy shall be granted, upon his written request, a trial by a general court-martial, and any cadet dismissed from the academy for hazing shall not thereafter be reappointed to the corps of cadets nor be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member.

"That all Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed."

The regulations of the United States Military Academy upon the subject of hazing having been modified, the Secretary of War is hereby authorized to dispose of any cases which are now pending, and in which final action has not yet been taken, under the provisions of the said regulations as modified. [36 Stat. L. 323.]

For that portion of the Act of March 2, 1901, hereby amended, see 4 Fed. Stat. Annot. 883.

An Act Making appropriations for the support of the Military Academy for the fiscal year ending June thirtieth, nineteen hundred and twelve, and for other purposes.

[Act of March 3, 1911, ch. 267.]

[SEC. 1.] [*Pay of acting first sergeant of detachment of engineers.*] * * * That hereafter the pay and allowances of the acting first sergeant of the United States Military Academy detachment of engineers shall be the same as the pay and allowances of a first sergeant of a company of engineers: *And provided further*, That when an acting first sergeant of the detachment of engineers may hereafter be retired, his retired pay and allowances shall be the same as the pay and allowances of a retired first sergeant of a company of engineers. [36 Stat. L. 1019.]

MILITARY SECRETS.

See **NATIONAL DEFENSE SECRETS.**

MILITIA.

Act of April 21, 1910, Ch. 184, 268.

Allotments to States, etc., Available for Joint Maneuvers, 1908—Credit in Accounts, 268.

Act of April 21, 1910, Ch. 185, 268.

Participation in Army Maneuvers, etc.—District of Columbia Added—Pay—Army Appropriations Not to Be Used—Use of Annual Allotment to States, etc.—Statement of Expenses—Regular Army Officer to Retain Command, 268.

CROSS-REFERENCES.

Issue of Automatic Pistols for, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Rank of Officers, see ARTICLES OF WAR.

An Act To provide for the payment of expenses involved by the participation of the militia in joint maneuvers with the Regular Army during the season of nineteen hundred and eight.

[*Act of April 21, 1910, ch. 184.*]

[*Allotments to states, etc., available for joint maneuvers, 1908—credit in accounts.*] That the disbursing officers of the several States, Territories, and the District of Columbia are hereby authorized to pay from allotments under section sixteen hundred and sixty-one, Revised Statutes, as amended, such sums as may be necessary to settle accounts incurred by the several States, Territories, and the District of Columbia for expenses involved by the participation of the militia in joint encampments with the Regular Army during the season of nineteen hundred and eight: *Provided*, That the accounting officers of the Treasury are hereby authorized and directed to credit such disbursements. [36 Stat. L. 329.]

For R. S. sec. 1661, see 4 Fed. Stat. Annot. 898.

An Act To further amend the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three.

[*Act of April 21, 1910, ch. 185.*]

[*Participation in army maneuvers, etc.—District of Columbia added—pay—army appropriations not to be used—use of annual allotment to states, etc.—statement of expenses—Regular Army officer to retain command.*] That section fifteen of the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, as amended by the Act entitled "An Act to further amend the Act entitled 'An Act to promote the efficiency of the militia, and for other purposes,' approved May twenty-seventh, nineteen hundred and eight," be, and the same is hereby, amended so as to read as follows:

"SEC. 15. That the Secretary of War is authorized to provide for participation by any part of the organized militia of any State, Territory, or the District of Columbia, on the request of the governor of a State or Territory, or the commanding-general of the militia of the District of Columbia, in the encampments, maneuvers, and field instruction of any part of the Regular Army, at or near any military post or camp or lake or sea-coast defenses of the United States. In such case the organized militia so participating shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the Regular Army, and no part of the sums appropriated for the support of the Regular Army shall be used to pay any part of the expenses of the organized militia of any State or Territory or the District of Columbia, while engaged in joint encampments, maneuvers, and field instruction of the Regular Army and militia: *Provided*, That the Secretary of War is authorized, under requisition of the governor of a State or Territory or the commanding-general of the militia of the District of Columbia, to pay to the quartermaster-general, or such other officer of the militia as may be duly designated and appointed for the purpose, so much of its allotment, under the annual appropriation authorized by section sixteen hundred and sixty-one, Revised Statutes, as amended, as shall be necessary for the payment, subsistence, transportation, and other expenses of such portion of the organized militia as may engage in encampments, maneuvers, and field instruction with any part of the Regular Army at or near any military post or camp or lake or sea-coast defenses of the United States, and the Secretary of War shall forward to Congress, at each session next after said encampments, a detailed statement of the expense of such encampments and maneuvers: *Provided*, That the command of such military post or camp and the officers and troops of the United States there stationed shall remain with the regular commander of the post without regard to the rank of the commanding or other officers of the militia temporarily so encamped within its limits or in its vicinity: *Provided further*, That except as herein specified the right to command during such joint encampments, maneuvers, and field instruction shall be governed by the rules set out in Articles One hundred and twenty-two and One hundred and twenty-four of the rules and articles for the government of the armies of the United States." [36 Stat. L. 329.]

Section 15 of the Act of Jan. 21, 1903, as it read prior to this amendment, is given in 1909 Supp. Fed. Stat. Annot. 349.

For R. S. sec. 1661, as amended, see 1909 Supp. Fed. Stat. Annot. 343.

MINERAL LANDS, MINES, AND MINING.

Act of May 18, 1910, Ch. 240, 270.

Sec. 1. Bureau of Mines—Established in Interior Department—Director to Be Appointed, 270.

2. Duties, 270.

3. Secretary to Furnish Offices, Clerks, etc., 271.

4. Transfer of Investigations from Geological Survey—Appropriations Transferred—Employees, etc., Transferred, 271.

5. No Authority over Mines, etc., in States, 271.

6. Effect, 271.

Joint Resolution of June 25, 1910, No. 36, 271.

Sec. 1. Bureau of Mines—Editions of Publications Limited, 271.

2. Additional Copies to Meet Demands, 271.

Act of March 2, 1911, Ch. 201, 271.

Locators of Mineral Oil Lands—Patents Not to Be Denied, Solely for Transfer before Discovery, etc., 271.

CROSS-REFERENCE.

In Alaska, see ALASKA.

An Act To establish in the Department of the Interior a Bureau of Mines.

[Act of May 18, 1910, ch. 240.]

[SEC. 1.] *[Bureau of Mines—established in Interior Department—director to be appointed.]* That there is hereby established in the Department of the Interior a bureau, to be called the Bureau of Mines, and a director of said bureau, who shall be thoroughly equipped for the duties of said office by technical education and experience and who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive a salary of six thousand dollars per annum; and there shall also be in the said bureau such experts and other employees as may from time to time be authorized by Congress. [36 Stat. L. 369.]

SEC. 2. *[Duties.]* That it shall be the province and duty of said bureau and its director, under the direction of the Secretary of the Interior, to make diligent investigation of the methods of mining, especially in relation to the safety of miners, and the appliances best adapted to prevent accidents, the possible improvement of conditions under which mining operations are carried on, the treatment of ores and other mineral substances, the use of explosives and electricity, the prevention of accidents, and other inquiries and technologic investigations pertinent to said industries, and from time to time make such public reports of the work, investigations, and information obtained as the Secretary of said department may direct, with the recommendations of such bureau. [36 Stat. L. 370.]

SEC. 3. [*Secretary to furnish offices, clerks, etc.*] That the Secretary of the Interior shall provide the said bureau with furnished offices in the city of Washington, with such books, records, stationery, and appliances, and such assistants, clerks, stenographers, typewriters, and other employees as may be necessary for the proper discharge of the duties imposed by this Act upon such bureau, fixing the compensation of such clerks and employees within appropriations made for that purpose. [36 Stat. L. 370.]

SEC. 4. [*Transfer of investigations from Geological Survey — appropriations transferred — employees, etc., transferred.*] That the Secretary of the Interior is hereby authorized to transfer to the Bureau of Mines from the United States Geological Survey the supervision of the investigations of structural materials and the analyzing and testing of coals, lignites, and other mineral fuel substances and the investigation as to the causes of mine explosions; and the appropriations made for such investigations may be expended under the supervision of the Director of the Bureau of Mines in manner as if the same were so directed in the appropriations Acts; and such investigations shall hereafter be within the province of the Bureau of Mines, and shall cease and determine under the organization of the United States Geological Survey; and such experts, employees, property and equipment as are now employed or used by the Geological Survey in connection with the subjects herewith transferred to the Bureau of Mines are directed to be transferred to said bureau. [36 Stat. L. 370.]

SEC. 5. [*No authority over mines, etc., in states.*] That nothing in this Act shall be construed as in any way granting to any officer or employee of the Bureau of Mines any right or authority in connection with the inspection or supervision of mines or metallurgical plants in any State. [36 Stat. L. 370.]

SEC. 6. [*Effect.*] This Act shall take effect and be in force on and after the first day of July, nineteen hundred and ten. [36 Stat. L. 370.]

Joint Resolution Limiting the editions of the publications of the Bureau of Mines.

[Joint Resolution of June 25, 1910, No. 36.]

[SEC. 1.] [*Bureau of Mines — editions of publications limited.*] That the publications of the Bureau of Mines shall be published in such editions as recommended by the Secretary of the Interior, but not to exceed ten thousand copies for the first edition. [36 Stat. L. 883.]

SEC. 2. [*Additional copies to meet demands.*] That whenever the edition of any of the publications of the Bureau of Mines shall have become exhausted and the demand for it continues, there shall be published, on the requisition of the Secretary of the Interior, as many additional copies as the Secretary of the Interior may deem necessary to meet the demand. [36 Stat. L. 883.]

An Act To protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

[Act of March 2, 1911, ch. 201.]

[*Locators of mineral oil lands — patents not to be denied, solely for transfer before discovery, etc.*] That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States

containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry. [*36 Stat. L. 1015.*]

MINTS.

See *COINAGE, MINTS, AND ASSAY OFFICES.*

MISBRANDING.

Of Insecticides, see AGRICULTURE.

MONEY.

See *COINAGE, MINTS, AND ASSAY OFFICES; PUBLIC MONEY.*

MONEY ORDERS.

See *POSTAL SERVICE — POST-OFFICE DEPARTMENT.*

MONEY PAID INTO COURT.

Act of March 3, 1911, Ch. 224, 273.

*Money Paid into Court—Order of Withdrawal—Unclaimed Money—
Payment on Order of Court—Permanent Appropriation—Applicable
to Prior Deposits, 273.*

An Act To amend section nine hundred and ninety-six of the Revised Statutes of the United States as amended by the Act of February nineteenth, eighteen hundred and ninety-seven.

[Act of March 3, 1911, ch. 224.]

[*Money paid into court—order of withdrawal—unclaimed money—payment on order of court—permanent appropriation—applicable to prior deposits.*] That section nine hundred and ninety-six of the Revised Statutes of the United States as amended by the Act of February nineteenth, eighteen hundred and ninety-seven, is hereby amended so as to read as follows:

“**Sec. 996.** No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States: *Provided*, That any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders, and this Act is applicable to all money deposited in the Treasury of the United States in accordance with section nine hundred and ninety-six, Revised Statutes of the United States, as amended February nineteenth, eighteen hundred and ninety-seven.” [36 Stat. L. 1083.]

For R. S. sec. 996 as it read prior to this amendment, see 5 Fed. Stat. Annot. 71.

MOTOR BOATS.

See *COLLISIONS*.

NATIONAL DEFENSE SECRETS.

Act of March 3, 1911, Ch. 226, 274.

Sec. 1. National Defense—Offenses Specified—Obtaining Unlawful Information—Obtaining Photographs, Sketches, Plans, etc.—Receiving Unlawful Information—Communicating Information—Disclosing Plans, etc.—Punishment, 274.

2. Punishment for Communication to Foreign Governments, etc., 274.

3. Jurisdiction for Offenses on High Seas—In the Philippines, 275.

An Act To prevent the disclosure of national defense secrets.

[Act of March 3, 1911, ch. 226.]

[SEC. 1.] *[National defense—offenses specified—obtaining unlawful information—obtaining photographs, sketches, plans, etc.—receiving unlawful information—communicating information—disclosing plans, etc.—punishment.]* That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place noncontiguous to but subject to the jurisdiction thereof; or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take, or make, any document, sketch, photograph, photographic negative, plan, model, or knowledge of anything connected with the national defense to which he is not entitled; or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge; knowing the same to have been so obtained, taken, or made; or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; or whoever, being lawfully intrusted with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. [36 Stat. L. 1084.]

SEC. 2. *[Punishment for communication to foreign governments, etc.]* That whoever, having committed any offense defined in the preceding section, communicates or attempts to communicate to any foreign government, or to any agent or employee thereof, any document, sketch, photograph, photographic negative, plan, model, or knowledge so obtained, taken, or made, or so intrusted to him, shall be imprisoned not more than ten years. [36 Stat. L. 1085.]

SEC. 3. [*Jurisdiction for offenses on high seas—in the Philippines.*] That offenses against the provisions of this Act committed upon the high seas or elsewhere outside of a judicial district shall be cognizable in the district where the offender is found or into which he is first brought; but offenses hereunder committed within the Philippine Islands shall be cognizable in any court of said islands having original jurisdiction of criminal cases, with the same right of appeal as is given in other criminal cases where imprisonment exceeding one year forms a part of the penalty; and jurisdiction is hereby conferred upon such courts for such purpose. [*36 Stat. L. 1085.*]

NATIONAL FORESTS.

See *PUBLIC LANDS; TIMBER LANDS AND FOREST RESERVES.*

NATURALIZATION.

Act of June 25, 1910, Ch. 401, 276.

Sec. 1. Extra Allowance to Clerks of Courts—Salaries Allowed to Additional Naturalization Clerks—Limit—Continuance at Beginning of Fiscal Year—Mode of Payment, etc., 276.

2. Payment for Clerical Assistance—Restriction—Appropriation—Regulations—Limit, 277.

3. Petitions for Citizenship—Issue of Naturalization Papers without Declaration in Certain Cases, 277.

Act of Feb. 24, 1911, Ch. 151, 278.

Insane Alien—Completion of Naturalization by Wife, etc., of, to Make Homestead Entry, 278.

An Act To amend section thirteen of an Act entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," and for other naturalization purposes.

[Act of June 25, 1910, ch. 401.]

[SEC. 1.] [*Extra allowance to clerks of courts—salaries allowed to additional naturalization clerks—limit—continuance at beginning of fiscal year—mode of payment, etc.*] That section thirteen of the Act approved June twenty-ninth, nineteen hundred and six, entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," is hereby amended by striking out the last sentence of the section, which reads as follows: "And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance," and inserting in lieu thereof the following:

"And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the Secretary of Commerce and Labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary the naturalization business of such clerk warrants further additional assistance: *Provided*, That in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: *Provided further*, That when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the Secretary of Commerce and Labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the Secretary of Commerce and Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of

the fiscal year until such time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this Act.

"That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of Commerce and Labor may prescribe." [36 Stat. L. 829.]

For sec. 13 of the Act of June 29, 1906, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 372.

SEC. 2. [*Payment for clerical assistance — restriction — appropriation — regulations — limit.*] That the Secretary of Commerce and Labor is hereby authorized to make requisition on the Treasurer of the United States for such amount as may be necessary in his opinion to pay the clerks of the several courts exercising jurisdiction under section three of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes, page five hundred and ninety-six), for any additional clerical assistance employed by them during the period from September twenty-seventh, nineteen hundred and six, to June thirtieth, nineteen hundred and seven, inclusive, if in the opinion of said Secretary the business of such clerks during the aforesaid period, warranted any allowance for such additional clerical assistance: *Provided*, That no allowance shall be made by said Secretary to any clerk for additional clerical assistance who has not collected fees in naturalization proceedings in excess of the sum of four thousand five hundred dollars during the period from September twenty-seventh, nineteen hundred and six, to June thirtieth, nineteen hundred and seven, inclusive, and that the total salaries of such additional clerical assistance shall in no instance exceed the fees received by the United States from the clerk of that court during the period from September twenty-seventh, nineteen hundred and six, to June thirtieth, nineteen hundred and seven, inclusive. Such amount as may be necessary to pay the additional clerical assistance herein provided for, not exceeding two thousand dollars, is hereby appropriated from any moneys in the Treasury of the United States not otherwise appropriated: *Provided*, That payment for the clerical assistance herein provided for shall be in the manner and under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided, further*, That no moneys shall be paid to any clerk in excess of the aggregate of the sums paid out by him. [36 Stat. L. 830.]

For sec. 3 of the Act of June 29, 1906, see 1909 Supp. Fed. Stat. Annot. 365.

SEC. 3. [*Petitions for citizenship — issue of naturalization papers without declaration in certain cases.*] That paragraph two of section four of an Act entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-ninth, nineteen hundred and six, be amended by adding after the proviso in paragraph two of section four of said Act the following:

"*Provided further*, That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United

States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their [*sic*] intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens. [36 Stat. L. 830.]

For sec. 4 of the Act of June 29, 1906, see 1909 Supp. Fed. Stat. Annot. 366.

An Act Providing for the naturalization of the wife and minor children of insane aliens, making homestead entries under the land laws of the United States.

[Act of Feb. 24, 1911, ch. 151.]

[*Insane alien — completion of naturalization by wife, etc., of, to make homestead entry.*] That when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws be naturalized without making any declaration of intention. [36 Stat. L. 929.]

NAVAL ACADEMY.

Act of April 12, 1910, Ch. 157, 279.

Sec. 1. Naval Academy Band Reorganized — Pay, etc., 279.

2. Enlistment, etc. — No Back Pay, etc., 279.

An Act To reorganize and enlist the members of the United States Naval Academy Band.

[Act of April 12, 1910, ch. 157.]

[Sec. 1.] [*Naval Academy band reorganized — pay, etc.*] That the Naval Academy Band shall consist of one leader, who shall have the pay and allowance of a second lieutenant in the Marine Corps; one second leader, with pay at the rate of fifty dollars per month; twenty-nine musicians, first class, and eleven musicians, second class; and shall be paid from "Pay of the navy." [36 Stat. L. 297.]

Sec. 2. [*Enlistment, etc. — no back pay, etc.*] That the members of the Naval Academy Band as now organized shall be enlisted in the navy and credited with all prior service of whatever nature as members of said band, as shown by the records of the Naval Academy and the pay rolls of the ships and academy; and the said leader and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are, or may hereafter become, applicable to other enlisted men of the navy: *Provided*, That no back pay shall be allowed to the leader or to any member of the said band by reason of the passage of this act. [36 Stat. L. 297.]

NAVIGABLE WATERS.

See *RIVERS, HARBORS, AND CANALS; TIMBER LANDS AND FOREST RESERVES.*

NAVIGATION.

By Motor Boats, see COLLISIONS.

And see generally, *SHIPPING AND NAVIGATION.*

NAVY.

Act of June 24, 1910, Ch. 378, 280.

Sec. 1. Paymasters' Clerks — Pay and Allowances — Retired Pay, etc. — Nurse Corps (Female) — Commutation of Quarters — Payments Allowed, 280. Collisions with Naval Vessels — Adjustment of Claims for Damages, 281. Chiefs of Bureaus — Pay, etc. — Rank, etc., after Thirty Years' Service — Commissions, 281. Recruiting — Certificate of Age Required — Oath of Applicant — Discharge, etc., of Minors, 281. Naval Home — Employing Beneficiaries, 281. Detail of Line under Staff Officers, 282. Commutation of Prisoners' Rations — Use of Profits on Sales, 282. Navy Ration or Commutation, 282. Bureau of Yards and Docks — Technical Services — Limit, etc., 282.

Act of March 4, 1911, Ch. 239, 282.

Sec. 1. Direct and Indirect Charges Included in Cost of Work under Appropriations — Money Accounts to Show Charges, 282. Officers Performing Engineering Duty on Shore Only, Made Additional Numbers — Retirement, 283. Officers Failing Physical Examination for Promotion to Be Retired, 283. Heat, etc., to Young Men's Christian Association Buildings at Yards, 283.

Act of Aug. 22, 1911, Ch. 42, 283.

Secretary of Navy — Partial Payments on Contracts, 283.

CROSS-REFERENCES.

Discharge Certificate to Person Serving under Assumed Name, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Discrimination against United States Uniform, see UNIFORMS.

Naval Vessels Sent to Marine Schools, see EDUCATION.

Report by Secretary to Congress, see ESTIMATES, APPROPRIATIONS, AND REPORTS.

And see generally, NAVAL ACADEMY.

An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes.

[Act of June 24, 1910, ch. 378.]

[SEC. 1.] *[Paymasters' clerks — pay and allowances — retired pay, etc. — nurse corps (female) — commutation of quarters — payments allowed.]*

* * * The provision of the Act approved May thirteenth, nineteen hundred and eight, entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nine," relating to the pay of paymasters' clerks, is hereby amended so as to read as follows:

"All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the navy."

The Secretary of the Navy is authorized, in his discretion, to allow members of the Nurse Corps (female) of the navy fifteen dollars per month in lieu of quarters when government quarters are not available, and that the accounting

officers of the Treasury are hereby authorized and directed to allow in the accounts of disbursing officers of the navy all payments heretofore made by them in accordance with orders of the Secretary of the Navy for commutation of quarters to members of the Nurse Corps (female) of the navy at the rate herein specified. [36 Stat. L. 606.]

For the Act of May 13, 1908, ch. 166, see 1909 Supp. Fed. Stat. Annot. 390.

[*Collisions with naval vessels — adjustment of claims for damages.*] * * *

The Secretary of the Navy is hereby authorized to consider, ascertain, adjust and determine the amounts due on all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collision, for which collisions vessels of the navy shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [36 Stat. L. 607.]

[*Chiefs of bureaus — pay, etc. — rank, etc., after thirty years' service — commissions.*] * * * The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear-admiral of the lower nine; and all officers of the navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred. [36 Stat. L. 607.]

[*Recruiting — certificate of age required — oath of applicant — discharge, etc., of minors.*] * * * Recruiting: Expenses of recruiting for the naval service; rent of rendezvous and expenses of maintaining the same; advertising for and obtaining men and apprentice seamen; actual and necessary expenses in lieu of mileage to officers on duty with traveling recruiting parties, one hundred and thirty thousand dollars: *Provided*, That no part of this appropriation shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen, unless in case of minors a certificate of birth or a verified written statement by the parents, or either of them, or in case of their death a verified written statement by the legal guardian, be first furnished to the recruiting officer, showing applicant to be of age, required by naval regulations, which shall be presented with the application for enlistment; except in cases where such certificate is unobtainable, enlistment may be made when the recruiting officer is convinced that oath of applicant as to age is credible; but when it is afterwards found upon evidence satisfactory to the Navy Department that recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, upon request of either parent, be released from service in the navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment. [36 Stat. L. 608.]

[*Naval Home — employing beneficiaries.*] * * * That for the performance of such additional services in and about the Naval Home as may be necessary, the Secretary of the Navy is authorized to employ, on the recommendation of the governor, beneficiaries in said home, whose compensation shall be

fixed by the Secretary and paid from the appropriation for the support of the home. [36 Stat. L. 610.]

[*Detail of line under staff officers.*] * * * That line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy-yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed. [36 Stat. L. 614.]

[*Commutation of prisoners' rations — use of profits on sales.*] * * * That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed thirty cents per diem for each ration so commuted; labor in general storehouses and paymasters' offices in navy-yards, including naval stations maintained in island possessions under the control of the United States, and expenses in handling stores purchased under the naval supply fund; and for the purchase of United States Army emergency rations, as required: *Provided*, That hereafter a profit not to exceed fifteen per centum may be charged on sales from ships' stores, such profit to be expended in the discretion of the Secretary of the Navy, under such regulations as he may prescribe, for the amusement, comfort, and contentment of the enlisted force, and to be accounted for to the Bureau of Supplies and Accounts, Navy Department: [36 Stat. L. 619.]

[*Navy ration or commutation.*] * * * and no law shall be construed to entitle marines on shore duty to any rations, or commutation thereof, other than such as now are or may hereafter be allowed to enlisted men in the army: *Provided, however*, That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the army ration, such marines may be allowed the navy ration or commutation therefor. [36 Stat. L. 626.]

[*Bureau of Yards and Docks — technical services — limit, etc.*] * * * BUREAU OF YARDS AND DOCKS: Chief clerk, two thousand dollars; draftsman and clerk, one thousand eight hundred dollars; clerk of class three; clerk of class two; two clerks of class one; clerk, one thousand one hundred dollars; six clerks, at one thousand dollars each; assistant messenger; three messenger boys, at six hundred dollars each; and two laborers; in all, twenty thousand one hundred and forty dollars.

The services of skilled draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Yards and Docks to carry into effect the various appropriations thereunder and be paid from such appropriations: *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and twelve shall not exceed forty thousand dollars; a statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [36 Stat. L. 1212.]

An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and twelve, and for other purposes.

[Act of March 4, 1911, ch. 239.]

[Sec. 1.] [*Direct and indirect charges included in cost of work under appropriations — money accounts to show charges.*] That hereafter, in fixing the cost of work under the various naval appropriations, the direct and indirect

charges incident thereto shall be included in such cost: *And provided further*, That the Bureau of Supplies and Accounts shall keep the money accounts of the Naval Establishment in such manner as to show such charges and shall report the same annually for the information of Congress. [36 Stat. L. 1267.]

[*Officers performing engineering duty on shore only, made additional numbers — retirement.*] * * * That officers on the active list of the line of the United States Navy who, under authority of law, now perform engineering duty on shore only are hereby made additional to the numbers in the grades in which they are now serving, and shall be carried as additional to the numbers of each grade to which they may hereafter be promoted: *Provided*, That said officers shall be entitled to all the benefits of retirement under existing or future laws equally with other officers of like rank and service. [36 Stat. L. 1267.]

[*Officers failing physical examination for promotion to be retired.*] * * * Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted. [36 Stat. L. 1267.]

[*Heat, etc., to Young Men's Christian Association buildings at yards.*] * * * That the Secretary of the Navy is authorized, in his discretion, to furnish hereafter, without charge, heat and light for the Young Men's Christian Association buildings in navy yards and stations. [36 Stat. L. 1274.]

An Act Authorizing the Secretary of the Navy to make partial payments for work already done under public contracts.

[Act of Aug. 22, 1911, ch. 42.]

[*Secretary of Navy — partial payments on contracts.*] That the Secretary of the Navy be, and he hereby is, authorized, in his discretion, to make partial payments from time to time during the progress of the work under existing contracts and all contracts hereafter made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts hereafter made shall provide for a lien in favor of the Government, which lien is hereby made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: *Provided*, That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions. [37 Stat. L. 32.]

A similar provision was contained in the Navy Appropriation Act of March 4, 1911, 36 Stat. L. 1267. That provision, however, was repealed by Joint Resolution No. 5, of Aug. 14, 1911.

NEW MEXICO.

See *STATES; TERRITORIES.*

NOMINATIONS.

See ELECTIONS.

NURSES.

See NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

OATHS.

See CIVIL SERVICE; JUDICIAL OFFICERS; PUBLIC OFFICERS.

OFFICERS.

See PUBLIC OFFICERS.

OIL AND OIL LANDS.

See MINERAL LANDS, MINES, AND MINING.

OIL PIPE LINES.

See PUBLIC LANDS.

PANAMA CANAL.

See RIVERS, HARBORS, AND CANALS.

PARDON.

See PRISONS AND PRISONERS.

PARIS GREEN.

See *AGRICULTURE*.

PARKS.

See *PUBLIC PARKS*.

PAROLE.

See *PRISONS AND PRISONERS*.

PATENTS.

Act of June 25, 1910, Ch. 414, 285.

Sec. 1. Caveats Abolished, 285.

2. Fees for Caveats Abolished, 285.

3. Present Caveats Not Affected, 285.

Act of June 25, 1910, Ch. 423, 286.

*Recovery for Unlicensed Use of Patent by United States — Claims Barred
— Defenses Allowed — Patents by Government Employees, 286.*

An Act To repeal section forty-nine hundred and two and to amend section forty-nine hundred and thirty-four of the Revised Statutes, relating to caveats.

[Act of June 25, 1910, ch. 414.]

[**SEC. 1.**] [*Caveats abolished.*] That section forty-nine hundred and two of the Revised Statutes be, and the same is hereby, repealed. [*36 Stat. L. 843.*]

SEC. 2. [*Fees for caveats abolished.*] That section forty-nine hundred and thirty-four of the Revised Statutes be amended by striking out the following:
"On filing each caveat, ten dollars." [*36 Stat. L. 843.*]

SEC. 3. [*Present caveats not affected.*] That this Act shall take effect July first, nineteen hundred and ten, and shall not apply to any caveat filed prior to said date. [*36 Stat. L. 843.*]

For R. S. secs. 4902, 4934, see 5 Fed. Stat. Annot. 496, 604.

An Act To provide additional protection for owners of patents of the United States, and for other purposes.

[Act of June 25, 1910, ch. 423.]

[*Recovery for unlicensed use of patent by United States — claims barred — defenses allowed — patents by government employees.*] That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims: *Provided, however,* That said Court of Claims shall not entertain a suit or reward compensation under the provisions of this Act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further,* That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further,* That the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service. [36 Stat. L. 851.]

For title 60 of the Revised Statutes, see 5 Fed. Stat. Annot. 417 *et seq.*

PENSIONS.

Act of June 17, 1910, Ch. 297, 287.

Sec. 1. Board of Pension Appeals — Vacancies Not to Be Filled, 287.

Act of June 25, 1910, Ch. 413, 287.

Sec. 2. Rural Delivery Carriers May Administer Oaths — Fee Allowed, 287.

Joint Resolution of Feb. 27, 1911, No. 13, 287.

Military Records — Proviso in Laws Correcting, Not to Prevent Pensions Applied for after Passage, 287.

[**SEC. 1.**] [*Board of Pension Appeals — vacancies not to be filled.*]

* * * That no vacancy hereafter occurring upon the Board of Pension Appeals, as now constituted, shall be filled by original appointment, transfer, or otherwise; [*36 Stat. L. 511.*]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

SEC. 2. [*Rural delivery carriers may administer oaths — fee allowed.*]

That hereafter, in addition to the officers now authorized to administer oaths in such cases, rural free delivery carriers of the United States are hereby required, empowered, and authorized to administer any and all oaths required to be made by pensioners and their witnesses in the execution of their vouchers; with like effect and force as officers having a seal, and they are authorized to charge and receive for each voucher not exceeding twenty-five cents, to be paid by the pensioner. [*36 Stat. L. 843.*]

This is from the Pension Appropriation Act of June 25, 1910, ch. 413.

Joint Resolution Modifying certain laws relating to the military records of certain soldiers and sailors.

[**Joint Resolution of Feb. 27, 1911, No. 13.**]

[*Military records — proviso in laws correcting, not to prevent pensions applied for after passage.*] That in all laws approved during the Sixty-first Congress having for their object the removal of disabilities accruing from defective records in the military or naval service of the United States, the words "*Provided, That, other than as above set forth, no bounty, pay, pension, or other emolument shall accrue prior to or by reason of the passage of this Act*" shall not prohibit or prevent the granting of a pension on an application made after the approval of this Act, and accruing only from the date of said application, [*36 Stat. L. 1458.*]

PHILIPPINE ISLANDS.

Joint Resolution of April 9, 1910, No. 19, 288.

Terms of Supreme Court at Baguio, etc., 288.

Act of Feb. 15, 1911, Ch. 81, 288.

Sec. 1. Members of Assembly to Be Elected for Four Years—Regular Sessions of Legislature, 288.

2. Resident Commissioners, 288.

3. Inconsistent Laws Repealed, 289.

Joint Resolution Fixing the terms of court in the Philippine Islands.

[Joint Resolution of April 9, 1910, No. 19.]

[Terms of Supreme Court at Baguio, etc.] That the supreme court of the Philippine Islands is authorized to hold such special term or terms in each year at Baguio, in the Province of Benguet, or at any other suitable place in the Philippine Islands, as may be provided by order of the court, and to make such orders with reference to the transfer of records and the issuing of process as shall be necessary to make the orders, decrees, and judgments entered by the court in such special term or terms effective. [*36 Stat. L. 877.*]

An Act Providing for the quadrennial election of members of the Philippine Assembly and Resident Commissioners to the United States, and for other purposes.

[Act of Feb. 15, 1911, ch. 81.]

[Sec. 1.] [Members of Assembly to be elected for four years—regular sessions of legislature.] That the present members of the Philippine Assembly shall hold office until the sixteenth day of October, anno Domini nineteen hundred and twelve, and their successors shall be chosen by the people in the year nineteen hundred and twelve, and in every fourth year thereafter, and shall hold office for four years beginning on the sixteenth day of October next following their election. At its next regular session after the passage of this Act the Philippine Legislature shall fix the date for the commencement of its annual sessions. [*36 Stat. L. 910.*]

See 5 Fed. Stat. Annot. 720.

Sec. 2. [Resident Commissioners.] That the present Resident Commissioners shall hold office until their successors shall have been duly elected and qualified. Their successors may be elected by the present Philippine Legislature, and if so elected shall hold office until March fourth, nineteen hundred and thirteen. At the regular session beginning in nineteen hundred and twelve, and quadrennially thereafter, the Philippine Legislature shall in the manner now provided by law elect two Resident Commissioners to the United States, each of whom shall hold office for the term of four years beginning upon the fourth day of March next ensuing his election. Each of said Resident Commissioners shall, in addition to the salary and expenses now allowed by law, be allowed the same sum for stationery and for the pay of necessary clerk hire as

is now allowed to the Members of the House of Representatives of the United States, and the franking privilege now enjoyed by Members of the House of Representatives. [36 Stat. L. 910.]

See 5 Fed. Stat. Annot. 721.

SEC. 3. [*Inconsistent laws repealed.*] That all Acts or parts of Acts inconsistent herewith are hereby repealed so far, and so far only, as they conflict with the provisions of this Act. [36 Stat. L. 910.]

This Act supersedes the Act of June 14, 1910, ch. 291, 36 Stat. L. 467, which deals with the same subjects.

PHOTOGRAPHS.

See *NATIONAL DEFENSE SECRETS*.

PICTURES.

See *NATIONAL DEFENSE SECRETS*.

PIPE LINES.

Right of Way over Public Domain, see *PUBLIC LANDS*.
And see generally, *INTERSTATE COMMERCE*.

POLITICAL CONTRIBUTIONS.

See *ELECTIONS*.

POOR PERSONS.

See *COSTS*.

PORTO RICO.

Act of June 14, 1910, Ch. 290, 290.

Lands, etc., Near San Juan, Granted to, 290.

An Act To authorize the President to convey to the people of Porto Rico certain lands and buildings not needed for purposes of the United States.

[Act of June 14, 1910, ch. 290.]

[*Lands, etc., near San Juan, granted to.*] That the President is hereby authorized, in his discretion, to convey to the people of Porto Rico such lands and buildings, or interests therein, adjacent to the city of San Juan, reserved for public uses under the authority conferred by the Act approved July first, nineteen hundred and two (Thirty-second Statutes at Large, page seven hundred and thirty-one), as in his opinion are no longer needed for purposes of the United States. [36 Stat. L. 467.]

PORTS OF ENTRY.

See CUSTOMS DUTIES.

POSTAL SERVICE—POST-OFFICE DEPARTMENT.

Act of May 12, 1910, Ch. 280, 292.

Sec. 1. Additional Compensation to Fourth-class Postmasters, 292.

Detroit, Marine Service—Contracts, 292.

Transportation of Mail—Compensation to Land-grant Roads, Reduced, 292.

Advertising Mail Lettings—Posting in Each Office Named—Second-class Mail Matter—Return of Undeliverable, at Third-class Rates—Conflicting Laws Repealed, 293.

Act of May 23, 1910, Ch. 254, 293.

Postal Service—Money-order Notices—R. S. sec. 4035 Repealed, 293.

Act of May 23, 1910, Ch. 255, 293.

Registered Mail—Receipts on Delivery Given When Requested, 293.

Act of June 17, 1910, Ch. 297, 294.

Sec. 1. Sale of Post-route Maps to Public, 294.

Act of June 24, 1910, Ch. 380, 294.

Undelivered Letters—Return to Writer at Time of Request, 294.

Act of June 25, 1910, Ch. 386, 294.

Sec. 1. Postal Savings Depositories—Board of Trustees to Control—Composition—Regulations, etc.—Annual Report to Congress—Details—Postal Service Expenses, 294.

2. Stamps for Free Mail Matter, 295.

3. Designation of Post Offices, 295.

4. Opening Accounts—Persons Qualified—Limitation, 295.

5. Pass Books, etc.—Other Devices, 295.

6. Restriction of Deposits—Cards for Small Amounts—Savings Stamps—Credited on Deposits—Cancellation—Preparation of Cards and Stamps, 295.

7. Interest on Deposits—Balance Limited, 296.

8. Withdrawals—Payment by Banks—No Charge for Cashing, etc., 296.

9. Funds to Be Deposited in Solvent Banks—Interest Required—Reserve Fund—Security from Banks—Distribution of Deposits Locally—Deposits with Treasurer—Withdrawals for Payments—Amount to Be Invested in Government Bonds—Residue to Remain on Deposit—Disposal—Application of Interest, etc.—Restriction—Disposal of Bonds—Definitions, 296.

10. Issue of Bonds to Depositors—Interest Rate—Payable in Gold—Conditions of Issue—Regulations—Investment of Savings Fund in—Exempt from Taxes—Not Receivable for National Bank Circulation, 297.

11. Redemption of United States Bonds for Savings Investment—Reissue to Trustees of Savings Fund—Redemption of Reissued Bonds, 298.

12. Separation of Accounts, etc.—General Laws Applicable—Additional Bonds, 298.

13. Compensation to Fourth-class Postmasters—Presidential Offices Excluded, 298.

14. Appropriation for Expenses of Establishing, etc.—Duties of Postal Officials—Regulations, etc., 299.

15. Postal Penal Laws, etc., Made Applicable, 299.

16. Faith of United States Pledged to Payment, 299.

17. Payments of Deposits under Order of Court, 299.

Act of June 25, 1910, Ch. 434, 300.

Letter Carriers—Payment of Claims for Overtime under Eight-hour Law—Appropriation—Limit to Attorney's Fee—Punishment for Violations, 300.

Act of Feb. 16, 1911, Ch. 87, 300.

Letter Carriers Allowed by Consolidation of Post Offices, 300.

Act of March 4, 1911, Ch. 241, 300.

Sec. 1. Salary of Postmaster at St. Louis, 301.

Clerks and Carriers in Certain Localities, 301.

Restriction on Wooden Mail Cars—Cars Required Hereafter—Steel Construction Required after July 1, 1916, 301.

Travel Allowances to Clerks on Duty over Ten Hours, 301.

Leaves to Railway Postal Clerks, etc., 301.

Indemnity Allowed for Lost Third or Fourth Class Matter—Limit, 301.

2. Punishment for Sending Indecent, etc., Matter—Inciting Arson, Murder, or Assassination Included, 302.

3. Compensatory Time Off for Sunday Labor, 302.

4. Salaries of Postal Employees—Division by Months—Computations of Parts of Month, 302.

5. Postal Savings Depositories—Expenses of Establishing, Payable from the Treasury—Rent, Central Office—Accounting—Designation of Offices, Compensation, etc.—Regulations for Deposits, Withdrawals, etc., 302.

6. Permissible Marks on Third and Fourth Class Matter—"Please Do Not Open until Christmas" Allowed, 303.

7. Appropriations, 303.

8. Postal Notes Authorized—Denominations—Good for Six Months—Not Indorsable—Liability Canceled by Payments, 303.

CROSS-REFERENCE.

Rural Delivery of Carriers Administering Oaths Required of Pensioners, see PENSIONS.

An Act Making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes.

[Act of May 12, 1910, ch. 230.]

[Sec. 1.] [Additional compensation to fourth-class postmasters.] * * *

That hereafter the Postmaster-General may allow to fourth-class postmasters additional compensation for separating services and for unusual conditions during a portion of the year, in lieu of the allowance for clerical services for this purpose now authorized by law. **[36 Stat. L. 359.]**

[Detroit, marine service—contracts.] * * * That hereafter the Postmaster-General may, in his discretion, enter into contracts for a period of not exceeding four years for the steamboat and other equipment necessary for the performance of the Detroit River postal service. **[36 Stat. L. 361.]**

[Transportation of mail—compensation to land-grant roads, reduced.]

* * * The provision of the act of March second, nineteen hundred and seven, entitled "An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and eight, and for other purposes," fixing the compensation to be paid for transportation of mail on land-grant railroads at the rate of seventeen dollars and ten cents for each two thousand pounds carried in excess of forty-eight thousand pounds, is hereby amended to make such rate of compensation after June

thirtieth, nineteen hundred and ten, fifteen dollars and thirty-nine cents for each two thousand pounds carried in excess of forty-eight thousand pounds, and the Postmaster-General is hereby authorized and directed to readjust the compensation in accordance with this amendment. [36 Stat. L. 362.]

The provision from the Act of March 2, 1907, above amended, is given in 1909 Supp. Fed. Stat. Annot. 523.

[*Advertising mail lettings — posting in each office named — second-class mail matter — return of undeliverable, at third-class rates — conflicting laws repealed.*] * * * So much of the Act making appropriations for the service of the Post-Office Department for the fiscal year ended June thirtieth, eighteen hundred and eighty-two, and for other purposes, approved March first, eighteen hundred and eighty-one, as relates to the advertisements of mail lettings is hereby amended to read as follows:

Hereafter the Postmaster-General shall cause advertisements of all general mail lettings of each State and Territory to be conspicuously posted in each post-office named in said advertisements for at least sixty days before the time of such general lettings, and no other advertisement of such lettings shall be required; but this provision shall not apply to any other than general mail lettings.

That hereafter when copies of any publication of the second class, mailed by a publisher at the pound rate or free in the county of publication, are undeliverable at the address thereon, the postmaster at the office of destination shall promptly notify the publisher of the fact, giving the reason therefor, and copies received five weeks after the mailing of the notice to the publisher, and in no instance until two successive issues thereof have been published, shall, under such regulations as the Postmaster-General may prescribe, be separately returned to the publisher thereof charged with postage at the third-class rate. All laws and parts of laws in conflict with this Act are hereby repealed. [36 Stat. L. 366.]

The provision of the Act of March 1, 1881, here amended, is given in 5 Fed. Stat. Annot. 878.

An Act To repeal section four thousand and thirty-five of the Revised Statutes, providing for the issuance of money-order notices, and for other purposes.

[Act of May 23, 1910, ch. 254.]

[*Postal service — money-order notices — R. S. sec. 4035 repealed.*] That section four thousand and thirty-five of the Revised Statutes, providing that "the postmaster issuing a money order shall send a notice thereof by mail, without delay, to the postmaster on whom it is drawn," be, and the same is hereby, repealed. [36 Stat. L. 415.]

For R. S. sec. 4035, see 5 Fed. Stat. Annot. 944.

An Act To amend section thirty-nine hundred and twenty-eight of the Revised Statutes to provide for receipts for registered mail, and for other purposes.

[Act of May 23, 1910, ch. 255.]

[*Registered mail — receipts on delivery given when requested.*] That section thirty-nine hundred and twenty-eight of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 3928. Whenever the sender shall so request, a receipt shall be taken on the delivery of any registered mail matter, showing to whom and when the same was delivered, which receipt shall be returned to the sender, and be received in the courts as prima facie evidence of such delivery." [36 Stat. L. 416.]

For R. S. sec. 3928, as it read prior to this enactment, see 5 Fed. Stat. Annot. 872.

[Sec. 1.] [*Sale of post-route maps to public.*] * * * And the Postmaster-General may authorize the sale to the public of post-route maps and rural-delivery maps or blueprints at the cost of printing and ten per centum thereof added, the proceeds of such sales to be used as a further appropriation for the preparation and publication of post-route maps and rural-delivery maps or blueprints. [36 Stat. L. 522.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

An Act To provide for the return of undelivered letters and for other purposes.

[Act of June 24, 1910, ch. 380.]

[*Undelivered letters — return to writer at time of request.*] That section thirty-nine hundred and thirty-nine of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 3939. When the writer of any letter on which the postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster-General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter." [36 Stat. L. 630.]

For R. S. sec. 3939, as it read prior to this amendment, see 5 Fed. Stat. Annot. 877.

An Act To establish postal savings depositories for depositing savings at interest with the security of the Government for repayment thereof, and for other purposes.

[Act of June 25, 1910, ch. 386.]

[Sec. 1.] [*Postal savings depositories — board of trustees to control — composition — regulations, etc. — annual report to Congress — details — postal service expenses.*] That there be, and is hereby, created a board of trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Act, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Postmaster-General, the Secretary of the Treasury, and the Attorney-General, severally, acting ex officio, and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices.

The board of trustees shall submit a report to Congress at the beginning of each regular session showing by States and Territories (for the preceding fiscal

year) the number and names of post-offices receiving deposits, the aggregate amount of deposits made therein, the aggregate amount of withdrawals therefrom, the number of depositors in each, the total amount standing to the credit of all depositors at the conclusion of the year, the amount of such deposits at interest, the amount of interest received thereon, the amount of interest paid thereon, the amount of deposits surrendered by depositors for bonds issued by authority of this Act, and the number and amount of unclaimed deposits. Also the amount invested in government securities by the trustees, the amount of extra expense of the Post-Office Department and the postal service incident to the operation of the postal savings depository system, the amount of work done for the savings depository system by the Post-Office Department and postal service in the transportation of free mail, and all other facts which it may deem pertinent and proper to present. [36 Stat. L. 814.]

SEC. 2. [*Stamps for free mail matter.*] That the Postmaster-General is hereby directed to prepare and issue special stamps of the necessary denominations for use, in lieu of penalty or franked envelopes, in the transmittal of free mail resulting from the administration of this Act. [36 Stat. L. 815.]

SEC. 3. [*Designation of post-offices.*] That said board of trustees is hereby authorized and empowered to designate such post-offices as it may select to be postal savings depository offices, and each and every post-office so designated by order of said board is hereby declared to be a postal savings depository office within the meaning of this Act and to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this Act and the regulations made in pursuance thereof. Each postal savings depository office shall be kept open for the transaction of business during such hours as the Postmaster-General, with the approval of the board of trustees, shall direct. [36 Stat. L. 815.]

SEC. 4. [*Opening accounts — persons qualified — limitation.*] That accounts may be opened and deposits made in any postal savings depository established under this Act by any person of the age of ten years or over, in his or her own name, and by a married woman in her own name and free from any control or interference by her husband; but no person shall at the same time have more than one postal savings account in his or her own right. [36 Stat. L. 815.]

SEC. 5. [*Pass books, etc. — other devices.*] That the postmaster at a postal savings depository office shall, upon the making of an application to open an account under this Act and the submission of an initial deposit, deliver to the depositor a pass book free of cost, upon which shall be written the name and signature or mark of the depositor and such other memoranda as may be necessary for purposes of identification, in which pass book entries of all deposits and withdrawals shall be made in both figures and writing: *Provided*, That the Postmaster-General may, with the approval of the board of trustees, adopt some other device or devices in lieu of a pass book as a means of making and preserving evidence of deposits and withdrawals. [36 Stat. L. 815.]

SEC. 6. [*Restriction of deposits — cards for small amounts — savings stamps — credited on deposits — cancellation — preparation of cards and stamps.*] That at least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with the person depositing the same, and one dollar, or multiples thereof, may be deposited after such account has

been opened, but no one shall be permitted to deposit more than one hundred dollars in any one calendar month: *Provided*, That in order that smaller amounts may be accumulated for deposit any person may purchase for ten cents from any depository office a postal savings card to which may be attached specially prepared adhesive stamps, to be known as "postal savings stamps," and when the stamps so attached amount to one dollar, or a larger sum in multiples thereof, including the ten-cent postal savings card, the same may be presented as a deposit for opening an account, and additions may be made to any account by means of such card and stamps in amounts of one dollar, or multiples thereof, and when a card and stamps thereto attached are accepted as a deposit the postmaster shall immediately cancel the same. It is hereby made the duty of the Postmaster-General to prepare such postal savings cards and postal savings stamps of denominations of ten cents, and to keep them on sale at every postal savings depository office, and to prescribe all necessary rules and regulations for the issue, sale, and cancellation thereof. [36 Stat. L. 815.]

SEC. 7. [*Interest on deposits — balance limited.*] That interest at the rate of two per centum per annum shall be allowed and entered to the credit of each depositor once in each year, the same to be computed on such basis and under such rules and regulations as the board of trustees may prescribe; but interest shall not be computed or allowed on fractions of a dollar: *Provided*, That the balance to the credit of any one person shall never be allowed to exceed five hundred dollars, exclusive of accumulated interest. [36 Stat. L. 816.]

SEC. 8. [*Withdrawals — payment by banks — no charge for cashing, etc.*] That any depositor may withdraw the whole or any part of the funds deposited to his or her credit, with the accrued interest, upon demand and under such regulations as the board of trustees may prescribe. Withdrawals shall be paid from the deposits in the State or Territory, so far as the postal funds on deposit in such State or Territory may be sufficient for the purpose, and, so far as practicable, from the deposits in the community in which the deposit was made. No bank in which postal savings funds shall be deposited shall receive any exchange or other fees or compensation on account of the cashing or collection of any checks or the performance of any other service in connection with the postal savings depository system. [36 Stat. L. 816.]

SEC. 9. [*Funds to be deposited in solvent banks — interest required — reserve fund — security from banks — distribution of deposits locally — deposits with treasurer — withdrawals for payments — amount to be invested in government bonds — residue to remain on deposit — disposal — application of interest, etc. — restriction — disposal of bonds — definitions.*] That postal savings funds received under the provisions of this Act shall be deposited in solvent banks, whether organized under national or state laws, being subject to national or state supervision and examination, and the sums deposited shall bear interest at the rate of not less than two and one-fourth per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but five per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks

located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this Act and the regulations made by authority thereof, but the amount deposited in any one bank shall at no time exceed the amount of the paid-in capital and one-half the surplus of such bank. If no such bank exist in any city, town, village, or locality, or if none where such deposits are made will receive such deposits on the terms prescribed, then such funds shall be deposited under the terms of this Act in the bank most convenient to such locality. If no such bank in any State or Territory is willing to receive such deposits on the terms prescribed, then the same shall be deposited with the treasurer of the board of trustees, and shall be counted in making up the reserve of five per centum. Such funds may be withdrawn from the treasurer of said board of trustees and all other postal savings funds, or any part of such funds, may be at any time withdrawn from banks and savings depository offices for the repayment of postal savings depositors when required for that purpose. Not exceeding thirty per centum of the amount of such funds may at any time be withdrawn by the trustees for investment in bonds or other securities of the United States, it being the intent of this Act that the residue of such funds, amounting to sixty-five per centum thereof, shall remain on deposit in the banks in each State and Territory willing to receive the same under the terms of this Act, and shall be a working balance and also a fund which may be withdrawn for investment in bonds or other securities of the United States, but only by direction of the President, and only when, in his judgment, the general welfare and the interests of the United States so require. Interest and profit accruing from the deposits or investment of postal savings funds shall be applied to the payment of interest due to postal savings depositors as hereinbefore provided, and the excess thereof, if any, shall be covered into the Treasury of the United States as a part of the postal revenue: *Provided*, That postal savings funds in the treasury of said board shall be subject to disposition as provided in this Act, and not otherwise: *And provided further*, That the board of trustees may at any time dispose of bonds held as postal savings investments and use the proceeds to meet withdrawals of deposits by depositors. For the purposes of this Act the word "Territory," as used herein, shall be held to include the District of Columbia, the District of Alaska, and Porto Rico, and the word "bank" shall be held to include savings banks and trust companies doing a banking business. [36 Stat. L. 816.]

SEC. 10. [*Issue of bonds to depositors — interest rate — payable in gold — conditions of issue — regulations — investment of savings fund in — exempt from taxes — not receivable for national bank circulation.*] That any depositor in a postal savings depository may surrender his deposit, or any part thereof, in sums of twenty dollars, forty dollars, sixty dollars, eighty dollars, one hundred dollars, and multiples of one hundred dollars and five hundred dollars, and receive in lieu of such surrendered deposits, under such regulations as may be established by the board of trustees, the amount of the surrendered deposits in United States coupon or registered bonds of the denominations of twenty dollars, forty dollars, sixty dollars, eighty dollars, one hundred dollars, and five hundred dollars, which bonds shall bear interest at the rate of two and one-half per centum per annum, payable semiannually, and be redeemable at the pleasure of the United States after one year from the date of their issue and payable twenty years from such date, and both principal and interest shall be payable in United States gold coin of the present standard of value: *Provided*, That the bonds herein authorized shall be issued only (first) when there are outstanding bonds of the United States subject to call, in which case the pro-

ceeds of the bonds shall be applied to the redemption at par of outstanding bonds of the United States subject to call, and (second) at times when under authority of law other than that contained in this Act the Government desires to issue bonds for the purpose of replenishing the Treasury, in which case the issue of bonds under authority of this Act shall be in lieu of the issue of a like amount of bonds issuable under authority of law other than that contained in this Act: *Provided further*, That the bonds authorized by this Act shall be issued by the Secretary of the Treasury under such regulations as he may prescribe: *And provided further*, That the authority contained in section nine of this Act for the investment of postal savings funds in United States bonds shall include the authority to invest in the bonds herein authorized whenever such bonds may be lawfully issued: *And provided further*, That the bonds herein authorized shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under state, municipal, or local authority: *And provided further*, That no bonds authorized by this Act shall be receivable by the Treasurer of the United States as security for the issue of circulating notes by national banking associations. [36 Stat. L. 817.]

SEC. 11. [*Redemption of United States bonds for savings investment — reissue to trustees of savings fund — redemption of reissued bonds.*] That whenever the trustees of the postal savings fund have in their possession funds available for investment in United States bonds they may notify the Secretary of the Treasury of the amount of such funds in their hands which they desire to invest in bonds of the United States subject to call, whereupon, if there are United States bonds subject to call, the Secretary of the Treasury shall call for redemption an amount of such bonds equal to the amount of the funds in the hands of the trustees which the trustees desire to thus invest, and the bonds so called shall be redeemed at par with accrued interest at the Treasury of the United States on and after three months from the date of such call, and interest on the said bonds shall thereupon cease: *Provided*, That the said bonds when redeemed shall be reissued at par to the trustees without change in their terms as to rate of interest and date of maturity: *And provided further*, That the bonds so reissued may, in the discretion of the Secretary of the Treasury, be called for redemption from the trustees in like manner as they were originally called for redemption from their former owners whenever there are funds in the Treasury of the United States available for such redemption. [36 Stat. L. 818.]

SEC. 12. [*Separation of accounts, etc. — general laws applicable — additional bonds.*] That postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employees of the postal service, who shall be held to the same accountability under their bonds for such funds as for public moneys; and no person connected with the Post-Office Department shall disclose to any person other than the depositor the amount of any deposits, unless directed so to do by the Postmaster-General. All statutes relating to the safe-keeping of and proper accounting for postal receipts are made applicable to postal savings funds, and the Postmaster-General may require postmasters, assistant postmasters, and clerks at postal savings depositories to give any additional bond he may deem necessary. [36 Stat. L. 818.]

SEC. 13. [*Compensation to fourth-class postmasters — presidential offices excluded.*] That additional compensation shall be allowed postmasters at post-offices of the fourth class for the transaction of postal savings depository business. Such compensation shall not exceed one-fourth of one per centum on the

average sum upon which interest is paid each calendar year on receipts at such post-office, and shall be paid from the postal revenues; but postmasters, assistant postmasters, clerks, or other employees at post-offices of the presidential grade shall not receive any additional compensation for such service. [36 Stat. L. 818.]

SEC. 14. [*Appropriation for expenses of establishing, etc.—duties of postal officials—regulations, etc.*] That the sum of one hundred thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, or so much thereof as may be necessary, to enable the Postmaster-General and the board of trustees to establish postal savings depositories in accordance with the provisions of this Act, including the reimbursement of the Secretary of the Treasury for expenses incident to the preparation, issue, and registration of the bonds authorized in this Act; and the Postmaster-General is authorized to require postmasters and other postal officers and employees to transact, in connection with their other duties, such postal savings depository business as may be necessary; and he is also authorized to make, and with the approval of the board of trustees to promulgate, and from time to time to modify or revoke, subject to the approval of said board, such rules and regulations not in conflict with law as he may deem necessary to carry the provisions of this Act into effect. [36 Stat. L. 818.]

SEC. 15. [*Postal penal laws, etc., made applicable.*] That all the safeguards provided by law for the protection of public moneys, and all statutes relating to the embezzlement, conversion, improper handling, retention, use, or disposal of postal and money-order funds and the punishments provided for such offenses are hereby extended and made applicable to postal savings depository funds, and all statutes relating to false returns of postal and money-order business, the forgery, counterfeiting, alteration, improper use or handling of postal and money-order blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor, with the penalties provided in such statutes, are hereby extended and made applicable to postal savings depository business, and the forgery, counterfeiting, alteration, improper use or handling of postal savings depository blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor. [36 Stat. L. 818.]

SEC. 16. [*Faith of United States pledged to payment.*] That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided. [36 Stat. L. 819.]

SEC. 17. [*Payments of deposits under order of court.*] That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sums deposited by any person with a postal savings depository if the same shall not have been appealed from and the time for appeal has expired shall, upon submission to the Postmaster-General of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any State or Territory or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, be accepted and pursued by the board of trustees as conclusive of the title, right, interest, or possession so adjudicated, and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States from the claim or demand of any person or persons to the same. [36 Stat. L. 819.]

An Act To provide for the payment of overtime claims of letter carriers excluded from judgment as barred by limitation.

[Act of June 25, 1910, ch. 434.]

[*Letter carriers — payment of claims for overtime under eight-hour law — appropriation — limit to attorneys' fee — punishment for violations.*] That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the several parties named in Senate Document Numbered Two hundred and sixteen, Fifty-sixth Congress, first session, and Senate Document Numbered One hundred and fifty-eight, Fifty-sixth Congress, second session, or their legal representatives, out of any money in the Treasury not otherwise appropriated, the amounts set opposite each of their names, respectively, aggregating two hundred and eighty-two thousand nine hundred and forty-three dollars and eighty-eight cents, and said sum of two hundred and eighty-two thousand nine hundred and forty-three dollars and eighty-eight cents is hereby appropriated out of any money in the Treasury not otherwise appropriated, representing services actually performed by them as letter carriers in excess of eight hours per day and reported by the commissioners of the Court of Claims as being the amounts due them under the provisions of the Act of May twenty-fourth, eighteen hundred and eighty-eight, entitled "An Act to limit the hours that letter carriers in cities shall be employed per day," but which have been excluded or excepted from judgment for the sole reason that the same were barred by the statute of limitations: *Provided*, That no agent, attorney, firm of attorneys, or other person engaged, heretofore or hereafter, in preparing, presenting, or prosecuting any claim or claims named in Senate Document Numbered Two hundred and sixteen, Fifty-sixth Congress, first session, and Senate Document Numbered One hundred and fifty-eight, Fifty-sixth Congress, second session, above referred to, shall directly or indirectly demand, receive, or retain for such service in preparing, presenting, or prosecuting such claim, or for any service or act whatsoever in connection with such claim, a sum greater than five per centum of the amount of such claim, and any person who shall violate the above provision shall be guilty of a misdemeanor, and upon conviction thereof shall, for each and every offense, be fined not exceeding five hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. [36 Stat. L. 865.]

For the Act of May 24, 1888, above referred to, see 5 Fed. Stat. Annot. 819.

An Act To authorize the employment of letter carriers at certain post-offices,

[Act of Feb. 16, 1911, ch. 37.]

[*Letter carriers allowed by consolidation of post-offices.*] That hereafter when two or more post-offices situated within the corporate limits of any city, village, or borough are consolidated by authority of the Postmaster-General, and the said offices together produced a gross revenue for the preceding fiscal year of not less than ten thousand dollars, letter carriers may be employed for the free delivery of mail matter in like manner as if any one of such post-offices had produced such revenue in said fiscal year. [36 Stat. L. 911.]

An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and twelve, and for other purposes.

[Act of March 4, 1911, ch. 341.]

[SEC. 1.] [*Salary of postmaster at St. Louis.*] * * * That hereafter the compensation paid to postmaster at Saint Louis, Missouri, shall be eight thousand dollars per annum. [36 Stat. L. 1329.]

[*Clerks and carriers in certain localities.*] * * * Whenever a postmaster in any locality with a population of not more than twenty thousand inhabitants certifies to the department that, owing to unusual conditions in his community, he is unable to secure the services of efficient employees otherwise, the Postmaster General having ascertained the truth of the certification may authorize, in his discretion, the appointment of clerks and letter carriers for that office at such higher rates of compensation, within the present recognized grades, and in the District of Alaska, at higher salaries than one thousand two hundred dollars, as may be necessary in order to insure a proper conduct of the postal business, but not to exceed in the aggregate the sum annually appropriated for said purposes, and in all such cases their salaries shall be paid from the appropriation for unusual conditions, and the Postmaster General shall make report to Congress annually of the places where and the amounts so expended. [36 Stat. L. 1332.]

[*Restriction on wooden mail cars — cars required hereafter — steel construction required after July 1, 1916.*] * * * That after the first of July, nineteen hundred and eleven, no pay shall be allowed for the use of any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and specifications of the Post Office Department for such type of cars, nor for any wooden full railway post-office car run in any train between adjoining steel cars or between the engine and a steel car adjoining, and that hereafter additional cars accepted for this service shall be of steel, or with steel underframe, if used in a train in which a majority of the cars are of like construction: *Provided further*, That after the first of July, nineteen hundred and sixteen, the Postmaster General shall not approve or allow to be used or pay for any full railway post-office car not constructed of steel or with steel underframe, if such post-office car is used in a train in which a majority of the cars are of steel or of steel underframe construction. [36 Stat. L. 1335.]

[*Travel allowances to clerks on duty over ten hours.*] * * * That hereafter in addition to the salaries by law provided the Postmaster General is hereby authorized to make travel allowances, not exceeding in the aggregate the sum annually appropriated, to railway postal clerks assigned to duty in railway post-office cars for actual expenses incurred by them while on duty, after ten hours from the time of beginning their initial run, under such regulations as he may prescribe, and in no case shall such an allowance exceed one dollar per day. [36 Stat. L. 1336.]

[*Leaves to railway postal clerks, etc.*] * * * That the Postmaster General may allow railway postal clerks whose duties require them to work six days or more a week throughout the year and the employees of the mail-lock and mail-bag repair shops an annual vacation of thirty days with pay. [36 Stat. L. 1336.]

[*Indemnity allowed for lost third or fourth class matter — limit.*] * * * That the Postmaster General is hereby authorized to indemnify the senders or owners of third and fourth class domestic registered matter lost in the mails, the indemnity, which shall be paid out of the postal revenues, not to exceed twenty-five dollars for a single piece of registered matter or the actual value thereof if less than twenty-five dollars: *Provided*, That no indemnity shall be paid if the loss has been otherwise reimbursed. [36 Stat. L. 1337.]

SEC. 2. [*Punishment for sending indecent, etc., matter — inciting arson, murder, or assassination included.*] That section two hundred and eleven of an Act of Congress entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, be amended by adding thereto the following: "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination." [36 Stat. L. 1339.]

For sec. 211 of the Penal Laws, see 1909 Supp. Fed. Stat. Annot. 462.

SEC. 3. [*Compensatory time off for Sunday labor.*] That hereafter for services required on Sundays of supervisory officers, clerks in first and second class post offices, and city letter carriers, compensatory time off during working days in amount equal to that of the Sunday employment may be allowed, under such regulations as the Postmaster General may prescribe; but this provision shall not apply to auxiliary or substitute employees. [36 Stat. L. 1339.]

SEC. 4. [*Salaries of postal employees — division by months — computations of parts of month.*] That after June thirtieth, nineteen hundred and eleven, where the salary or compensation of any employee in the postal service is at an annual or monthly rate, the following rules shall be followed in computing the amount due: An annual salary or compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payment for a fractional part of any calendar month there shall be paid such proportion of one of such installments, or of the amount of the monthly salary or compensation, as the number of days in the fractional part of that month bears to the actual number of days in that month. [36 Stat. L. 1339.]

SEC. 5. [*Postal savings depositories — expenses of establishing, payable from the Treasury — rent, central office — accounting — designation of offices, compensation, etc. — regulations for deposits, withdrawals, etc.*] That the sum of five hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated and made immediately available, out of any money in the Treasury not otherwise appropriated, to enable the Postmaster General to continue the establishment, maintenance, and extension of postal savings depositories, including the reimbursement of the Secretary of the Treasury for expenses incident to the preparation, issue, and registration of the bonds authorized by the Act of June twenty-fifth, nineteen hundred and ten: *Provided*, That out of such sum an amount not to exceed ten thousand dollars may be expended for the rental, if necessary, of quarters for the central office of the Postal Savings System in the District of Columbia: *And provided further*, That all expenditures under this appropriation shall be audited by the Auditor for the Post Office Department: *And provided further*, That the Postmaster General shall select and designate the post offices which are to be postal savings depository offices, and shall appoint and fix the compensation of such superintendents, inspectors, and other employees as may be necessary in conducting, supervising, and directing the business of such offices, including the employees of a central office at Washington, District of Columbia, and shall prescribe the hours during which postal savings depository offices shall remain open. He shall also from time to time make rules and regulations with respect to the deposits in and withdrawal of moneys from postal savings depositories and the issue of pass books or such other devices as he may adopt as evidence of such deposits or

withdrawals, and the provisions of the Act approved June twenty-fifth, nineteen hundred and ten, are hereby modified accordingly. [36 Stat. L. 1340.]

The Act relating to postal savings depositories is given, *supra*, p. 294.

SEC. 6. [*Permissible marks on third and fourth class matter — "Please do not open until Christmas," allowed.*] That in addition to the permissible marks, writing, and printing on mail matter of the third and fourth classes, respectively, or on the envelopes or packages containing them, as authorized by the Act of Congress approved January twentieth, eighteen hundred and eighty-eight, entitled "An Act relating to permissible marks, printing, or writing, upon second, third, and fourth class matter, and to amend the twenty-second and twenty-third sections of an Act entitled 'An Act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes,'" there may be placed on such mail matter, or on the package, wrapper, or envelope inclosing the same, or on a tag or label attached thereto, either in writing or otherwise, the words "Please do not open until Christmas," or words to that effect. [36 Stat. L. 1340.]

For the Act of Jan. 20, 1888, see 5 Fed. Stat. Annot. 835.

SEC. 7. [*Appropriations.*]

SEC. 8. [*Postal notes authorized — denominations — good for six months — not indorsable — liability canceled by payment.*] That the Postmaster General may authorize postmasters at such offices as he shall designate, under such regulations as he shall prescribe, to issue and pay money orders of fixed denominations, not exceeding ten dollars, to be known as postal notes.

That postal notes shall be valid for six calendar months from the last day of the month of their issue, but thereafter may be paid under such regulations as the Postmaster General may prescribe.

That postal notes shall not be negotiable or transferable through indorsement.

That if a postal note has been once paid, to whomsoever paid, the United States shall not be liable for any further claim for the amount thereof. [36 Stat. L. 1340.]

PRINCIPAL AND SURETY.

See *SURETY COMPANIES*.

PRINTING.

See *PUBLIC PRINTING*.

PRISONS AND PRISONERS.

Act of June 25, 1910, Ch. 387, 304.

- Sec. 1. Prisoners — Parole from United States Prisons — Condition, 304.*
- 2. Board of Parole — Clerk, Meetings, etc. — In Other Prisons, 304.*
- 3. Application — Discretion to Release — Terms and Conditions — Limits of Residence — Approval by Attorney-General, 304.*
- 4. Arrest on Violations, 305.*
- 5. Officers Authorized to Arrest — Expenses Chargeable to Prison, 305.*
- 6. Hearing by Board — Revoking Order, 305.*
- 7. Parole Officer — Duties — Salary, etc. — Supervision of Marshal, 305.*
- 8. Gratuities to Paroled Prisoners — No Additional, on Final Discharge, 306.*
- 9. Convicts in State Reformatories — Parole under State Laws — Expenses — Approval of Attorney-General — Returned to Home, 306.*
- 10. Pardoning, etc., Power of President Not Impaired, 306.*

An Act To parole United States prisoners, and for other purposes.

[Act of June 25, 1910, ch. 387.]

[SEC. 1.] [*Prisoners — parole from United States prisons — condition.*] That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided. [36 Stat. L. 819.]

SEC. 2. [*Board of parole — clerk, meetings, etc. — in other prisons.*] That the superintendent of prisons of the Department of Justice, and the warden and physician of each United States penitentiary shall constitute a board of parole for such prison, which shall establish rules and regulations for its procedure subject to the approval of the Attorney-General. The chief clerk of such prison shall be clerk of said board of parole, and meetings shall be held at each prison as often as the regulations of such board shall provide: *Provided*, That in every case where a prison other than a United States penitentiary is used for the confinement of such prisoners it shall be the duty of the Attorney-General to designate the officers of said prison who, together with the superintendent of prisons shall constitute such board for said prison. [36 Stat. L. 819.]

SEC. 3. [*Application — discretion to release — terms and conditions — limits of residence — approval by Attorney-General.*] That if it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible

with the welfare of society, then said board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by Act of Congress; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board: *Provided*, That no release on parole shall become operative until the findings of the board of parole under the terms hereof shall have been approved by the Attorney-General of the United States. [36 Stat. L. 819.]

SEC. 4. [*Arrest on violations.*] That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner. [36 Stat. L. 820.]

SEC. 5. [*Officers authorized to arrest — expenses chargeable to prison.*] That any officer of said prison or any federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to said prison within the time specified in said warrant therefor. All necessary expenses incurred in the administration of this Act shall be paid out of the appropriation for the prison in connection with which such expense was incurred, and such appropriation is hereby made available therefor. [36 Stat. L. 820.]

SEC. 6. [*Hearing by board — revoking order.*] That at the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. [36 Stat. L. 820.]

SEC. 7. [*Parole officer — duties. — salary, etc. — supervision of marshal.*] That each board of parole shall appoint a parole officer for the penitentiary over which it has jurisdiction. Subject to the direction and control of such board, it shall be the duty of such officer to aid paroled prisoners in securing employment and to visit and exercise supervision over them while on parole, and such officer shall have such authority and perform such other duties as the board of parole may direct. The salary of each parole officer shall be fixed by the board of parole, but shall not exceed one thousand five hundred dollars per annum, which, together with his actual and necessary traveling expenses, when ap-

proved by such board, shall be paid out of the appropriation for the maintenance of the penitentiary to which he is assigned, which appropriation is hereby made available for the purpose. In addition to such parole officers the supervision of paroled prisoners may also be devolved upon the United States marshals when the board of parole may deem it necessary. [36 Stat. L. 820.]

SEC. 8. [*Gratuities to paroled prisoners — no additional, on final discharge.*] That it shall be the duty of the warden of the prison to furnish to any and all paroled prisoners the usual gratuities, consisting of clothing, transportation, and five dollars in money; the transportation furnished shall be to the place to which the paroled prisoner has elected to go, with the approval of the board of parole. The warden of the prison who furnishes these gratuities is hereby authorized to charge the actual cost of the same in his accounts against the United States: *Provided, however,* That when any such paroled prisoner shall have received his final discharge, while he is away from such prison, he shall be entitled to no further gratuities provided for discharged prisoners under existing law. [36 Stat. L. 820.]

SEC. 9. [*Convicts in state reformatories — parole under state laws — expenses — approval of Attorney-General — returned to home.*] That whenever any person has been convicted of any offense against the United States which is punishable by imprisonment, and has been sentenced to imprisonment and is confined therefor, in any reformatory institution of any State in accordance with section fifty-five hundred and forty-eight of the Revised Statutes, or other laws of the United States, then if such State has laws for the parole of prisoners committed to such institutions by the courts of that State, such person convicted of any offense against the United States shall be eligible to parole on the same terms and conditions and by the same authority and subject to recommitment for violation of such parole in the same manner, as persons committed to such institutions by the courts of said State, and the laws of said State relating to the parole of prisoners and the supervision thereof in such institutions are hereby adopted and made to apply to persons committed to such institutions for offenses against the United States. The necessary cost of parole and supervision of such prisoners, to the State where such institution is located shall be paid by the United States out of the appropriation for the support of prisoners confined in state institutions, which appropriation is hereby made available for the purpose. No such prisoner shall be entitled to go on parole until the Attorney-General shall have approved the order therefor: *Provided,* That when a prisoner is committed to such institution outside of the State where he lives he may be permitted by his parole to return to his home, and in such case the supervision of such prisoner on parole shall devolve upon the marshal of the district where said prisoner lives, and in case such prisoner should violate his parole a warre[a]nt for his recommitment shall be delivered to and executed by said marshal. [36 Stat. L. 821.]

For R. S. sec. 5548, see 6 Fed. Stat. Annot. 46.

SEC. 10. [*Pardoning, etc., power of President not impaired.*] That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by Act of Congress. [36 Stat. L. 821.]

PROSTITUTION.

Importing Aliens, see IMMIGRATION.
WHITE SLAVE TRAFFIC, see that title.

PUBLIC CONTRACTS.

Act of June 17, 1910, Ch. 297, 307.

Sec. 4. Supplies for Executive Departments — Contracts to Be Made by Secretary of the Treasury — General Supply Committee Created — Duties of — Limitation — Bonds of Contractors — Report of Supplies Taken — Disbursing Officers — Limitation — Telephone and Electric Service, 307.

5. Inconsistent Laws Repealed, 308.

CROSS-REFERENCES.

Appropriations for River and Harbor Works, see RIVERS, HARBORS, AND CANALS.

Contracts for New Buildings, see PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.

Partial Payments for Work by Secretary of Navy, see NAVY.

SEC. 4. [Supplies for executive departments — contracts to be made by Secretary of the Treasury — general supply committee created — duties of — limitation — bonds of contractors — report of supplies taken — disbursing officers — limitation — telephone and electric service.] That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall

perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him. [36 Stat. L. 531.]

For R. S. sec. 3700, see 6 Fed. Stat. Annot. 93.

SEC. 5. [*Inconsistent laws repealed.*] That all laws or parts of laws inconsistent with this Act are repealed. [36 Stat. L. 531.]

The above sections 4 and 5 are from the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297.

PUBLIC DEBT.

Act of Feb 4, 1910, Ch. 25, 309.

Sec. 1. Bonds, etc., of United States — Principal and Interest Payable in Gold,
309.

2. Exemption from Taxes — Appropriation for Expenses of Issue, etc., 309.

3. Inconsistent Laws Repealed, 309.

An Act Prescribing certain provisions and conditions under which bonds and certificates of indebtedness of the United States may be issued, and for other purposes.

[*Act of Feb. 4, 1910, ch. 25.*]

[**SEC. 1.**] [*Bonds, etc., of United States — principal and interest payable in gold.*] That any bonds and certificates of indebtedness of the United States hereafter issued shall be payable, principal and interest, in United States gold coin of the present standard of value; and that such bonds may be issued in such denominations as may be prescribed by the Secretary of the Treasury. [*36 Stat. L. 192.*]

SEC. 2. [*Exemption from taxes — appropriation for expenses of issue, etc.*] That any certificates of indebtedness hereafter issued shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal, or local authority; and that a sum not exceeding one-tenth of one per centum of the amount of any certificates of indebtedness issued is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expenses of preparing, advertising, and issuing the same. [*36 Stat. L. 192.*]

SEC. 3. [*Inconsistent laws repealed.*] That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed. [*36 Stat. L. 192.*]

PUBLIC DOCUMENTS.

Act of June 25, 1910, Ch. 384, 310.

Sec. 1. Control of Office of Superintendent, 310.

Act of June 25, 1910, Ch. 439, 310.

Public Printing and Binding — Documents and Reports — Reserved Sets Discontinued — Binding for Senators, Members, etc., 310.

CROSS-REFERENCE.

Publications of Bureau of Mines, see MINERAL LANDS, MINES, AND MINING.

[SEC. 1.] [*Control of office of superintendent.*] * * * That the office of the superintendent of documents shall be under the control of the Public Printer as heretofore; the disbursements on account of salaries or other expenses of the office of the superintendent of documents shall be made by the Public Printer, and a statement thereof shall be included in his annual report for each fiscal year. [36 Stat. L. 770.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

An Act To amend section fifty-four of an Act approved January twelfth, eighteen hundred and ninety-five, providing for the public printing and binding and the distribution of public documents, as amended by Public Resolution Numbered Thirty-six, approved June thirtieth, nineteen hundred and two.

[*Act of June 25, 1910, ch. 439.*]

[*Public printing and binding — documents and reports — reserved sets discontinued — binding for senators, members, etc.*] That that part of section fifty-four of an Act approved January twelfth, eighteen hundred and ninety-five, providing for the public printing and binding and the distribution of public documents which reads as follows: "The remainder of said documents and reports shall be reserved by the Public Printer in unstitched form, and shall be held subject to be bound in the number provided by law, upon orders from the Vice-President, Senators, Representatives, Delegates, Secretary of the Senate, and Clerk of the House, in such binding as they shall select, except full morocco or calf; and when not called for and delivered within two years after printing shall be delivered in unbound form to the Superintendent of Documents for distribution," as amended by Public Resolution Numbered Thirty-six, approved June thirtieth, nineteen hundred and two, is hereby repealed, to take effect at the close of the second session of the Sixty-first Congress, and the reserved documents and reports therein provided shall thereafter not be printed: *Provided*, That nothing herein shall operate to abridge in any way the right of the Vice-President, Senators, Representatives, Delegates, Resident Commissioners, Secretary of the Senate, and Clerk of the House to have bound in half morocco, or material not more expensive, one copy of every public document to which he may be entitled. [36 Stat. L. 868.]

For sec. 54 of the Act of Jan. 12, 1895, see 6 Fed. Stat. Annot. 147.

PUBLIC LANDS.

Act of Jan. 28, 1910, Ch. 14, 312.

- Sec. 1. Homestead Settlers—Time Extended to Establish Residence by Certain—Regular Period Not Shortened—Adverse Claims Excluded,* 312.
2. Leaves of Absence Granted—No Deduction from Regular Period, 313.

Act of Feb. 15, 1910, Ch. 27, 313.

- Havre, Mont., Land District Established—Description,* 313.

Act of Feb. 15, 1910, Ch. 28, 313.

- Des Moines, Iowa, Land Office Abolished—Transfer of Records, etc.,* 313.

Act of March 15, 1910, Ch. 96, 314.

- Temporary Withdrawals for Applications under "Carey Act"—Restoration,* 314.

Act of March 15, 1910, Ch. 97, 314.

- Sec. 1. Vale Land District, Oreg., Created—Boundaries—Land Office,* 314.
2. Transfer of Plats, etc., 314.
3. Register and Receiver to Be Appointed, 315.

Act of April 12, 1910, Ch. 155, 315.

- Sec. 1. Pipe Lines Granted Right of Way Through, in Arkansas,* 315.
2. Applications, 315.
3. Use Restricted, 315.
4. Forfeiture for Nonuser, etc., 315.
5. Forfeiture for Violation of Anti-trust Law, 315.

Act of June 11, 1910, Ch. 284, 316.

- Sec. 1. Reclamation Projects—Reappraisal of Unsold Townsite Lots under,* 316.
2. Manner of Payment, 316.

Act of June 17, 1910, Ch. 298, 316.

- Sec. 1. Enlarged Homestead Entries Permitted of Public Lands in Idaho,* 316.
2. Applications, Fees, etc., 316.
3. Additions Allowed Incomplete Homestead Entries, 316.
4. Proof of Cultivation Required, 317.
5. Regular Homestead Entries Not Affected—No Commutations, 317.
6. Lands without Water for Domestic Use—Residence Not Required—Cultivation to Be Made—Personal Work—Leaves of Absence, 317.

Act of June 22, 1910, Ch. 318, 317.

- Sec. 1. Classified, etc., Coal Lands—Agricultural Entries for Surface Allowed—Right to Prospect, etc., for Coal Reserved—Limit and Conditions,* 317.
2. Applications to State Nature of Entry, 318.
3. Patents to Reserve Coal Rights—Disposal of Coal Deposits—Entry for Prospecting, etc.—Damages to Surface Owners—Mining for Domestic Use—Right of Entryman to Disprove Coal Classifications, 318.

Act of June 22, 1910, Ch. 320, 319.

- Sec. 1. Fort Sumner Land District, N. Mex., Created—Boundaries—Land Office,* 319.
2. Transfer of Plats, etc., 319.
3. Register and Receiver to Be Appointed, 319.

Act of June 23, 1910, Ch. 357, 319.

- Assignment of Completed Homestead Entries in Reclamation Projects—Patent to Assignee,* 319.

Act of June 25, 1910, Ch. 408, 320.

- Sec. 1. Railroad Land Grants—Deposits for Cost of Surveying, etc., Required from Companies—Secretary of Interior to Specify Amount, etc.—Disbursement of Deposits—Repayment of Excess,* 320.
2. Forfeiture of Grant on Failure to Make Deposit—Proceedings, 320.
3. Public Surveys, etc., Not Affected—Surveyed Lands Subject to Taxation, etc., 321.
4. Regulations, 321.

PUBLIC LANDS.

Act of June 25, 1910, Ch. 421, 321.

Sec. 1. Temporary Withdrawals by President for Power Sites, Irrigation, etc., Authorized, 321.

2. Mining Rights Continued — Exceptions — Rights of Bona Fide Oil or Gas Claimants — Status of Prior Claims — Homestead, etc., Settlements Excepted — Restriction on New Forest Reserves, 321.

3. Report of Withdrawals to Congress, 322.

Act of June 25, 1910, Ch. 432, 322.

Irrigation Act — Homesteaders under, Allowed Leave until Water Turned on — Required Residence Not Lessened, 322.

Joint Resolution of June 25, 1910, No. 40, 322.

Necessary Resurveys Authorized — Bona Fide Rights Not Impaired — Amount for, Increased to 20 per Cent, 322.

Act of Dec. 23, 1910, Ch. 7, 323.

Sec. 1. Per Diem to Surveyors, 323.

Act of Feb. 3, 1911, Ch. 84, 323.

Second Desert-land, etc., Entries Allowed, if First Lost, etc. — Parties Excluded, 323.

Act of Feb. 18, 1911, Ch. 58, 323.

Sec. 1. Homestead Settlers — Time Extended to Establish Residence by Certain — Regular Period Not Shortened — Adverse Claims Not Affected, 323.

Absence Permitted — Not Deducted from Full Period, 324.

Act of March 3, 1911, Ch. 225, 324.

Sec. 1. Homestead Entries in National Forests — Reinstatement of, Canceled for Erroneous Allowance, 324.

2. Rights of Contestants, 324.

Act of March 4, 1911, Ch. 261, 324.

Sec. 1. Refund to Registers of Fees for Cancellation Notices — Accounts — Limitation, 324.

2. Accounting Hereafter, 324.

Act of March 4, 1911, Ch. 285, 325.

Sec. 1. Registers and Receivers — Restriction on Expenditures, 325.

Act of Aug. 17, 1911, Ch. 22, 325.

Sec. 1. Homestead Entry — Rosebud Indian Reservation — Extension of Time to Make Payment, 325.

2. Failure to Make Payment — Forfeiture, 325.

3. Effect on Adverse Claim, 325.

Joint Resolution of Aug. 21, 1911, No. 7, 325.

Carey Act — One Million Additional Acres of Land in Colorado, 325.

CROSS-REFERENCES.

Indian Lands, see INDIANS.

In Hawaii, see HAWAIIAN ISLANDS.

Mineral Claims in Alaska, see ALASKA.

Naturalization of Wife and Minor Children of Insane Alien Making Homestead Entries, see NATURALIZATION.

Right of Way over Electric Lines, see TELEGRAPH, TELEPHONE, CABLE, AND ELECTRIC LINES.

And see generally, MINERAL LANDS, MINES, AND MINING; TIMBER LANDS AND FOREST RESERVES.

An Act Extending the time for certain homesteaders to establish residence upon their lands.

[Act of Jan. 28, 1910, ch. 14.]

[SEC. 1.] [Homestead settlers — time extended to establish residence by certain — regular period not shortened — adverse claims excluded.] That all persons who have heretofore made homestead entries in the States of North

Dakota, South Dakota, Idaho, Minnesota, Montana, Nebraska, Colorado, and Wyoming, and the Territory of New Mexico, where the period in which they were, or are, required by law to make entry under declaratory statement or establish residence expired or expires after December first, nineteen hundred and nine, are hereby granted until May fifteenth, nineteen hundred and ten, within which to make entry or establish residence upon the lands so entered by them: *Provided*, That this extension of time shall not shorten either the period of commutation or of actual residence under the homestead law: *Provided further*, That this Act shall not apply to an adverse claim established by entry and residence after the expiration of the time allowed for establishing residence of the first entryman, and prior to the passage of this Act. [36 Stat. L. 189.]

SEC. 2. [*Leaves of absence granted — no deduction from regular period.*] That homestead entrymen or settlers upon the public domain in the States above named are hereby granted a leave of absence from their land for a period of three months from the date of the approval of this Act: *Provided*, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law. [36 Stat. L. 189.]

An Act For the establishment of a new land district in the State of Montana.

[Act of Feb. 15, 1910, ch. 27.]

[*Havre, Mont., land district established — description.*] That all that portion of the State of Montana included within the boundaries hereinafter described is hereby constituted a new land district, and that the land office for said district shall be located at Havre, in Chouteau County, Montana: Beginning on the range line when extended between ranges twenty-eight and twenty-nine east, where the same will intersect the international boundary line between the United States of America and the Dominion of Canada, thence south, allowing for the proper offsets on the sixth, seventh, and ninth standard parallels north, to the point of intersection with the center of the Missouri River; thence westerly and northwesterly along the center of the Missouri River to the point of intersection with the center of the Marias River; thence northwesterly along the Marias River to the point of intersection with the Montana principal meridian; thence north along said principal meridian to the point of intersection with the international boundary line; thence east to the range line when extended between ranges twenty-eight and twenty-nine east, to the place of beginning. [36 Stat. L. 192.]

An Act To abolish the United States land office at Des Moines, Iowa.

[Act of Feb. 15, 1910, ch. 28.]

[*Des Moines, Iowa, land office abolished — transfer of records, etc.*] That the land office at Des Moines, Iowa, shall be, and is hereby, abolished from and after the twenty-eighth day of February, nineteen hundred and ten; and the Secretary of the Interior is hereby authorized to transfer to the State of Iowa such of the transcripts, documents, and records of the office as are not required for the use of the United States and as the State may desire to preserve. [36 Stat. L. 193.]

An Act Authorizing the Secretary of the Interior to make temporary withdrawals of public lands for certain purposes.

[Act of March 15, 1910, ch. 96.]

[*Temporary withdrawals for applications under "Carey Act" — restoration.*] That to aid in carrying out the purposes of section four of the Act of August eighteenth, eighteen hundred and ninety-four, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending eighteen hundred and ninety-five, and for other purposes," it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made. [36 Stat. L. 237.]

An Act Authorizing the creation of an additional land district in the State of Oregon, to be known as the "Vale land district."

[Act of March 15, 1910, ch. 97.]

[SEC. 1.] [*Vale land district, Oreg., created — boundaries — land office.*] That an additional land district is hereby created in the State of Oregon, to embrace lands described as follows: Commencing at a point where the township line between townships eleven and twelve south intersects the Snake River; thence west along said township line to its intersection with the northwest corner of township twelve south, range thirty-six east; thence south on the range line between ranges thirty-five and thirty-six east to its intersection with the fourth standard parallel south; thence east on said fourth standard parallel south to its intersection with the range line between ranges thirty-six and thirty-seven east; thence south along said range line to its intersection with the sixth standard parallel south; thence west along said sixth parallel south to the northwest corner of township thirty-one south, range thirty-five east; thence south along the range line between ranges thirty-four and thirty-five east to the southwest corner of township thirty-seven south, range thirty-five east; thence east along the north boundary of township thirty-eight south to the northwest corner of township thirty-eight south, range thirty-seven east; thence south along the range line between ranges thirty-six and thirty-seven south to its intersection with the boundary line between the States of Oregon and Nevada; thence east along said boundary line to its intersection with the boundary line between the States of Oregon and Idaho; thence north and northerly along said boundary to the place of beginning; and that Vale, Malheur County, within said district, is hereby designated as the site for the land office thereof. [36 Stat. L. 238.]

SEC. 2. [*Transfer of plats, etc.*] That the Secretary of the Interior shall cause all plats, maps, records, and papers in the Burns and La Grande land offices which relate to or form a necessary part of the record of the lands embraced in the land district hereby created to be transferred to the same, and said district created as aforesaid shall be known as the "Vale land district." [36 Stat. L. 238.]

SEC. 3. [*Register and receiver to be appointed.*] That the President is authorized to appoint, by and with the advice and consent of the Senate, a register and a receiver for said land district, and they shall be subject to the same laws and be entitled to the same compensation as is or may be hereafter provided by law in relation to the existing land offices and officers in said State. [36 Stat. L. 238.]

An Act To grant right of way over the public domain in the State of Arkansas for oil or gas pipe lines.

[Act of April 12, 1910, ch. 155.]

[SEC. 1.] [*Pipe lines granted right of way through, in Arkansas.*] That a right of way through the public lands of the United States in the State of Arkansas is hereby granted for pipe-line purposes to any citizen of the United States or any company or corporation authorized by its charter to transport oil, crude or refined, or natural gas which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proof of organization under the same, to the extent of the ground occupied by the said pipe line and ten feet on each side of the center line of same. [36 Stat. L. 296.]

SEC. 2. [*Applications.*] That any citizen of the United States, company, or corporation desiring to secure the benefits of this Act shall within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed land, and if the same be upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its lines, and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such land over which such line shall pass shall be disposed of subject to such right of way. [36 Stat. L. 296.]

SEC. 3. [*Use restricted.*] That nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care. [36 Stat. L. 296.]

SEC. 4. [*Forfeiture for nonuser, etc.*] That if any section of said pipe line shall not be completed within one year after the approval by the Secretary of the Interior of said section, or if any section of said pipe line shall be abandoned or shall not be used for a period of two years, the right of way herein granted as to any uncompleted, abandoned or unused section of said pipe line shall be forfeited to the extent that the same is not completed or is abandoned or unused at the date of the forfeiture, without further action or declaration on the part of the Government or any proceedings or judgment of any court. [36 Stat. L. 296.]

SEC. 5. [*Forfeiture for violation of antitrust law.*] That if any citizen, company, or corporation taking advantage of the benefits of this Act, shall violate the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (commonly known as the Sherman antitrust act), or any amendment thereof, the right of way herein granted shall be forfeited without further action or declaration on the part of the Government or any proceedings or judgment of any court. [36 Stat. L. 296.]

For the Act of July 2, 1890 (Sherman Anti-trust Act), see 7 Fed. Stat. Annot. 336.

An Act Providing for the reappraisal of unsold lots in town sites on reclamation projects, and for other purposes.

[Act of June 11, 1910, ch. 234.]

[SEC. 1.] [*Reclamation projects—reappraisal of unsold townsite lots under.*] That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within town sites on projects under the reclamation Act heretofore or hereafter appraised under the provisions of the Act approved April sixteenth, nineteen hundred and six, entitled "An Act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the Act approved June twenty-seventh, nineteen hundred and six, entitled "An Act providing for the subdivision of lands entered under the reclamation Act, and for other purposes;" and thereafter to proceed with the sale of such town lots in accordance with said Acts. [36 Stat. L. 465.]

For the Act of April 16, 1906, see 1909 Supp. Fed. Stat. Annot. 539. For the Act of June 27, 1906, see 1909 Supp. Fed. Stat. Annot. 543.

SEC. 2. [*Manner of payment.*] That in the sale of town lots under the provisions of the said Acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments. [36 Stat. L. 466.]

See note to sec. 1 above.

An Act To provide for an enlarged homestead.

[Act of June 17, 1910, ch. 293.]

[SEC. 1.] [*Enlarged homestead entries permitted of public lands in Idaho.*] That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this Act, in the State of Idaho, three hundred and twenty acres or less of arid nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this Act until the lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation, at a reasonable cost, from any known source of water supply. [36 Stat. L. 531.]

SEC. 2. [*Applications, fees, etc.*] That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this Act, and shall pay the fees now required to be paid under the homestead laws. [36 Stat. L. 532.]

For R. S. sec. 2290, see 6 Fed. Stat. Annot. 290.

SEC. 3. [*Additions allowed incomplete homestead entries.*] That any homestead entryman of lands of the character herein described, upon which final

proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry. [36 Stat. L. 532.]

SEC. 4. [*Proof of cultivation required.*] That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry. [36 Stat. L. 532.]

For R. S. sec. 2291, see 6 Fed. Stat. Annot. 292.

SEC. 5. [*Regular homestead entries not affected — no commutations.*] That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the State of Idaho under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this Act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this Act shall be commuted. [36 Stat. L. 532.]

For R. S. sec. 2289, see 6 Fed. Stat. Annot. 235.

SEC. 6. [*Lands without water for domestic use — residence not required — cultivation to be made — personal work — leaves of absence.*] That whenever the Secretary of the Interior shall find that any tracts of land in the State of Idaho subject to entry under this Act do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate three hundred and twenty thousand acres, and thereafter they shall be subject to entry under this Act without the necessity of residence upon the land entered: *Provided*, That the entryman shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of said entry, and that after six months from date of entry and until final proof the entryman shall reside not more than twenty miles from said land and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. Leave of absence from a residence established under this section may, however, be granted upon the same terms and conditions as are required of other homestead entrymen. [36 Stat. L. 532.]

An Act To provide for agricultural entries on coal lands.

[Act of June 22, 1910, ch. 313.]

[SEC. 1.] [*Classified, etc., coal lands — agricultural entries for surface allowed — right to prospect, etc., for coal reserved — limit and conditions.*] That from and after the passage of this Act unreserved public lands of the

United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" *Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. [36 Stat. L. 583.]

For section 4 of the Act of Aug. 18, 1894, above referred to, see 6 Fed. Stat. Annot. 397. For the Act of June 17, 1902, see 7 Fed. Stat.

Annot. 1098. For the Act of Feb. 19, 1909, see 1909 Supp. Fed. Stat. Annot. 560.

SEC. 2. [*Applications to state nature of entry.*] That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. [36 Stat. L. 584.]

For the Carey Act, see note under sec. 1, *supra*.

SEC. 3. [*Patents to reserve coal rights — disposal of coal deposits — entry for prospecting, etc. — damages to surface owners — mining for domestic use — right of entryman to disprove coal classifications.*] That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the

surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation. [36 Stat. L. 584.]

An Act To create an additional land district in the Territory of New Mexico, to be known as the "Fort Sumner land district."

[Act of June 23, 1910, ch. 320.]

[SEC. 1.] [Fort Sumner land district, N. Mex., created — boundaries — land office.] That an additional land district is hereby created in the Territory of New Mexico, to embrace lands described as follows: Beginning at the point where the township line between townships four and five north of the base line parallel intersects the boundary line between the Territory of New Mexico and the State of Texas; running thence west from said intersection along said township line to its intersection with the line between ranges fifteen and sixteen east of the New Mexico prime meridian; thence south along said range line to its intersection with the township line between townships five and six south; thence east along said township line to the boundary line between the Territory of New Mexico and the State of Texas; thence north on and along said boundary line to the place of beginning; and that Fort Sumner, within said district, is hereby designated as the site for the land office thereof. [36 Stat. L. 585.]

SEC. 2. [Transfer of plats, etc.] That the Secretary of the Interior shall cause all plats, maps, records, and papers in the Roswell and Sante Fe land offices which relate to or form a necessary part of the record of the lands embraced in the land district hereby created to be transferred to the same, and said district created as aforesaid shall be known as the "Fort Sumner land district." [36 Stat. L. 585.]

SEC. 3. [Register and receiver to be appointed.] That the President is authorized to appoint, by and with the consent of the Senate, a person to act as register and also a person to act as receiver of the aforesaid Fort Sumner land district, and that such clerical force as may be necessary shall be assigned to the said Fort Sumner land office by the Secretary of the Interior. [36 Stat. L. 585.]

An Act Providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead Act.

[Act of June 23, 1910, ch. 357.]

[Assignment of completed homestead entries in reclamation projects — patent to assignee.] That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and

cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the Act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said Act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation Act. [36 Stat. L. 592.]

For the Act of June 17, 1902, above mentioned, see 7 Fed. Stat. Annot. 1098.

An Act Making an appropriation for the survey of public lands lying within the limits of land grants, to provide for the forfeiture to the United States of unsurveyed land grants to railroads, and for other purposes.

[Act of June 25, 1910, ch. 406.]

[SEC. 1.] [*Railroad land grants — deposits for cost of surveying, etc., required from companies — Secretary of Interior to specify amount, etc. — disbursement of deposits — repayment of excess.*] That to enable the Secretary of the Interior to complete the adjustment of land grants made by Congress to aid in the construction of railroads, and to subject the lands granted to taxation by States, Territories, and municipal authorities, any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company or corporation, or for its use and benefit, by any Act of Congress, shall be, and is hereby, required, within ninety days from demand by the Secretary of the Interior, to deposit in a proper United States depository to the credit of the United States a sum sufficient to pay the cost of surveying, selecting, and conveying any of the unsurveyed lands granted to such company, or for its use and benefit, under any act of Congress: *Provided further*, That the Secretary of the Interior shall determine and specify in the notice or demand to such company the amount of the required deposit, and may, in his discretion, demand a sum sufficient to cover the cost of the survey, selection, and conveyance of the entire area granted to any company, or for its use and benefit, then unsurveyed, or for such townships or fractional townships as he may prescribe and designate in the notice or demand to such company, as aforesaid: *And provided further*, That the amount deposited shall, subject to the rules and regulations of the Department of the Interior, under the direction of the Commissioner of the General Land Office, be disbursed for the surveying, including office and field work, selection, and conveyance of the lands granted and designated in the notice of the Secretary of the Interior, as aforesaid: *And provided further*, That in the event the money deposited by any railroad corporation under the provisions of this act shall exceed the cost of said surveys, the said excess thereof shall be repaid to the corporations so depositing the same, or to its assigns. [36 Stat. L. 834.]

SEC. 2. [*Forfeiture of grant on failure to make deposit — proceedings.*] That if any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such corporation, or for its use and benefit, by any Act of Congress, shall, for ninety days from notice or demand by the Secretary of the Interior, as provided in this Act, neglect or refuse to deposit an amount sufficient to meet the expense of surveying, selecting, and

conveying the unsurveyed lands granted to such company, or for its use and benefit, by any Act of Congress, and designated in the notice or demand by the Secretary of the Interior, as aforesaid, the rights, title, and interests of such company, and all those claiming by, through, or under it, in and to the unsurveyed lands designated in the notice of the Secretary, as aforesaid, shall cease and forfeit to the United States; and the Secretary of the Interior shall notify the Attorney-General, who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain. [36 Stat. L. 834.]

SEC. 3. [*Public surveys, etc., not affected — surveyed lands subject to taxation, etc.*] That this Act shall not affect the right of the Secretary of the Interior to cause the public surveys to be extended over any lands granted to any railroad or corporation by any Act of Congress in the manner now otherwise provided by law, nor shall any claim, right, interest, or demand of the Government of the United States be waived or annulled by the provisions hereof: *Provided*, That all granted lands surveyed under the provisions of this Act shall be subject to taxation by States, Territories, and municipal authorities, and the right of the Government to reimburse itself for the survey, selection, and conveyance of such lands otherwise provided by law shall remain in full force and effect. [36 Stat. L. 834.]

SEC. 4. [*Regulations.*] That the Secretary of the Interior shall prescribe such rules and regulations as will be necessary to the carrying out of the foregoing provisions. [36 Stat. L. 835.]

An Act To authorize the President of the United States to make withdrawals of public lands in certain cases.

[Act of June 25, 1910, ch. 421.]

[SEC. 1.] [*Temporary withdrawals by President for power sites, irrigation, etc., authorized.*] That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. [36 Stat. L. 847.]

SEC. 2. [*Mining rights continued — exceptions — rights of bona fide oil or gas claimants — status of prior claims — homestead, etc., settlements excepted — restriction on new forest reserves.*] That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made

prior to the passage of this Act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. [36 Stat. L. 847.]

SEC. 3. [Report of withdrawals to Congress.] That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals. [36 Stat. L. 848.]

An Act Granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two.

[Act of June 25, 1910, ch. 432.]

[Irrigation Act — homesteaders under, allowed leave until water turned on — required residence not lessened.] That all qualified entrymen who have heretofore made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, known as the national irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law. [36 Stat. L. 864.]

For the Act of June 17, 1902, see 7 Fed. Stat. Annot. 1008.

Joint Resolution To amend and correct chapter two hundred and seventy-one of volume thirty-five, United States Statutes at Large.

[Joint Resolution of June 25, 1910, No. 40.]

[Necessary resurveys authorized — bona fide rights not impaired — amount for, increased to twenty per cent.] That the words "five per centum" in the last proviso of chapter two hundred and seventy-one of volume thirty-five of the United States Statutes at Large be changed to read "twenty per centum," so that the said chapter when so changed shall read as follows:

"That the Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement."

ment: *Provided further*, That not to exceed twenty per centum of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby." [36 Stat. L. 884.]

The Act above amended is that of March 3, 1909, and is set forth in 1909 Supp. Fed. Stat. Annot. 563.

[SEC. 1.] [*Per diem to surveyors.*] * * * That all surveyors heretofore or hereafter employed under the sundry civil appropriation Act approved June twenty-fifth, nineteen hundred and ten, to make surveys or resurveys shall, in addition to the compensation provided for therein, receive not more than three dollars per diem in lieu of subsistence for each day they have heretofore been or may hereafter be on duty under such employment. [36 Stat. L. 890.]

This is from the Urgent Deficiencies Appropriation Act of Dec. 23, 1910, ch. 7.

An Act Providing for second homestead and desert-land entries.

[Act of Feb. 3, 1911, ch. 34.]

[*Second desert-land, etc., entries allowed, if first lost, etc. — parties excluded.*] That any person who, prior to the approval of this Act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this Act shall furnish a description and the date of his former entry: *Provided*, That the provisions of this Act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry. [36 Stat. L. 896.]

An Act Extending the time for certain homesteaders to establish residence upon their lands.

[Act of Feb. 13, 1911, ch. 53.]

[SEC. 1.] [*Homestead settlers — time extended to establish residence by certain — regular period not shortened — adverse claims not affected.*] That all persons who have heretofore filed declaratory statements or made homestead entries in the States of North Dakota, South Dakota, Nebraska, Idaho, Montana, Colorado, Utah, Wyoming, Minnesota, Washington, and Oregon, and the Territories of Arizona and New Mexico, where the period in which they were or are required by law to make entry under such declaratory statements or to establish residence expired or expires after December first, nineteen hundred and ten, are hereby granted until May fifteenth, nineteen hundred and eleven, within which to make such entry or establish such residence upon the lands so entered by them: *Provided*, That this extension of time shall not shorten either the period of commutation or actual residence required by the homestead law: *Provided further*, That this Act shall not affect an adverse claim initiated prior to the passage of the Act and after the expiration of the time allowed an entryman for establishing residence on the land. [36 Stat. L. 903.]

SEC. 2. [*Absence permitted — not deducted from full period.*] That homestead entrymen or settlers upon the public domain in the States and Territories above named be, and the same are hereby, relieved from the necessity of residence upon their lands from the date of the approval of this Act to May fifteenth, nineteen hundred and eleven: *Provided*, That the time of actual absence during the period named shall not be deducted from the full time of residence required by law. [36 Stat. L. 904.]

An Act Providing for the validation of certain homestead entries.

[Act of March 3, 1911, ch. 225.]

[SEC. 1.] [*Homestead entries in national forests — reinstatement of, canceled for erroneous allowance.*] That all homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve. [36 Stat. L. 1084.]

SEC. 2. [*Rights of contestants.*] That in all cases where contests were initiated under the provisions of the Act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this Act. [36 Stat. L. 1084.]

An Act For the relief of registers and former registers of the United States land offices.

[Act of March 4, 1911, ch. 261.]

[SEC. 1.] [*Refund to registers of fees for cancellation notices — accounts — limitation.*] That the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, to registers and former registers of United States land offices money earned by them for issuing notices of the cancellation of entries subsequent to July twenty-sixth, eighteen hundred and ninety-two, which money, under the instructions of the Secretary of the Interior, they were erroneously required to deposit in the United States Treasury, contrary to the provisions of the Act approved July twenty-sixth, eighteen hundred and ninety-two: *Provided*, That such refund shall be made only of money deposited subsequent to the approval of the Act of July twenty-sixth, eighteen hundred and ninety-two, and shall be made upon accounts stated and certified by the Secretary of the Interior: *And provided further*, That said refund shall be made of only such fees which have not entered into the compensation paid to such registers out of the appropriation for salaries and commissions of registers and receivers for any fiscal year. [36 Stat. L. 1351.]

SEC. 2. [*Accounting hereafter.*] That hereafter all money or fees received or collected by registers of United States land offices for issuing notices of cancellation of entries shall be reported and accounted for by such registers in the same manner as other fees or moneys received or collected. [36 Stat. L. 1351.]

[SEC. 1.] [*Registers and receivers — restriction on expenditures.*] * * * That no expenses chargeable to the Government shall be incurred by registers and receivers in the conduct of local land offices except upon previous specific authorization by the Commissioner of the General Land Office. [36 Stat. L. 1415.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

An Act Extending the time of payment to certain homesteaders in the Rosebud Indian Reservation, in the State of South Dakota.

[Act of Aug. 17, 1911, ch. 22.]

[SEC. 1.] [*Homestead entry — Rosebud Indian Reservation — extension of time to make payment.*] That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation, in the State of South Dakota, authorized by the Act approved March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time within which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, and payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment is due; that all moneys paid for interest as herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the lands. [37 Stat. L. 21.]

SEC. 2. [*Failure to make payment — forfeiture.*] That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited. [37 Stat. L. 22.]

SEC. 3. [*Effect on adverse claim.*] That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this Act. [37 Stat. L. 22.]

Joint Resolution Providing for additional lands for Colorado under the provisions of the Carey Act.

[Joint Resolution of Aug. 21, 1911, No. 7.]

[*Carey Act — one million additional acres of land in Colorado.*] That an additional one million acres of arid lands within the State of Colorado be made available and subject to the terms of section four of an Act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and that the State of Colorado be allowed, under the provisions of said Acts, said additional area, or so much thereof as may be necessary for the purposes and under the provisions of said Acts. [37 Stat. L. 38.]

The portion of the Act of Aug. 18, 1894, above referred to ("The Carey Act") is given in 6 Fed. Stat. Annot. 397.

PUBLIC MONEY.

Act of March 4, 1911, Ch. 285, 326.

Sec. 1. Construction of Public Buildings—Disbursements to Be Made from Treasury Department—Payments by Collectors of Customs—Compensation for Disbursements Restricted to Bonded Appointees, 326.

[**SEC. 1.**] *[Construction of public buildings—disbursements to be made from Treasury Department—payments by collectors of customs—compensation for disbursements restricted to bonded appointees.] * * ** Hereafter all disbursements of money appropriated for the construction of public buildings under the control of the Treasury Department shall be made by the Treasury Department at Washington, District of Columbia, except in cases of public buildings located so remote from the seat of government as to occasion hardship by undue delay in making payments to contractors, in every such exceptional case the Secretary of the Treasury may, in his discretion, require the collector of customs at or nearest the place where such building is being constructed to make the disbursement, as provided in section seventeen hundred and sixty-five of the Revised Statutes of the United States, but in such exceptional cases no additional compensation shall be paid to any collector of customs for disbursements made hereunder; and hereafter no compensation or commissions shall be allowed for the disbursement of any appropriation for the construction, extension, enlargement, remodeling, or repairs of any public building under the control of the Treasury Department, except to disbursing agents heretofore appointed and who have qualified by giving bonds. [*36 Stat. L. 1387.*]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.
For R. S. sec. 1765, see 6 Fed. Stat. Annot. 595.

PUBLIC OFFICERS.

Act of Feb. 13, 1911, Ch. 43, 327.

Authority to Administer Oaths in Investigations, 327.

An Act To amend section one hundred and eighty-three of the Revised Statutes.

[Act of Feb. 13, 1911, ch. 43.]

[*Authority to administer oaths in investigations.*] That section one hundred and eighty-three of the Revised Statutes of the United States be, and is hereby, amended so as to read as follows:

"**Sec. 183.** Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Revenue-Cutter Service, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation." [36 Stat. L. 898.]

For R. S. sec. 183, as it read prior to this amendment, see 6 Fed. Stat. Annot. 606.

PUBLIC PARKS.

Act of May 11, 1910, Ch. 226, 328.

Sec. 1. The Glacier National Park — Land Set Apart as — Removal of Trespassers — Valid Rights Not Affected — Rights of Way for Railways — Reclamation Projects — No Indemnity Selections Allowed Corporations, 328.

2. Regulations for Protection, etc. — Leases for Hotels, etc. — Removal of Dead, etc., Timber, 329.

CROSS-REFERENCE.

Appellate Jurisdiction over Yellowstone National Park, see JUDICIARY.

An Act To establish "The Glacier National Park" in the Rocky Mountains south of the international boundary line, in the State of Montana, and for other purposes.

[Act of May 11, 1910, ch. 226.]

[SEC. 1.] [*The Glacier National Park — land set apart as — removal of trespassers — valid rights not affected — rights of way for railways — reclamation projects — no indemnity selections allowed corporations.*] That the tract of land in the State of Montana particularly described by metes and bounds as follows, to wit: Commencing at a point on the international boundary between the United States and the Dominion of Canada at the middle of the Flathead River; thence following southerly along and with the middle of the Flathead River to its confluence with the Middle Fork of the Flathead River; thence following the north bank of said Middle Fork of the Flathead River to where it is crossed by the north boundary of the right of way of the Great Northern Railroad; thence following the said right of way to where it intersects the west boundary of the Blackfeet Indian Reservation; thence northerly along said west boundary to its intersection with the international boundary; thence along said international boundary to the place of beginning, is hereby reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States under the name of "The Glacier National Park;" and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided further*, That rights of way through the valleys of the North and Middle forks of the Flathead River for steam or electric railways may be acquired within said Glacier National Park under filings or proceedings heretofore or hereafter made or instituted under the laws applicable to the acquisition of such rights over or upon the unappropriated public domain of the United States, and that the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the

development and maintenance of a government reclamation project: *And provided further*, That no lands within the limits of said park hereby created belonging to or claimed by any railroad or other corporation now having or claiming the right of indemnity selection by virtue of any law or contract whatsoever shall be used as a basis for indemnity selection in any State or Territory whatsoever for any loss sustained by reason of the creation of said park. [36 Stat. L. 354.]

SEC. 2. [*Regulations for protection, etc.—leases for hotels, etc.—removal of dead, etc., timber.*] That said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations not inconsistent with the laws of the United States as he may deem necessary or proper for the care, protection, management, and improvement of the same, which regulations shall provide for the preservation of the park in a state of nature so far as is consistent with the purposes of this Act, and for the care and protection of the fish and game within the boundaries thereof. Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or company, for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors, and to parcels of ground not exceeding one acre in extent and for not to exceed twenty years to persons who have heretofore erected or whom he may hereafter authorize to erect summer homes or cottages; he may also sell and permit the removal of such matured, or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park. [36 Stat. L. 354.]

PUBLIC PRINTING.

Act of June 25, 1910, Ch. 384, 330.

Sec. 1. Employees with Annual Salaries — Leave of Absence, 330.

Details of Employees of Printing Office, 330.

CROSS-REFERENCE.

See *PUBLIC DOCUMENTS*.

[**SEC. 1.**] [*Employees with annual salaries — leave of absence.*] * * *
That hereafter employees in the Government Printing Office receiving annual salaries fixed by law shall be allowed leave at the rate of pay received by them at the time such leave is granted, the same to be payable from the specific appropriation for their salaries. [*36 Stat. L. 767.*]

This and the following paragraph are from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

[*Details of employees of printing office.*] * * * Hereafter no employee of the Government Printing Office shall be detailed to duties not pertaining to the work of public printing and binding in any executive department or other government establishment unless expressly authorized by law. [*36 Stat. L. 770.*]

PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.

Act of June 25, 1910, Ch. 383, 331.

Secs. 1-32. (Special), 331.

33. *Contracts for New Buildings — Limit for Sites — Sketch Plans to Be Approved before Expenditure — Changes — Restrictions, 331.*

34. *Competitive Plans — Full Architectural Services of Successful Architect Authorized, 332.*

35. *Plans for Buildings for Departments, etc. — Preparation by Supervising Architect's Office, 332.*

Act of June 25, 1910, Ch. 384, 332.

Sec. 9. Executive Mansion — Designation of Custodian of Property in — Bond — Annual Inventory Required — Approval, Filing, etc., 332.

Act of March 2, 1911, Ch. 192, 332.

Sec. 9. Superintendent of Capitol, etc., May Transfer Discontinued Apparatus, etc. — Statement Required, 332.

Act of March 4, 1911, Ch. 285, 333.

Sec. 1. Capitol Power Plant — Vacancies in Operating Force, 333.

CROSS-REFERENCES.

Destruction of Public Buildings, see PUBLIC MONEY.

Statement of Proceeds of Sales, see ESTIMATES, APPROPRIATIONS, AND REPORTS.

An Act To increase the limit of cost of certain public buildings, to authorize the enlargement, extension, remodeling, or improvement of certain public buildings, to authorize the erection and completion of public buildings, to authorize the purchase of sites for public buildings, and for other purposes.

[Act of June 25, 1910, ch. 383.]

[SECS. 1-32.] [Special.]

SEC. 33. [*Contracts for new buildings — limit for sites — sketch plans to be approved before expenditure — changes — restriction.*] That section thirty-seven hundred and thirty-four of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"SEC. 3734. And hereafter no money shall be paid nor contracts made for payment for any site for a public building in excess of the amount specifically appropriated therefor; and no money shall be expended upon any public building until after sketch plans showing the tentative design and arrangement of such building, together with outline description and detailed estimates of the cost thereof shall have been made by the Supervising Architect of the Treasury Department (except when otherwise authorized by law) and said sketch plans, and estimates shall have been approved by the Secretary of the Treasury and the head of each executive department who will have officials located in such building; but such approval shall not prevent subsequent changes in the design, arrangement, materials, or methods of construction or cost which may be found

necessary or advantageous: *Provided*, That no such changes shall be made involving an expense in excess of the limit of cost fixed or extended by Congress, and all appropriations made for the construction of such building shall be expended within the limit of cost so fixed or extended." [36 Stat. L. 699.]

For R. S. sec. 3734, as it read prior to this amendment, see 6 Fed. Stat. Annot. 698.

SEC. 34. [*Competitive plans—full architectural services of successful architect authorized.*] That hereafter the Secretary of the Treasury be, and he is hereby, authorized to enter into contracts for the full architectural services of the successful architect in any competition held under the provisions of the Act of February twentieth, eighteen hundred and ninety-three, and to compensate him for his services from the appropriation for "general expenses of public buildings" available at the time payment for the particular services rendered is due. [36 Stat. L. 699.]

For the Act of Feb. 20, 1893, see 6 Fed. Stat. Annot. 706.

SEC. 35. [*Plans for buildings for departments, etc.—preparation by Supervising Architect's office.*] That hereafter the Secretary of the Treasury may, in his discretion, upon the request of the head of any other executive department, or establishment of the Government not under any executive department, cause the plans, drawings, designs, specifications, and estimates to be prepared in the office of the Supervising Architect, for any building or buildings for governmental purposes which the head of any other executive department or establishment not under an executive department may be authorized to have constructed: *Provided*, That the proper appropriations for the support and maintenance of the office of the Supervising Architect be reimbursed for the cost of such work. [36 Stat. L. 699.]

SEC. 9. [*Executive Mansion—designation of custodian of property in—bond—annual inventory required—approval, filing, etc.*] Hereafter the steward, housekeeper, or such other employee of the Executive Mansion as the President may designate, shall, under the direction of the President, have the charge and custody of and be responsible for the plate, furniture, and public property therein, and shall, before entering upon the duties of the office, give bond for the faithful discharge thereof, said bond to be in the sum of ten thousand dollars, and be approved by the Secretary of War. And hereafter a complete inventory, in proper books, shall be made annually in the month of June, under the direction of the officer in charge of public buildings and grounds, of all the public property in and belonging to the Executive Mansion, showing when purchased, its cost, condition, and final disposition. This inventory shall be submitted to the President for his approval, and shall then be kept for reference in the Office of Public Buildings and Grounds, which shall furnish a copy thereof to the steward, housekeeper, or other employee responsible for the property. [36 Stat. L. 773.]

The above sec. 9 is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

SEC. 9. [*Superintendent of Capitol, etc., may transfer discontinued apparatus, etc.—statement required.*] The Superintendent of the Capitol Building and Grounds may transfer apparatus, appliances, equipments, and supplies of

any kind, discontinued or permanently out of service, to such other branches of the service of the United States, or District of Columbia, whenever, with the approval of the Secretary of the Interior, in his judgment the interests of the Government service may require it. A detailed statement of all such transfers shall be submitted in the annual report to Congress of the Superintendent of the Capitol Building and Grounds. [36 Stat. L. 1011.]

The above sec. 9 is from the District of Columbia Appropriation Act of March 2, 1911, ch. 192.

[SEC. 1.] [*Capitol power plant — vacancies in operating force.*] * * * That hereafter the heating, lighting, and power plant constructed under the terms of the Act approved April twenty-eighth, nineteen hundred and four, shall be known as the Capitol power plant; and hereafter all vacancies occurring in the force operating said plant and the substations in connection therewith shall be filled by said superintendent with the approval of said commission in control of the House Office Building appointed under the Act approved March fourth, nineteen hundred and seven. [36 Stat. L. 1414.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 235.

RAILROADS.

Act of April 5, 1910, Ch. 148, 335.

- Sec. 1. Liability of Railroad Common Carriers to Employees—Time Limit of Actions—Jurisdiction—Concurrent Jurisdiction of State Courts, 335.*
2. Survival of Actions in Case of Death, 335.

Act of April 14, 1910, Ch. 160, 335.

- Sec. 1. Railway Safety Appliances—Application of Laws, 335.*
2. Equipment Required after July 1, 1911, on Cars, 336.
3. Standard Equipment Required in Six Months—Penalty—Extension of Period—Modifying Standard Draw Bars, 336.
4. Penalty for Violations—Hauling Defective Cars for Necessary Repairs—Risk of Carrier—Use of Chains Limited, 336.
5. Liability for Hauling Defective Cars Except for Repairs, 337.
6. Enforcement by Interstate Commerce Commission, 337.

Act of May 6, 1910, Ch. 208, 337.

- Sec. 1. Railway Accidents—Common Carriers to Make Monthly Reports of, 337.*
2. Penalty, 338.
3. Investigation by Interstate Commerce Commission—Authority Conferred—Co-operation with State Commissions—Publication, etc., of Reports, 338.
4. Reports Inadmissible as Evidence in Damage Suits, 338.
5. Form of Reports, 338.
6. Prior Act Repealed, 338.
7. Definitions—"Interstate Commerce"—"Foreign Commerce," 338.
8. Effect, 338.

Act of Feb. 17, 1911, Ch. 108, 339.

- Sec. 1. Locomotive Boilers—Common Carriers Affected by Act—Meaning of Terms—"Railroads"—"Employees," 339.*
2. Locomotives—Use, unless with Safe Boilers, Unlawful—Inspection, 339.
3. Chief and Two Assistant Chief Inspectors—Appointment, etc.—Selection—Salaries, etc.—Office, etc., 339.
4. Inspection Districts—District Inspectors—In Classified Civil Service—Salaries, etc.—Examinations of Applicants—Disqualifications, 340.
5. Inspection by Carriers—Approval, etc., of Rules Filed—Rules to Be Observed if Carrier Fails to File Any—Changes—Office Rules, etc.—Approval of All Rules, 340.
6. District Inspection—Personal Inspection of Boilers—Inspection by Carriers—Sworn Reports to Be Filed—Repairing Defects—Notice of Defective Boilers, etc.—Appeals to Chief Inspector by Carrier—Re-examination—Effect—Appeals to Interstate Commerce Commission—Final Action—Inspector's Requirements Effective Pending Appeals, 341.
7. Annual Report of Chief Inspector, 342.
8. Accidents from Failure of Boilers—Investigation—Disabled Parts to Be Preserved—Detailed Reports—Reports by Interstate Commerce Commission of Cause, etc.—Reports, etc., Not Admitted in Damage Suits, 342.
9. Penalty for Violations by Carriers—Duty of District Attorneys to Bring Suits—Information from Chief Inspector, 342.
10. Limit of Appropriations, 342.

CROSS-REFERENCES.

Agent in Washington for Service of Process, see INTERSTATE COMMERCE.
Grant of Lands in Indian Reservations, see INDIANS.
Issue of Stocks and Bonds, see INTERSTATE COMMERCE.
Land Grants, Forfeiture of, see PUBLIC LANDS.
Panama Railroad, see RIVERS, HARBORS, AND CANALS.
Regulation of Railroad Transportation, see INTERSTATE COMMERCE.
Right of Way through Cemeteries, see CEMETERIES.
Transportation of Mail, see POSTAL SERVICE—POST-OFFICE DEPARTMENT.

An Act To amend an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight.

[Act of April 5, 1910, ch. 148.]

[SEC. 1.] [*Liability of railroad common carriers to employees — time limit of actions — jurisdiction — concurrent jurisdiction of state courts.*] That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." [36 Stat. L. 291.]

For sec. 6 of the Act of April 22, 1908, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 585.

SEC. 2. [*Survival of actions in case of death.*] That said Act be further amended by adding the following section as section nine of said Act:

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." [36 Stat. L. 291.]

An Act To supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

[Act of April 14, 1910, ch. 160.]

[SEC. 1.] [*Railway safety appliances — application of laws.*] That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts." [36 Stat. L. 298.]

For the Acts above mentioned, see the title RAILROADS in 6 Fed. Stat. Annot. 752, 756, and in 10 Fed. Stat. Annot. 375.

SEC. 2. [*Equipment required after July 1, 1911, on cars.*] That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. [36 Stat. L. 298.]

SEC. 3. [*Standard equipment required in six months — penalty — extension of period — modifying standard draw bars.*] That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. [36 Stat. L. 298.]

For sec. 4 of the Act of March 2, 1893, see 6 Fed. Stat. Annot. 755.

SEC. 4. [*Penalty for violations — hauling defective cars for necessary repairs — risk of carrier — use of chains limited.*] That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be

hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight. [36 Stat. L. 299.]

For sec. 6 of the Act of March 2, 1893, as amended April 1, 1896, see 6 Fed. Stat. Annot. 756.

SEC. 5. [*Liability for hauling defective cars except for repairs.*] That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act. [36 Stat. L. 299.]

For the Act of March 2, 1893, as amended, above referred to, see 6 Fed. Stat. Annot. 752 *et seq.*

SEC. 6. [*Enforcement by Interstate Commerce Commission.*] That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act. [36 Stat. L. 299.]

An Act Requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said commission.

[Act of May 6, 1910, ch. 208.]

[SEC. 1.] [*Railway accidents — common carriers to make monthly reports of.*] That it shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of

all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the commission. [36 Stat. L. 350.]

SEC. 2. [*Penalty.*] That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same. [36 Stat. L. 351.]

SEC. 3. [*Investigation by Interstate Commerce Commission — authority conferred — co-operation with state commissions — publication, etc., of reports.*] That the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The commission, or any impartial investigator thereunto authorized by said commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances, and for that purpose may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation. Said commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the commission deems proper. [36 Stat. L. 351.]

SEC. 4. [*Reports inadmissible as evidence in damage suits.*] That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation. [36 Stat. L. 351.]

SEC. 5. [*Form of reports.*] That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided. [36 Stat. L. 351.]

SEC. 6. [*Prior Act repealed.*] That the Act entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," approved March third, nineteen hundred and one, is hereby repealed. [36 Stat. L. 351.]

For the Act of March 3, 1901, above repealed, see 6 Fed. Stat. Annot. 757.

SEC. 7. [*Definitions — "interstate commerce" — "foreign commerce."*] That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other

State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia. [36 Stat. L. 351.]

SEC. 8. [*Effect.*] That this Act shall take effect sixty days after its passage. [36 Stat. L. 351.]

An Act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

[Act of Feb. 17, 1911, ch. 103.]

[SEC. 1.] [*Locomotive boilers — common carriers affected by Act — meaning of terms — "railroads" — "employees."*] That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train. [36 Stat. L. 913.]

SEC. 2. [*Locomotives — use, unless with safe boilers, unlawful — inspection.*] That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. [36 Stat. L. 913.]

SEC. 3. [*Chief and two assistant chief inspectors — appointment, etc. — selection — salaries, etc. — office, etc.*] That there shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this Act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of

three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require. [36 Stat. L. 914.]

SEC. 4. [*Inspection districts — district inspectors — in classified civil service — salaries, etc. — examinations of applicants — disqualifications.*] That immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several States, the Territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector shall receive a salary of one thousand eight hundred dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector. [36 Stat. L. 914.]

SEC. 5. [*Inspection by carriers — approval, etc., of rules filed — rules to be observed if carrier fails to file any — changes — office rules, etc. — approval of all rules.*] That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this Act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regula-

tions be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect. [36 Stat. L. 914.]

SEC. 6. [*District inspection — personal inspection of boilers — inspection by carriers — sworn reports to be filed — repairing defects — notice of defective boilers, etc. — appeals to chief inspector by carrier — re-examination — effect — appeals to Interstate Commerce Commission — final action — inspector's requirements effective pending appeals.*] That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this Act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this Act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided,* That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action

of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further*, That pending either appeal the requirements of the inspector shall be effective. [36 Stat. L. 915.]

SEC. 7. [*Annual report of chief inspector.*] That the chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire. [36 Stat. L. 916.]

SEC. 8. [*Accidents from failure of boilers—investigation—disabled parts to be preserved—detailed reports—reports by Interstate Commerce Commission of cause, etc.—reports, etc., not admitted in damage suits.*] That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation. [36 Stat. L. 916.]

SEC. 9. [*Penalty for violations by carriers—duty of district attorneys to bring suits—information from chief inspector.*] That any common carrier violating this Act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this Act coming to his knowledge. [36 Stat. L. 916.]

SEC. 10. [*Limit of appropriations.*] That the total amounts directly appropriated to carry out the provisions of this Act shall not exceed for any one fiscal year the sum of three hundred thousand dollars. [36 Stat. L. 916.]

RATES.

See INTERSTATE COMMERCE.

RECIPROCITY WITH CANADA.

See CUSTOMS DUTIES.

RECLAMATION ACT.

See PUBLIC LANDS; PUBLIC PARKS; WATERS

RED CROSS.

See CHARITIES.

REFORMATORY.

See PRISONS AND PRISONERS.

REPORTS.

Making False Reports, see FALSE ACCOUNTS AND REPORTS.
And see generally, ESTIMATES, APPROPRIATIONS, AND REPORTS.

RESERVOIRS.

See RIVERS, HARBORS, AND CANALS; WATERS.

REVENUE MARINE—REVENUE-CUTTER SERVICE.

Act of March 4, 1911, Ch. 285. 344.

Sec. 1. Burials of Officers and Men in National Cemeteries. (Temporary), 344.

Act of April 21, 1910, Ch. 182. 344.

Sec. 1. Revenue-cutter Service—Two New Vessels Authorized. (Temporary),

344.

2. Transfer of Stations, 344.

3. Construction under Eight-hour Law, 344.

CROSS-REFERENCE.

Discrimination against United States Uniform, see UNIFORMS.

[SEC. 1.] [*Burials of officers and men in national cemeteries.*] * * *

That officers and men of the Revenue-Cutter Service dying in the service of the United States, or dying in a destitute condition after having been honorably discharged from the service, may be buried in any national cemetery free of cost, under the regulations now or hereafter provided for the burial of officers and men of the Army in national cemeteries. [36 Stat. L. 1889.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

An Act Authorizing the Secretary of the Treasury to provide two new revenue cutters, and for other purposes.

[Act of April 21, 1910, ch. 182.]

[SEC. 1.] [*Revenue-Cutter Service—two new vessels authorized.*] [*Temporary.*]

SEC. 2. [*Transfer of stations.*] That the Secretary of the Treasury is hereby authorized from time to time to make such transfer and change of stations of revenue cutters as he may deem desirable for the best interests of the service, and in his discretion to direct any revenue cutter to cruise in any waters to perform the duties of the Revenue-Cutter Service. [36 Stat. L. 326.]

SEC. 3. [*Construction under eight-hour law.*] The Secretary of the Treasury is directed to have the vessels provided for herein constructed in accordance with the provisions of the Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August first, eighteen hundred and ninety-two. [36 Stat. L. 326.]

For the Act of Aug. 1, 1892, above referred to, see 4 Fed. Stat. Annot. 779.

RIVERS, HARBORS, AND CANALS.

Act of June 23, 1910, Ch. 360, 345.

Amendment of Act of June 21, 1906, 345.

Regulations Governing Constructing of Dams over Navigable Waters, Extended — Approval of Secretary of War and Chief of Engineers — Changes — Conditions — Approaches, etc., to Locks — Water Power — Bearing upon Improvements to Be Considered — Charges for Improvements, etc. — Charges for Storage Reservoirs, etc., Constructed, 346.

Rights Reserved for Navigation, 347.

Flowage, etc., Damages — Lights, Fishways, etc., to Be Maintained — Penalty for Failure, 347.

Forfeiture of Rights — Revocation When Needed for Public Use — Termination in Fifty Years — Exceptions, 347.

Penalty for Noncompliance with Orders — Removal, etc. — Suits for Expense — Proceeding — Litigation, 348.

Time for Construction, 348.

Right to Alter, etc., Reserved, 348.

Construction of "Persons" and "Dam," 348.

Act of June 25, 1910, Ch. 382, 349.

Sec. 2. Appropriations for River and Harbor Works — Combining Contracts, 349.

3. Examination of Watersheds, etc., of Navigable Streams — Report on Dams, etc., 349.

4. Injuries by Vessels on River and Harbor Works — Adjustment of Claims, 349.

5. Temporary Leases Allowed, 349.

Act of June 25, 1910, Ch. 384, 349.

Sec. 1. Isthmian Canal — Expenditures Paid from Proceeds of Bond Sales, 349.

2. Panama Railroad — Annual Subsidy Not Required, 350.

5. Isthmian Canal — Estimates — Detailed Statement of Employees, Materials, etc., to Accompany — Payments Other than Salaries, 350.

Act of March 2, 1911, Ch. 195, 350.

Panama Canal Bonds — Not Receivable for National Bank Circulation, 350.

Act of March 4, 1911, Ch. 285, 350.

Sec. 1. Isthmian Canal — Expenditures from Sale of Bonds, 350.

2. Panama Railroad Not to Carry Insurance Nor Pay for Notes, etc., 351.

5. Injuries to Employees — Compensation Allowed — Filing Claims for Deaths, 351.

6. Panama Railroad — Bond Not Required for Services, etc., by, 351.

An Act To amend an Act entitled "An Act to regulate the construction of dams across navigable waters," approved June twenty-first, nineteen hundred and six.

[Act of June 23, 1910, ch. 360.]

[Amendment of Act of June 21, 1906.] That the Act entitled "An Act to regulate the construction of dams across navigable waters," approved June twenty-first, nineteen hundred and six, be, and the same is hereby, amended to read as follows:

The Act of June 21, 1906, hereby amended, is given in 1909 Supp. Fed. Stat. Annot. 604.

"SECTION 1. [*Regulations governing constructing of dams over navigable waters, extended—approval of Secretary of War and Chief of Engineers—changes—conditions—approaches, etc., to locks—water power—bearing upon improvements to be considered—charges for improvements, etc.—charges for storage reservoirs, etc., constructed.*] That when authority has been or may hereafter be granted by Congress, either directly or indirectly or by any official or officials of the United States, to any persons, to construct and maintain a dam for water power or other purpose across or in any of the navigable waters of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans and specifications for any dam to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans or specifications either before or after completion of the structure unless the modification of such plans or specifications has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War: *Provided*, That in approving the plans, specifications, and location for any dam, such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate, without expense to the United States, in connection with any dam and accessory or appurtenant works, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States free water power or power generated from water power for building and operating such constructions: *Provided further*, That in acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power; and, as a part of the conditions and stipulations imposed by them, shall provide for improving and developing navigation, and fix such charge or charges for the privilege granted as may be sufficient to restore conditions with respect to navigability as existing at the time such privilege be granted or reimburse the United States for doing the same, and for such additional or further expense as may be incurred by the United States with reference to such project, including the cost of any investigations necessary for approval of plans and of such supervision of construction as may be necessary in the interests of the United States: *Provided further*, That the Chief of Engineers and the Secretary of War are hereby authorized and directed to fix and collect just and proper charge or charges for the privilege granted to all dams authorized and constructed under the provisions of this Act which shall receive any direct benefit from the construction, operation, and maintenance

nance by the United States of storage reservoirs at the headwaters of any navigable streams, or from the acquisition, holding, and maintenance of any forested watershed, or lands located by the United States at the headwaters of any navigable stream, wherever such shall be, for the development, improvement, or preservation of navigation in such streams in which such dams may be constructed. [36 Stat. L. 593.]

"SEC. 2. [*Rights reserved for navigation.*] That the right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built in accordance with the provisions of this Act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such an extent as may be necessary to provide proper facilities for navigation. [36 Stat. L. 594.]

"SEC. 3. [*Flowage, etc., damages — lights, fishways, etc., to be maintained — penalty for failure.*] That the persons constructing, maintaining, or operating any dam or appurtenant or accessory works, in accordance with the provisions of this Act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise. The persons owning or operating any such dam, or accessory works, subject to the provisions of this Act, shall maintain, at their own expense, such lights and other signals thereon and such fishways as the Secretary of Commerce and Labor shall prescribe, and for failure so to do in any respect shall be deemed guilty of a misdemeanor and subject to a fine of not less than five hundred dollars, and each month of such failure shall constitute a separate offense and subject such persons to additional penalties therefor. [36 Stat. L. 594.]

"SEC. 4. [*Forfeiture of rights — revocation when needed for public use — termination in fifty years — exceptions.*] That all rights acquired under this Act shall cease and be determined if the person, company, or corporation acquiring such rights shall, at any time, fail, after receiving reasonable notice thereof, to comply with any of the provisions and requirements of the Act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War, including the payment into the Treasury of the United States of the charges provided for by section one of this Act: *Provided*, That Congress may revoke any rights conferred in pursuance of this Act whenever it is necessary for public use, and, in the event of any such revocation by Congress, the United States shall pay the owners of any dam and appurtenant works built under authority of this Act, as full compensation, the reasonable value thereof, exclusive of the value of the authority or franchise granted, such reasonable value to be determined by mutual agreement between the Secretary of War and the said owners, and in case they can not agree, then by proceedings instituted in the United States circuit court for the condemnation of such properties: *And provided also*, That the authority granted under or in pursuance of the provisions of this Act shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this Act, unless sooner revoked as herein provided or Congress shall otherwise direct: *Provided, however*, That this limitation shall not apply to any corporation or individual heretofore authorized by the United States, or by any State, to construct a dam in or across a navigable waterway, upon which dam expenditures of money have heretofore been made in reliance upon such grant or grants. [36 Stat. L. 595.]

"SEC. 5. [*Penalty for noncompliance with orders — removal, etc. — suits for expense — proceeding — litigation.*] That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above-described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dam and accessory work to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expense may be brought in the name of the United States against such persons and recovery had for such expense in any court of competent jurisdiction. Said provision as to recovery of expense shall not apply wherever the United States has been previously reimbursed for such removal; and the removal or [of] any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any dam under this Act the cause or question arising may be tried before the circuit court of the United States in any district in which any portion of said obstruction or dam touches. [36 Stat. L. 595.]

"SEC. 6. [*Time for construction.*] That whenever Congress shall hereafter by law authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the dam authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act. [36 Stat. L. 596.]

"SEC. 7. [*Right to alter, etc., reserved.*] That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions. [36 Stat. L. 596.]

"SEC. 8. [*Construction of "persons" and "dam."*] That the word 'persons' as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations. The word 'dam' as used in this Act shall be construed to import both the singular and the plural, as the case demands." [36 Stat. L. 596.]

SEC. 2. [*Appropriations for river and harbor works—combining contracts.*] Whenever the appropriations made by Congress for river and harbor works can be more advantageously expended by combining in one contract two or more works, such combinations shall be made; and whenever the appropriations made, or authorized to be made, for the completion of any such work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated, or authorized, to the prosecution of such work. [36 Stat. L. 668.]

The above sec. 2, and secs. 3, 4, and 5 following, are from the River and Harbor Appropriation Act of June 25, 1910, ch. 382.

SEC. 3. [*Examination of watersheds, etc., of navigable streams—report on dams, etc.*] * * * The surveys of navigable streams herein or hereafter authorized shall include such stream-flow measurements and other investigations of the watersheds as may be necessary for preparation of plans of improvement and a proper consideration of all uses of the stream affecting navigation, and whenever necessary similar investigations may be made in connection with all navigable streams under improvement. Whenever permission for the construction of dams in navigable streams is granted, or is under consideration by Congress, such surveys and investigations of the sections of the streams affected may be made as are necessary to secure conformity with rational plans for the improvement of the streams for navigation. * * * [36 Stat. L. 669.]

SEC. 4. [*Injuries by vessels on river and harbor works—adjustment of claims.*] That whenever any vessel belonging to or employed by the United States engaged upon river and harbor work collides with and damages another vessel, pier, or other legal structure belonging to any person or corporation, the Chief of Engineers shall cause an immediate and thorough examination to be made, and, if in his judgment, the facts and circumstances of the collision are such as to make the whole or any part of the damage inflicted a proper charge against the United States, the Chief of Engineers, subject to the approval of the Secretary of War, shall have authority to adjust and settle all claims for damages caused by such collision in cases where the claim for damage does not exceed five hundred dollars, and report the same to Congress for consideration. [36 Stat. L. 676.]

SEC. 5. [*Temporary leases allowed.*] That the requirements of section thirty-seven hundred and forty-four of the Revised Statutes shall not apply to the lease of lands, or easements therein, or of buildings, rooms, wharves, or rights of wharfage or dockage, or to the hire of vessels, boats, and other floating craft, for use in connection with river and harbor improvements, where the period of any such lease or hire is not to exceed three months. [36 Stat. L. 676.]

For R. S. sec. 3744, see 6 Fed. Stat. Annot. 132.

[SEC. 1.] [*Isthmian canal—expenditures paid from proceeds of bond sales.*] * * * That all expenditures from the appropriations herein and hereafter made for the Isthmian Canal shall be paid from, or reimbursed to the Treasury of the United States out of the proceeds of the sale of bonds authorized in section eight of the said Act approved June twenty-eighth, nineteen

hundred and two, and section thirty-nine of the tariff act approved August fifth, nineteen hundred and nine. [36 Stat. L. 772.]

The above section 1, and sections 2 and 5 following are from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

see 6 Fed. Stat. Annot. 838. For section 39 of the Tariff Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Annot. 834.

For section 8 of the Act of June 28, 1902,

• SEC. 2. [*Panama railroad — annual subsidy not required.*] * * * That hereafter payment by the Panama Railroad Company to the United States, in accordance with the treaty with Panama, of the annual subsidy of two hundred and fifty thousand dollars, as provided by the concession granted by the United States of Colombia, shall not be required. [36 Stat. L. 772.]

SEC. 5. [*Isthmian canal — estimates — detailed statement of employees, materials, etc., to accompany — payments other than salaries.*] Hereafter there shall be submitted under each item of appropriation, proposed in the annual estimates for construction of the Isthmian Canal, notes giving in parallel columns information which will show the number, by grade or classes, of officers, employees, and skilled and unskilled laborers proposed to be paid under each of said appropriations for the ensuing fiscal year and those being paid at the close of the fiscal year next preceding the period when said estimates are prepared and submitted; also, in connection with each item for material and miscellaneous purposes other than salaries or pay for personal services, the amounts actually expended or obligated for like purposes during the entire fiscal year next preceding the preparation and submission of said estimates. [36 Stat. L. 773.]

An Act To restrain the Secretary of the Treasury from receiving bonds issued to provide money for the building of the Panama Canal as security for the issue of circulating notes to national banks, and for other purposes.

[Act of March 2, 1911, ch. 195.]

[*Panama canal bonds — not receivable for national bank circulation.*] That the Secretary of the Treasury be, and he is hereby, authorized to insert in the bonds to be issued by him under section thirty-nine of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine, a provision that such bonds shall not be receivable by the Treasurer of the United States as security for the issue of circulating notes to national banks; and the bonds containing such provision shall not be receivable for that purpose. [36 Stat. L. 1013.]

For sec. 39 of the Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Annot. 834.

[SEC. 1.] [*Isthmian canal — expenditures from sale of bonds.*] * * * That all expenditures from the appropriations heretofore, herein, and hereafter made for the Isthmian Canal, exclusive of fortifications, shall be paid from, or reimbursed to the Treasury of the United States out of the proceeds of the sale of bonds authorized in section eight of the said Act approved June twenty-eighth, nineteen hundred and two, and section thirty-nine of the tariff Act approved August fifth, nineteen hundred and ten. [36 Stat. L. 1450.]

This and the following secs. 2, 5, and 6 are from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

SEC. 2. [*Panama Railroad not to carry insurance nor pay for notes, etc.*] Hereafter the Panama Railroad Company shall carry no insurance to cover marine or fire losses, nor make any further payment on the principal or interest on notes heretofore given by it to the United States for moneys appropriated for its use. [36 Stat. L. 1451.]

SEC. 5. [*Injuries to employees — compensation allowed — filing claims for deaths.*] That hereafter the Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment shall apply to all employees under the Isthmian Canal Commission, when injured in the course of their employment; and claims for compensation on account of injury or death resulting from an accident occurring hereafter shall be settled by the chairman of the Isthmian Canal Commission, who shall, as to such claims and under such regulations as he may prescribe, perform all the duties now devolving upon the Secretary of Commerce and Labor: *Provided*, That when an injury results in death, claim for compensation on account thereof shall be filed within one year after such death. [36 Stat. L. 1452.]

See 1909 Supp. Fed. Stat. Annot. 330.

SEC. 6. [*Panama Railroad — bond not required for services, etc., by.*] Hereafter the Panama Railroad Company shall not be required to give bond, either with or without surety, in contracts which it may make to furnish services, materials, or supplies to the Army, Navy, Marine Corps, or other departments of the Government, and such contracts may be made for periods less than one year, as may be agreed on, and formal contracts in writing shall not be required unless agreed on. [36 Stat. L. 1452.]

RURAL DELIVERY.

Carriers Administering Oaths Required of Pensioners, see PENSIONS.

SAFETY APPLIANCE ACT.

See *RAILROADS.*

SANDWICH ISLANDS.

See *HAWAIIAN ISLANDS.*

SAVINGS DEPOSITORIES.

See *POSTAL SERVICE — POST-OFFICE DEPARTMENT.*

SCHOOLS.

See *EDUCATION*.

SEAL FISHERIES.

See *ALASKA*.

SECRETS OF NATIONAL DEFENSE.

See *NATIONAL DEFENSE SECRETS*.

SHIPPING AND NAVIGATION.

Act of June 23, 1910, Ch. 378, 352.

Sec. 1. Maritime Lien on Vessels for Repairs, Supplies, etc., 352.

2. Persons Presumed to Have Authority, 353.

3. Charterers, etc., 353.

4. Waiving Lien — Other Proceedings Not Affected, 353.

5. State Laws Superseded, 353.

Act of June 24, 1910, Ch. 379, 353.

Sec. 1. Radio-Communication — Required on Ocean-going Steamers — Exception, 353.

2. Exchange with Other Stations, 354.

3. Penalty for Violation — Libel upon Vessel, 354.

4. Regulations, 354.

Act of June 25, 1910, Ch. 384, 354.

Sec. 7. Shipping Commissioners — Permanent Appropriations Repealed — Estimates Required, 354.

CROSS-REFERENCES.

Entry of Vessels, see CUSTOMS DUTIES.

Injuries by Vessels on River and Harbor Works, see RIVERS, HARBORS, AND CANALS.

And see generally, COLLISIONS; TONNAGE DUTIES.

An Act Relating to liens on vessels for repairs, supplies, or other necessities.

[Act of June 23, 1910, ch. 373.]

[**SEC. 1.**] [*Maritime lien on vessels for repairs, supplies, etc.*] That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the

order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. [36 Stat. L. 604.]

Not retrospective.—This section is not retrospective, and does not affect liens which accrued under a state statute prior to its approval. *The Edna*, (1911) 185 Fed. 206.

Prior to this Act there was no lien for supplies or materials furnished to a vessel in her home port except as given by local state statute. *The Princess*, (1911) 185 Fed. 218.

SEC. 2. [Persons presumed to have authority.] That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. [36 Stat. L. 604.]

SEC. 3. [Charterers, etc.] That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor. [36 Stat. L. 605.]

SEC. 4. [Waiving lien—other proceedings not affected.] That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessities from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam. [36 Stat. L. 605.]

SEC. 5. [State laws superseded.] That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessities.

An Act To require apparatus and operators for radio-communication on certain ocean steamers.

[Act of June 24, 1910, ch. 379.]

[SEC. 1.] [Radio-communication—required on ocean-going steamers—exception.] That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any ocean-going steamer of the United States, or of any foreign country, carrying passengers and carrying fifty or more persons, including passengers and crew, to leave or attempt to leave any port of the United States unless such steamer shall be equipped with an efficient apparatus for radio-communication, in good working order, in charge of a person skilled in the use of such apparatus, which apparatus shall be capable of transmitting and receiving messages over a distance of at least one hundred miles,

night or day: *Provided*, That the provisions of this Act shall not apply to steamers plying only between ports less than two hundred miles apart. [36 Stat. L. 629.]

SEC. 2. [*Exchange with other stations.*] That for the purpose of this Act apparatus for radio-communication shall not be deemed to be efficient unless the company installing it shall contract in writing to exchange, and shall, in fact, exchange, as far as may be physically practicable, to be determined by the master of the vessel, messages with shore or ship stations using other systems of radio-communication. [36 Stat. L. 630.]

SEC. 3. [*Penalty for violation — libel upon vessel.*] That the master or other person being in charge of any such vessel which leaves or attempts to leave any port of the United States in violation of any of the provisions of this Act shall, upon conviction, be fined in a sum not more than five thousand dollars, and any such fine shall be a lien upon such vessel, and such vessel may be libeled therefor in any district court of the United States within the jurisdiction of which such vessel shall arrive or depart, and the leaving or attempting to leave each and every port of the United States shall constitute a separate offense. [36 Stat. L. 630.]

SEC. 4. [*Regulations.*] That the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this Act by collectors of customs and other officers of the Government. [36 Stat. L. 630.]

SEC. 7. [*Shipping commissioners — permanent appropriations repealed — estimates required.*] So much of the Act approved June nineteenth, eighteen hundred and eighty-six (Statutes at Large, volume twenty-four, page seventy-nine), as makes a permanent indefinite appropriation to pay compensation to shipping commissioners and the clerks of the shipping commissioners for services under said Act is hereby repealed, to take effect from and after June thirtieth, nineteen hundred and eleven; and the Secretary of Commerce and Labor shall, for the fiscal year nineteen hundred and twelve, and annually thereafter, submit to Congress in the regular Book of Estimates detailed estimates for compensation of such commissioners and clerks. [36 Stat. L. 773.]

The above sec. 7 is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384. For the Act of June 19, 1886, see 7 Fed. Stat. Annot. 82.

SILVER COIN.

See *COINAGE, MINTS, AND ASSAY OFFICES.*

SLEEPING-CAR COMPANIES.

See *INTERSTATE COMMERCE.*

SOLDIERS' HOMES.

See *HOSPITALS AND ASYLUMS.*

SPECIAL AGENTS.

See *CUSTOMS DUTIES.*

SPIES.

See *NATIONAL DEFENSE SECRETS.*

STATE DEPARTMENT.

See *DIPLOMATIC AND CONSULAR OFFICERS.*

STATES.

Act of June 20, 1910, Ch. 310, 356.

New Mexico, 356.

Sec. 1. Admission of New Mexico as a State — Constitutional Convention, 356.

2. Meeting of Convention — Requisites of Constitution, 357.

3. Submission of Constitution to People, 359.

4. Submission to President and to Congress — Proclamation for Election of Officers, 359.

5. Convention to Provide for Election of Officers — Election, Returns, etc. — Certification of Result — Admission as State by President's Proclamation — Service of Territorial Officers, 360.

6. Public Lands, 360.

7. Lands in Lieu of Grants, 361.

8. Control of Schools, etc., 362.

9. Use of Five per Cent. Fund for Common Schools, 362.

10. Lands and Proceeds Thereof — How to Be Held and Disposed of, 362.

11. Commission to Select Granted Lands — Surveys, 364.

12. Territorial Grants Confirmed to State, 364.

13. Courts, 364.

14. Determination of Pending Appeals and Writs of Error — Succession of Courts, 365.

STATES.

- Sec. 15. Cases Pending in the Courts—Suits Not Begun Before Admission—State Substituted for Territory as Defendant in Federal Cases, 365.*
16. Assembling of Legislature—Certifying Election of Senators and Representatives—Operation of State Government—Territorial Laws Continued—United States Laws, 367.
17. Appropriation for Election and Convention Expenses, 367.
18. Saline Lands Reserved, 367.

Arizona, 367.

- 19. Arizona—Constitutional Convention, 367.*
20. Meeting of Convention—Requisites of Constitution, 368.
21. Submission of Constitution to People, 370.
22. Submission to President and to Congress, 371.
23. Election of Officers, 371.
24. Public Lands, 372.
25. Lands in Lieu of Grants, 372.
26. Control of Schools, etc., 373.
27. Use of Five per Cent. Fund for Common Schools, 373.
28. Lands and Proceeds Thereof—How to Be Held and Disposed of, 373.
29. Commission to Select Granted Lands—Surveys, 375.
30. Territorial Grants Confirmed to State, 375.
31. Courts, 376.
32. Determination of Pending Appeals and Writs of Error—Succession of Courts, 376.
33. Pending Cases—Suits Not Begun, 377.
34. Assembling of Legislature—Certifying Election of Senators and Representatives—Operation of State Government—Territorial Laws Continued—United States Laws, 378.
35. Appropriation for Election and Convention Expenses, 378.

Joint Resolution of Aug. 21, 1911, No. 8, 379.

- Sec. 1. New Mexico and Arizona—Admission to Union, 379.*
2. Boundary Line between Texas and New Mexico, 379.
3. Vote on Amendment to New Mexico Constitution Required as Condition Precedent, 379.
4. Election for Purpose of Voting on Amendment, 381.
5. Canvass of Ballots—Proclamation of Result, 381.
6. Restricting or Abridging Right of Suffrage, 382.
7. Arizona—Amendment of Constitution—Recall of Public Officers—Election, 382.

CROSS-REFERENCES.

Co-operation with United States for Conservation of Navigable Waters, etc., see
TIMBER LANDS AND FOREST RESERVES.
And see generally TERRITORIES.

AN ACT To enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

[Act of June 20, 1910, ch. 310.]

[SEC. 1.] [Admission of New Mexico as a state—constitutional convention.] That the qualified electors of the Territory of New Mexico are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico. Said convention shall consist of one hundred delegates; and the governor, chief justice, and secretary of said Territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the sev-

eral counties thereof in accordance with the voting population, as shown by the vote cast at the election for Delegate in Congress in said Territory in nineteen hundred and eight: *Provided*, That in the event that any new counties shall have been added after said election, the apportionment for delegates shall be made proportionate to the vote cast within the various precincts contained in the area of such new counties so created, and the proportionate number of delegates so apportioned shall be deducted from the original counties out of which such counties shall have been created.

The governor of said Territory shall, within thirty days after the approval of this Act, by proclamation, in which the aforesaid apportionment of delegates to the convention shall be fully specified and announced, order an election of the delegates aforesaid on a day designated by him in said proclamation, not earlier than sixty nor later than ninety days after the approval of this Act. Such election for delegates shall be held and conducted, the returns made, and the certificates of persons elected to such convention issued, as nearly as may be, in the same manner as is prescribed by the laws of said Territory regulating elections therein of members of the legislature existing at the time of the last election of said members of the legislature; and the provisions of said laws in all respects, including the qualifications of electors and registration, are hereby made applicable to the election herein provided for; and said convention, when so called to order and organized, shall be the sole judge of the election and qualifications of its own members. Qualifications to entitle persons to vote on the ratification or rejection of the constitution formed by said convention when said constitution shall be submitted to the people of said Territory hereunder shall be the same as the qualifications to entitle persons to vote for delegates to said convention. [36 Stat. L. 557.]

SEC. 2. [*Meeting of convention — requisites of constitution.*] That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capital of the Territory of New Mexico at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all. After organization they shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State —

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right

or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Third. That the debts and liabilities of said Territory of New Mexico and the debts of the counties thereof which shall be valid and subsisting at the time of the passage of this Act shall be assumed and paid by said proposed State, and that said State shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said Territory or of any of the several counties thereof at the time of the passage of this Act: *Provided*, That nothing in this Act shall be construed as validating or in any manner legalizing any territorial, county, municipal, or other bonds, obligations, or evidences of indebtedness of said Territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time said proposed State is admitted, nor shall the legislature of said proposed State pass any law in any manner validating or legalizing the same.

Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control, and that said schools shall always be conducted in English.

Fifth. That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude, and that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all State officers and members of the state legislature.

Sixth. That the capital of said State shall, until changed by the electors voting at an election provided for by the legislature of said State for that purpose, be at the city of Santa Fe, but no election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved,

or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.

Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress. [36 Stat. L. 558.]

SEC. 3. [*Submission of constitution to people.*] That when said constitution shall be formed as aforesaid the convention forming the same shall provide for the submission of said constitution to the people of New Mexico for ratification at an election which shall be held on a day named by said convention not earlier than sixty nor later than ninety days after said convention adjourns, at which election the qualified voters of New Mexico shall vote directly for or against said constitution and for or against any provisions thereof separately submitted. The returns of said election shall be made by the election officers direct to the secretary of the Territory of New Mexico at Santa Fe, who, with the governor and the chief justice of said Territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Santa Fe on the third Monday after said election and shall canvass the same. If a majority of the legal votes cast at said election shall reject the constitution, the said canvassing board shall forthwith certify said result to the governor of said Territory, together with the statement of votes cast upon the question of the ratification or rejection of said constitution and also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election; whereupon the governor of said Territory shall, by proclamation, order the constitutional convention to reassemble at a date not later than twenty days after the receipt by said governor of the documents showing the rejection of the constitution by the people, and thereafter a new constitution shall be framed and the same proceedings shall be taken in regard thereto in like manner as if said constitution were being originally prepared for submission and submitted to the people. [36 Stat. L. 560.]

SEC. 4. [*Submission to President and to Congress — proclamation for election of officers.*] That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of New Mexico as aforesaid a certified copy of the same shall be submitted to the President of the United States and to Congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if Congress and the President approve said constitution and the said separate provisions thereof, or, if the President approves the same and Congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of New Mexico, who shall, within thirty days after the receipt of said notification from the President of the United

States, issue his proclamation for the election of the state and county officers, the members of the state legislature and Representatives in Congress, and all other officers provided for in said constitution, all as hereinafter provided; said election to take place not earlier than sixty days nor later than ninety days after said proclamation by the governor of New Mexico ordering the same. [36 Stat. L. 560.]

SEC. 5. [*Convention to provide for election of officers — election, returns, etc. — certification of result — admission as state by President's proclamation — service of territorial officers.*] That said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the President of the United States and Congress approve the same, or in case the President approves the same and Congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of New Mexico, provided for in the preceding section, at which election officers for a full state government, including a governor, members of the legislature, two Representatives in Congress, to be elected at large from said State, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, the returns thereof made, canvassed, and certified to by the secretary of said Territory in the same manner as in this Act prescribed for the making of the returns, the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of voters at said election for all state officers, members of the legislature, county officers, and Representatives in Congress, and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution as hereinbefore provided. When said election of said state and county officers, members of the legislature, and Representatives in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified as hereinbefore provided, the governor of the Territory of New Mexico shall certify the result of said election, as canvassed and certified as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed State of New Mexico shall be deemed admitted by Congress into the Union, by virtue of this Act, on an equal footing with the other States. Until the issuance of said proclamation by the President of the United States, and until the said State is so admitted into the Union and said officers are elected and qualified under the provisions of the Constitution, the county and territorial officers of said Territory, including the Delegate in Congress thereof elected at the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said Territory: *Provided*, That no session of the territorial legislative assembly shall be held in nineteen hundred and eleven. [36 Stat. L. 561.]

SEC. 6. [*Public lands.*] That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are

wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however*, That the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such township containing six hundred and forty acres or more: *And provided further*, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated. [36 Stat. L. 561.]

SEC. 7. [*Lands in lieu of grants.*] That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp-land grant made by the Act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eighteen hundred and sixty-two, Twelfth Statutes at Large, page five hundred and three, which grants are hereby declared not to extend to the said State, and in lieu of the grant of saline lands heretofore made to the Territory of New Mexico for university purposes by section three of the Act of June twenty-first, eighteen hundred and ninety-eight, which is hereby repealed, except to the extent of such approved selections of such saline lands as may have been made by said Territory prior to the passage of this Act, the following grants of lands are hereby made, to wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for insane asylums, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for schools and asylums for the deaf, dumb, and the blind, one hundred

thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall, until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Grant and Santa Fe Counties, New Mexico, which said bonds were validated, approved, and confirmed by Act of Congress of January sixteenth, eighteen hundred and ninety-seven (Twenty-ninth statutes, page four hundred and eighty-seven), one million acres: *Provided*, That if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State. [36 Stat. L. 562.]

SEC. 8. [*Control of schools, etc.*] That the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. [36 Stat. L. 563.]

SEC. 9. [*Use of five per cent fund for common schools.*] That five per centum of the proceeds of sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State. [36 Stat. L. 563.]

SEC. 10. [*Lands and proceeds thereof — how to be held and disposed of.*] That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once

each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Lands east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars per acre, and lands west of said line shall not be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section eleven of this Act.

There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section eleven of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were [*sic*] by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful perform-

ance of his duties in regard thereto as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act. [36 Stat. L. 563.]

SEC. 11. [*Commission to select granted lands — surveys.*] That all lands granted in quantity or as indemnity by this Act shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general, or other officer exercising the functions of a surveyor-general, and the attorney-general of the said State; and after its admission into the Union said State may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public-land grants made to said State in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other States by the Act of Congress approved August eighteenth, eighteen hundred and ninety-four (Twenty-eighth Statutes at Large, page three hundred and ninety-four), and the provisions of said Act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said State of New Mexico. The fees to be paid to the register and receiver for each final location or selection of one hundred and sixty acres made hereunder shall be one dollar. [36 Stat. L. 565.]

SEC. 12. [*Territorial grants confirmed to state.*] That all grants of lands heretofore made by any Act of Congress to said Territory, except to the extent modified or repealed by this Act, are hereby ratified and confirmed to said State, subject to the provisions of this Act: *Provided, however,* That nothing in this Act contained shall, directly or indirectly, affect any litigation now pending and to which the United States is a party, or any right or claim therein asserted. [36 Stat. L. 565.]

SEC. 13. [*Courts.*] That the State, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said State, and the said district shall, for judicial purposes, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said State. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district

courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of New Mexico. [36 Stat. L. 565.]

SEC. 14. [*Determination of pending appeals and writs of error — succession of courts.*] That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper circuit court of appeals upon any record from the supreme court of said Territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a district court of said Territory or in any matter of habeas corpus upon any return or order of a district judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper circuit court of appeals, may be heard and determined by the Supreme Court of the United States or the proper circuit court of appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the circuit court of appeals to the circuit or district court, hereby established within the said State, or to the supreme court of such State, as the nature of the case may require. And the circuit, district, and state courts herein named shall respectively be the successors of the supreme court and of the district courts of the said Territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said Territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said State into the Union. [36 Stat. L. 565.]

SEC. 15. [*Cases pending in the courts — suits not begun before admission — State substituted for Territory, as defendant in federal cases.*] That the said circuit or the said district court, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said Territory at the date of its admission as a State, the case being such that, under the laws of the United States touching the jurisdictions of federal courts, it might properly have been begun in or (as a separable controversy' or otherwise) removed to said circuit or said district court, had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a State, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said State of New Mexico;

with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent but not the exclusive jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the State, as herein provided. All cases and controversies pending at the admission of the State, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the State. All files, records, and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district, and state courts, respectively, in such wise and so authenticated or proven as such courts shall, respectively, by rule direct, and upon transfer of any case or controversy, as herein provided, the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause, or proceeding pending in any court of the said Territory at the time of its admission as a State shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States, or state court, as the case may be: *Provided, however,* That all cases pending and undisposed of in the supreme court of the said Territory at the time of the admission thereof as a State shall be transferred, together with the records thereof, to the highest appellate court of the State, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts: *Provided further,* That all cases so pending in said territorial supreme court in which the United States is a party or which, if instituted within a State, would have fallen within the exclusive original cognizance of a circuit or district court of the United States, shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the eighth circuit, and be there heard and decided; and any such case which, if finally decided by the supreme court of the Territory, would have been in any manner reviewable by the Supreme Court of the United States, may in like manner and with like effect be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial supreme court to the highest appellate court of the State and to the said circuit court of appeals, shall be accomplished in such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said Territory as a State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said State and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said State had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said Territory shall be tried and punished by the appropriate courts of the said State, and such as shall have been committed against the laws of the United

States shall be tried and punished in the circuit or district courts of the United States.

All suits and actions brought by the United States in which said Territory is named as a party defendant, which shall be pending in any court of said Territory at the date of its admission hereunder, shall be transferred as herein provided; and the said State shall be substituted therein and become a party defendant thereto in lieu of said Territory. [36 Stat. L. 566.]

SEC. 16. [*Assembling of legislature — certifying election of senators and representatives — operation of state government — territorial laws continued — United States laws.*] That the members of the legislature elected at the election hereinbefore provided for may assemble at Santa Fe, organize, and elect two Senators of the United States in the manner now prescribed by the Constitution and laws of the United States; and the governor and secretary of state of the proposed State shall certify the election of the Senators and Representatives in the manner required by law; and the Senators and Representatives so elected shall be entitled to be admitted to seats in Congress and to all rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws of said Territory in force at the time of its admission into the Union shall be in force in said State until changed by the legislature of said State, except as modified or changed by this Act or by the constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States. [36 Stat. L. 567.]

SEC. 17. [*Appropriation for election and convention expenses.*] That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for defraying all and every kind and character of expense incident to the elections and convention provided for in this Act; that is, the payment of the expenses of holding the election for members of the constitutional convention and the election for the ratification of the constitution, at the same rates that are paid for similar services under the territorial laws, and for the payment of the mileage for and salaries of members of the constitutional convention at the same rates that are paid to members of the said territorial legislature under national law, and for the payment of all proper and necessary expenses, officers, clerks, and messengers thereof, and printing and other expenses incident thereto: *Provided*, That any expense incurred in excess of said sum of one hundred thousand dollars shall be paid by said State. The said money shall be expended under the direction of the Secretary of the Interior, and shall be forwarded, to be locally expended in the present Territory of New Mexico, through the secretary of said Territory as may be necessary and proper, in the discretion of the Secretary of the Interior, in order to carry out the full intent and meaning of this Act. [36 Stat. L. 568.]

SEC. 18. [*Saline lands reserved.*] That all saline lands in the proposed State of New Mexico are hereby reserved from entry, location, selection, or settlement until such time as Congress shall hereafter provide for their disposition. [36 Stat. L. 568.]

SEC. 19. [*Arizona — constitutional convention.*] That the qualified electors of the Territory of Arizona are hereby authorized to vote for and choose dele-

gates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona. Said convention shall consist of fifty-two delegates; and the governor, chief justice, and secretary of said Territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population as shown by the vote cast at the election for Delegate in Congress in said Territory in nineteen hundred and eight.

A qualified elector within the meaning of this section shall be any male citizen of the United States of the age of twenty-one years who shall have resided in the Territory at least twelve months next preceding the date fixed for the election of delegates to the constitutional convention, as herein provided for, and who shall possess in other respects the qualifications of an elector as provided by title twenty, Revised Statutes of Arizona, August second, nineteen hundred and one. Within ten days after the issuance of the governor's proclamation ordering the election of delegates to the constitutional convention, as herein provided, the board of supervisors of each county of the Territory shall meet and authorize and require a reregistration of the qualified electors of said county: *Provided, however,* That there need not be a reregistration of the qualified electors whose names appear on the great register of said county for the year nineteen hundred and eight, but all such names, together with such as may be registered under the provisions of this section, shall constitute the great register of said county and be used at each of the elections herein provided for; and so far as the same is consistent with the provisions of this Act, such registration, as also the making up, printing, distribution, and use of such great register, shall in all respects conform to and be governed by the provisions of chapter three of said title twenty, Revised Statutes of Arizona, nineteen hundred and one. And the provisions of this section shall apply to all voters at all elections for the election of delegates to the constitutional convention and for the ratification of the constitution, for state officers, members of the state legislature, Representatives in Congress, and all other officers named in said constitution or in any manner herein provided for or mentioned.

The governor of said Territory shall, within thirty days after the approval of this Act, by proclamation, in which the aforesaid apportionment of delegates to the convention shall be fully specified and announced, order an election of the delegates aforesaid on a day, designated by him in said proclamation, not earlier than sixty nor later than ninety days after the approval of this Act. Such election for delegates shall be held and conducted, the returns made, and the certificates of persons elected to such convention issued, as nearly as may be, in the same manner as is prescribed by the laws of said Territory regulating elections therein of members of the legislature existing at the time of the last election of said members of the legislature; and the provisions of said laws in all respects, including the qualifications of electors and registration, are hereby made applicable to the election herein provided for; and said convention when so called to order and organized shall be the sole judge of the election and qualifications of its own members. Qualifications to entitle persons to vote on the ratification or rejection of the constitution formed by said convention when said constitution shall be submitted to the people of said Territory hereunder shall be the same as the qualifications to entitle persons to vote for delegates to said convention. [36 Stat. L. 568.]

SEC. 20. [*Meeting of convention — requisites of constitution.*] That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capital of the Territory of Arizona at twelve o'clock noon

on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all; after organization they shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. The constitution shall be republican in form and make no distinction in civil or political rights on account or race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State —

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians, and the introduction of liquors into Indian country are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Third. That the debts and liabilities of said Territory of Arizona, and the debts of the counties thereof, which shall be valid and subsisting at the time of the passage of this Act, shall be assumed and paid by said proposed State, and that said State shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said Territory or of any of the several counties thereof at the time of the passage of this Act: *Provided*, That nothing in this Act shall be construed as validating or in any manner legalizing any territorial, county, municipal, or other bonds, obligations, or evidences of indebtedness of said Territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time said proposed State is admitted, nor shall the legislature of said proposed State pass any law in any manner validating or legalizing the same.

Fourth. That provisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said State and free from sectarian control; and that said schools shall always be conducted in English.

Fifth. That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude, and that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature.

Sixth. That the capital of said State shall, until changed by the electors voting at an election provided for by the legislature of said State for that purpose, be at the city of Phoenix, but no election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject, for a period of twenty-five years after such allotment, sale, reservation, or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country.

Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress. [36 Stat. L. 569.]

SEC. 21. [*Submission of constitution to people.*] That when said constitution shall be formed, as aforesaid, the convention forming the same shall provide for the submission of said constitution to the people of Arizona for ratification at an election which shall be held on a day named by said convention not earlier than sixty nor later than ninety days after said convention adjourns, at which election the qualified voters of Arizona shall vote directly for or against said constitution and for or against any provisions thereof separately submitted. The returns of said election shall be made by the election officers direct to the secretary of the Territory of Arizona at Phoenix, who, with the governor and chief justice of said Territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Phoenix on the third Monday after said election and shall canvass the same. If a majority of the legal votes cast at said election shall reject the constitution, the said canvassing board shall forthwith certify said result to the governor of said Territory, to-

gether with the statement of votes cast upon the question of the ratification or rejection of said constitution and also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election; whereupon the governor of said Territory shall, by proclamation, order the constitutional convention to reassemble at a date not later than twenty days after the receipt by said governor of the documents showing the rejection of the constitution by the people, and thereafter a new constitution shall be framed and the same proceedings shall be taken in regard thereto in like manner as if said constitution were being originally prepared for submission and submitted to the people. [36 Stat. L. 571.]

SEC. 22. [*Submission to President and to Congress.*] That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of Arizona, as aforesaid, a certified copy of the same shall be submitted to the President of the United States and to Congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if Congress and the President approve said constitution and the said separate provisions thereof, if any, or if the President approves the same and Congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of Arizona, who shall, within thirty days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the state and county officers, the members of the state legislature, and Representative in Congress, and all other officers provided for in said constitution, all as hereinafter provided; said election to take place not earlier than sixty days nor later than ninety days after said proclamation by the governor of Arizona ordering the same. [36 Stat. L. 571.]

SEC. 23. [*Election of officers.*] That said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the President of the United States and Congress approve the same, or in case the President approves the same and Congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of Arizona, provided for in the preceding section, at which election of officers for a full state government, including a governor, members of the legislature, one Representative in Congress, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, the returns thereof made, canvassed, and certified to by the secretary of said Territory, in the same manner as in this Act prescribed for the making of the returns, the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of voters at said election for all state officers, members of the legislature, county officers, and Representative in Congress, and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution, as hereinbefore provided. When said election of state and county officers, members of the legislature, and Representative in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the Territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclama-

tion by the President of the United States the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this Act on an equal footing with the other States. Until the issuance of said proclamation by the President of the United States, and until the said State is so admitted into the Union and said officers are elected and qualified under the provisions of the constitution, the county and territorial officers of said Territory, including the Delegate in Congress thereof elected in the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said Territory: *Provided*, That no session of the territorial legislative assembly shall be held in nineteen hundred and eleven. [36 Stat. L. 571.]

County assessors hold office under this section. *Meeden v. Yuma Co.*, 114 Pac. 974.

SEC. 24. [*Public lands.*] That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however*, That the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more: *And provided further*, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated. [36 Stat. L. 572.]

SEC. 25. [*Lands in lieu of grants.*] That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of

the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp-land grant made by the Act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eighteen hundred and three, which grants are hereby declared not to extend to the said State, the following grants are hereby made, to wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school [*sic*] and asylums for the deaf, dumb, and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall, until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopia, Pima, Yavapai, and Coconino counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two), one million acres: *Provided*, That if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State. [36 Stat. L. 573.]

SEC. 26. [*Control of schools, etc.*] That the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. [36 Stat. L. 573.]

SEC. 27. [*Use of five per cent fund for common schools.*] That five per centum of the proceeds of sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State. [36 Stat. L. 574.]

SEC. 28. [*Lands and proceeds thereof — how to be held and disposed of.*] That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory

provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the

proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act. [36 Stat. L. 574.]

SEC. 29. [*Commission to select granted lands — surveys.*] That all lands granted in quantity, or as indemnity, by this Act, shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general or other officer exercising the functions of a surveyor-general, and the attorney-general of the said State; and after its admission into the Union said State may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land grants made to said State in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other States by the Act of Congress approved August eighteenth, eighteen hundred and ninety-four (Twenty-eighth Statutes at Large, page three hundred and ninety-four), and the provisions of said Act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said State of Arizona. The fees to be paid to the register and receiver for each final location or selection of one hundred and sixty acres made hereunder shall be one dollar. [36 Stat. L. 575.]

SEC. 30. [*Territorial grants confirmed to state.*] That all grants of lands heretofore made by any Act of Congress to said Territory, except to the extent modified or repealed by this Act, are hereby ratified and confirmed to said State, subject to the provisions of this Act: *Provided, however,* That nothing in this Act contained shall, directly or indirectly, affect any litigation now

pending and to which the United States is a party, or any right or claim therein asserted. [36 Stat. L. 576.]

SEC. 31. [*Courts.*] That the said State, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said State, and the said district shall, for judicial purposes, be attached to the ninth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said State. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of Arizona. [36 Stat. L. 576.]

SEC. 32. [*Determination of pending appeals and writs of error — succession of courts.*] That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper circuit court of appeals upon any record from the supreme court of said Territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a district court of said Territory or, in any matter of habeas corpus, upon any return or order of a district judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper circuit court of appeals, may be heard and determined by the Supreme Court of the United States or the proper circuit court of appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the circuit court of appeals to the circuit or district court hereby established within the said State, or to the supreme court of such State, as the nature of the case may require. And the circuit, district, and state courts herein named shall, respectively, be the successors of the supreme court and of the district courts of said Territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said Territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said State into the Union. [36 Stat. L. 576.]

SEC. 33. [*Pending cases — suits not begun.*] That the said circuit or the said district courts, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the supreme court of the said Territory at the date of its admission as a State, the case being such that, under the laws of the United States touching the jurisdictions of federal courts, it might properly have been begun in or (as a separable controversy or otherwise) removed to said circuit or said district court had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a State, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said State of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the State as herein provided. All cases and controversies pending at the admission of the State, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the State. All files, records, and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district, and state courts, respectively, in such wise and so authenticated or proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause, or proceeding pending in any court of the said Territory at the time of its admission as a State shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States or state court, as the case may be: *Provided, however,* That all cases pending and undisposed of in the supreme court of the said Territory at the time of the admission thereof as a State shall be transferred, together with the records thereof, to the highest appellate court of the State, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts: *Provided further,* That all cases so pending in said territorial supreme court in which the United States is a party or which, if instituted within a State, would have fallen within the exclusive original cognizance of a circuit or district court of the United States shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the ninth circuit, and be there heard and decided; and any such case which, if finally decided by the supreme court of the Territory, would have been in any manner reviewable by the Supreme Court of the United States may, in like manner and with like effect, be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial supreme court to the highest appellate court of the State and to the said circuit court of appeals shall be accomplished in such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said Territory as a State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said State and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said State had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said Territory shall be tried and punished by the appropriate courts of the said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the circuit or district courts of the United States.

All suits and actions brought by the United States in which said Territory is named as a party defendant which shall be pending in any court of said Territory at the date of its admission hereunder shall be transferred as herein provided, and the said State shall be substituted therein and become a party defendant thereto in lieu of said Territory. [36 Stat. L. 577.]

SEC. 34. [*Assembling of legislature — certifying election of Senators and Representative — operation of state government — territorial laws continued — United States laws.*] That the members of the legislature elected at the election hereinbefore provided for may assemble at Phoenix, organize, and elect two Senators of the United States in the manner now prescribed by the Constitution and laws of the United States; and the governor and secretary of state of the proposed State shall certify the election of the Senators and Representative in the manner required by law, and the Senators and Representative so elected shall be entitled to be admitted to seats in Congress and to all rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws of said Territory in force at the time of its admission into the Union shall be in force in said State until changed by the legislature of said State, except as modified or changed by this Act or by the constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States. [36 Stat. L. 578.]

SEC. 35. [*Appropriation for election and convention expenses.*] That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for defraying all and every kind and character of expense incident to the elections and convention provided for in this Act; that is, the payment of the expenses of holding the election for members of the constitutional convention and the election for the ratification of the constitution, at the same rates that are paid for similar services under the territorial laws, and for the payment of the mileage for and salaries of members of the constitutional convention, at the same rates that are paid to members of the said territorial legislature under national law, and for the payment of all proper and necessary expenses, officers, clerks, and messengers thereof, and printing and other expenses incident thereto: *Provided*, That any expense incurred in excess of said sum of one hundred thousand dollars shall be paid by said State. The said

money shall be expended under the direction of the Secretary of the Interior, and shall be forwarded to be locally expended in the present Territory of Arizona, through the secretary of said Territory, as may be necessary and proper in the discretion of the Secretary of the Interior, in order to carry out the full intent and meaning of this Act. [36 Stat. L. 578.]

Joint Resolution To admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States.

[*Joint Resolution of Aug. 21, 1911, No. 8.*]

[SEC. 1.] [*New Mexico and Arizona — admission to Union.*] That the Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States, in accordance with the terms of an Act entitled "An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States" commonly called the enabling Act approved June twentieth, nineteen hundred and ten, and upon the terms and conditions hereinafter set forth. The admission herein provided for shall take effect upon the proclamation of the President of the United States, when the conditions explicitly set forth in this joint resolution shall have been complied with, which proclamation shall issue at the earliest practicable time after the results of the election herein provided for shall have been certified to the President, and also after evidence shall have been submitted to him of the compliance with the terms and conditions of this resolution.

The President is authorized and directed to certify the adoption of this resolution to the governor of each Territory as soon as practicable after the adoption hereof, and each of said governors shall issue his proclamation for the holding of the first general election as provided for in the constitution of New Mexico heretofore adopted and the election ordinance numbered two adopted by the constitutional convention of Arizona, respectively, and for the submission to a vote of the electors of said Territories of the amendments of the constitutions of said proposed States, respectively, herein set forth in accordance with the terms and conditions of this joint resolution. The results of said elections shall be certified to the President by the governor of each of said Territories; and if the terms and conditions of this joint resolution shall have been complied with, the proclamation shall immediately issue by the President announcing the result of said elections so ascertained, and upon the issuance of said proclamation the proposed State or States so complying shall be deemed admitted by Congress into the Union upon an equal footing with the other States. [37 Stat. L. 39.]

SEC. 2. [*Boundary line between Texas and New Mexico.*] That the admission of New Mexico shall be subject to the terms and conditions of a joint resolution approved February sixteenth, nineteen hundred and eleven, and entitled "Joint resolution reaffirming the boundary line between Texas and the Territory of New Mexico." [37 Stat. L. 39.]

SEC. 3. [*Vote on amendment to New Mexico constitution required as condition precedent.*] That before the proclamation of the President shall issue announcing the result of said election in New Mexico, and at the same time that

the State election aforesaid is held, the electors of New Mexico shall vote upon the following proposed amendment of their State constitution as a condition precedent to the admission of said State, to wit:

"Article XIX of the constitution, as adopted by the electors of New Mexico at an election held on the twenty-first day of January, anno Domini nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"ARTICLE XIX.

"AMENDMENT.

"SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the legislature at any regular session thereof; and if a majority of all members elected to each of the two houses voting separately shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

"The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the State, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the State for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said State after the adjournment of the legislature proposing such amendment or amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as said legislature may by law provide. If the same be ratified by a majority of the electors voting thereon such amendment or amendments shall become part of this constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately: *Provided*, That no amendment shall apply to or affect the provisions of sections one and three of Article VII hereof, on elective franchise, and sections eight and ten of Article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this State in an election at which at least three-fourths of the electors voting in the whole State and at least two-thirds of those voting in each county in the State shall vote for such amendment.

"SEC. 2. Whenever, during the first twenty-five years after the adoption of this constitution, the legislature, by a three-fourths vote of the members elected to each house, or, after the expiration of said period of twenty-five years, by a two-thirds vote of the members elected to each house, shall deem it necessary to call a convention to revise or amend this constitution, they shall submit the question of calling such convention to the electors at the next general election, and if a majority of all the electors voting on such question at said election in the State shall vote in favor of calling a convention the legislature shall, at the next session, provide by law for calling the same. Such convention shall consist of at least as many delegates as there are members of the house of representatives. The constitution adopted by such convention shall have no validity until it has been submitted to and ratified by the people.

"SEC. 3. If this constitution be in any way so amended as to allow laws to be enacted by direct vote of the electors the laws which may be so enacted shall be only such as might be enacted by the legislature under the provisions of this constitution.

"SEC. 4. When the United States shall consent thereto, the legislature, by a majority vote of the members in each house, may submit to the people the question of amending any provision of Article XXI of this constitution on compact with the United States to the extent allowed by the Act of Congress permitting the same, and if a majority of the qualified electors who vote upon any such amendment shall vote in favor thereof the said article shall be thereby amended accordingly.

"SEC. 5. The provisions of section one of this article shall not be changed, altered, or abrogated in any manner except through a general convention called to revise this constitution as herein provided." [37 Stat. L. 39.]

SEC. 4. [*Election for purpose of voting on amendment.*] That the probate clerks of the several counties of New Mexico shall provide separate ballots for the use of the electors at said first State election for the purpose of voting upon said amendment. Said separate ballots shall be printed on paper of a blue tint, so that they may be readily distinguished from the white ballots provided for the election of county and State officers. Said separate ballots shall be delivered only to the election officers authorized by law to receive and have the custody of the ballot boxes for use at said election and shall be delivered by them only to the individual voter and only one ballot to each elector at the time he offers to vote at the said general election, and shall have the initials of two election officers of opposite political parties written by them upon the back thereof. Said separate ballot shall not be marked either for or against the said amendment at the time it is handed to the elector by the election officer, and if the elector desires to vote upon said amendment, the ballot must be marked by the voter, unless he shall request one of the election officers to mark the same for him, in which case such election officer so called upon shall mark said ballot as such voter shall request. Any elector receiving such ballot shall return the same before leaving the polls to one of the election judges, who shall immediately deposit the same in the ballot box whether such ballot be marked or not. No ballots on said amendment except those so handed to said electors and so initialed shall be deposited in the ballot box or counted or canvassed. Said separate ballots shall have printed thereon the proposed amendment in both the English and the Spanish language. There shall be placed on said ballots two blank squares with dimensions of one-half an inch and opposite one of said squares shall be printed in both the English and the Spanish language the words "For constitutional amendment," and opposite the other blank square shall be printed in both the English and Spanish language the words "Against constitutional amendment."

Any elector desiring to vote for said amendment shall mark his ballot with a cross in the blank square opposite the words "For constitutional amendment," or cause the same to be so marked by an election officer as aforesaid, and any elector desiring to vote against said amendment shall mark his ballot with a cross in the blank square opposite the words "Against constitutional amendment," or cause the same to be so marked by an election officer as aforesaid. [37 Stat. L. 41.]

SEC. 5. [*Canvass of ballots — proclamation of result.*] That said ballots shall be counted and canvassed by said election officers, and the returns of said election upon said amendment shall be made by said election officers direct to the secretary of the Territory of New Mexico at Santa Fe, who, with the governor and chief justice of said Territory, shall constitute a canvassing board; and they, or any two of them, shall meet at said city of Santa Fe on the third Monday after said election and shall canvass the same. If a majority of the

legal votes cast at said election upon said amendment shall be in favor thereof, the said canvassing board shall forthwith certify said result to the governor of the Territory, together with the statement of votes cast upon the question of the ratification or rejection of said amendment; whereupon the governor of said Territory shall by proclamation declare the said amendment a part of the constitution of the proposed State of New Mexico, and thereupon the same shall become and be a part of said constitution; but if the same shall fail of such majority, then Article XIX of the constitution of New Mexico as adopted on January twenty-first, nineteen hundred and eleven, shall remain a part of said constitution.

Except as herein otherwise provided, said election upon this amendment shall be in all respects subject to the election laws of New Mexico now in force. [37 Stat. L. 41.]

SEC. 6. [*Restricting or abridging right of suffrage.*] That the fifth clause of section two of "An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and be admitted into the Union on an equal footing with the original States," approved June twentieth, anno Domini nineteen hundred and ten, be, and the same is hereby, amended so as to read as follows:

"Fifth. That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude." [37 Stat. L. 42.]

SEC. 7. [*Arizona — amendment of constitution — recall of public officers — election.*] That before the proclamation of the President shall issue, announcing the result of said election in Arizona, and at the same time that the State election is held, as aforesaid, the electors of Arizona shall vote upon and ratify and adopt the following proposed amendment to their State constitution as a condition precedent to the admission of said State, to wit:

"Section one of Article VIII of the constitution of the State of Arizona, adopted by the electors of said State at an election held on the ninth day of February, anno Domini nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"ARTICLE VIII. — REMOVAL FROM OFFICE.

"1. RECALL OF PUBLIC OFFICERS.

"SECTION 1. Every public officer in the State of Arizona, except members of the judiciary, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer may by petition, which shall be known as a recall petition, demand his recall."

The ballots to be provided for said first State election shall have printed thereon this proposed amendment and there shall be placed on said ballots two blank squares with dimensions of one-half an inch and opposite one of said squares shall be printed the words "For constitutional amendment" and opposite the other blank square shall be printed the words "Against constitutional amendment."

Any elector desiring to vote for said amendment shall place a cross in the blank square opposite the words "For constitutional amendment," and those desiring to vote against such amendment shall place a cross in the blank square opposite the words "Against constitutional amendment," and said ballots shall be counted and canvassed by the election officers of said State authorized by law to count and canvass the ballots cast at the election for State officers; and the returns of said election upon said amendment shall be made by said election officers direct to the secretary of the Territory of Arizona at Phoenix, who, with the governor and chief justice of said Territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Phoenix on the third Monday after said election and shall canvass the same. If a majority of the legal votes cast at said election upon said amendment shall be in favor thereof, the said canvassing board shall forthwith certify said result to the governor of the Territory, together with the statement of votes cast upon the question of the ratification or rejection of said amendment; whereupon the governor of said Territory shall, by proclamation, declare the said amendment a part of the constitution of the proposed State of Arizona and thereupon the same shall become and be a part of said constitution; and if the said proposed amendment to section one of Article VIII of the constitution of Arizona is not adopted and ratified as aforesaid then, and in that case, the Territory of Arizona shall not be admitted into the Union as a State, under the provisions of this Act.

Except as herein otherwise provided said election upon this amendment shall be in all respects except as to the educational qualifications of electors subject to the election laws of Arizona now in force. [*37 Stat. L. 42.*]

STATISTICS.

See *CENSUS*.

STEAM VESSELS.

Act of June 25, 1910, Ch. 384, 384.

Sec. 8. Steamboat Inspection Service—Permanent Indefinite Appropriations for, Repealed—Estimates Required, 384.

Act of June 25, 1910, Ch. 402, 384.

Steamboat Inspection Service—Inspection Certificates—Certificates of Inspection—Temporary Certificate—Exhibition of Certificates—Substitute for Regular Certificate—Revocation—Restriction—Completing Voyage after Certificate Expires—Condition—When Certificate Expires within Fifteen Days of Sailing Date, 384.

Act of March 4, 1911, Ch. 237, 385.

Sec. 1. Temporary Designations of Supervising Inspectors, 385.

SEC. 8. [*Steamboat inspection service—permanent indefinite appropriations for, repealed—estimates required.*] All laws and parts of laws, to the extent that they make a permanent indefinite appropriation to pay salaries of the Supervising Inspector-General, supervising inspectors, local inspectors, and assistant inspectors of steam vessels, and clerks of the steamboat inspectors, and for contingent expenses of the Steamboat Inspection Service, are repealed, to take effect from and after June thirtieth, nineteen hundred and eleven; and the Secretary of Commerce and Labor shall, for the fiscal year nineteen hundred and twelve, and annually thereafter, submit to Congress, in the regular Book of Estimates, detailed estimates for salaries and contingent expenses of the Steamboat Inspection Service. [36 Stat. L. 773.]

The above sec. 8 is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

An Act To amend section forty-four hundred and twenty-one of the Revised Statutes of the United States, as amended by Act of June eleventh, nineteen hundred and six.

[*Act of June 25, 1910, ch. 402.*]

[*Steamboat inspection service—inspection certificates—certificates of inspection—temporary certificate—exhibition of certificates—substitute for regular certificate—revocation—restriction—completing voyage after certificate expires—condition—when certificate expires within fifteen days of sailing date.*] That section forty-four hundred and twenty-one of the Revised Statutes of the United States, as amended by Act of June eleventh, nineteen hundred and six, be, and it is hereby, further amended, so as to read as follows, to wit:

“**Sec. 4421.** When the inspection of a steam vessel is completed and the inspectors approve the vessel and her equipment throughout, they shall make and subscribe a certificate to the collector or other chief officer of the customs of the district in which such inspection has been made, in accordance with the form and regulations prescribed by the board of supervising inspectors. Such certificate shall be verified by the oaths of inspectors signing it, before the chief officer of the customs of the district or any other person competent by law to

administer oaths. If the inspectors refuse to grant a certificate of approval, they shall make a statement in writing, and sign the same, giving the reasons for their disapproval. Upon such inspection and approval the inspectors shall also make and subscribe a temporary certificate, which shall set forth substantially the fact of such inspection and approval, and shall deliver the same to the master or owner of the vessel, and shall keep a copy thereof on file in their office. The said temporary certificate shall be carried and exposed by vessels in the same manner as is provided in section forty-four hundred and twenty-three for copies of the regular certificate, and the form thereof and the period during which it is to be in force shall be as prescribed by the board of supervising inspectors, or the executive committee thereof, as provided in section forty-four hundred and five. And such temporary certificate, during such period and prior to the delivery to the master or owner of the copies of the regular certificate, shall take the place of, and be a substitute for, such copies of the regular certificate of inspection, as required by sections forty-four hundred and twenty-three, forty-four hundred and twenty-four, and forty-four hundred and twenty-six, and for the purposes of said sections, and shall also, during such period, be a substitute for the regular certificate of inspection, as required by section forty-four hundred and ninety-eight, and for the purposes of said section until such regular certificate of inspection has been filed with the collector or other chief officer of customs. Such temporary certificate shall also be subject to revocation in the manner and under the conditions provided in section forty-four hundred and fifty-three. No vessel required to be inspected under the provisions of this title shall be navigated without having on board an unexpired regular certificate of inspection or such temporary certificate: *Provided, however,* That any such vessel, operated upon a regularly established line from a port of the United States to a port of a foreign country not contiguous to the United States, whose certificate of inspection expires at sea, or while said vessel is in a foreign port or a port of the Philippine Islands or Hawaii, may lawfully complete her voyage without the regular certificate of inspection or the temporary certificate required by this section, and no liability for penalties imposed by this title for want of such certificate shall be incurred until her voyage shall have been completed: *Provided,* That said voyage shall be so completed within thirty days after the expiration of said certificate or temporary certificate: *Provided further,* That no such vessel whose certificate of inspection shall expire within fifteen days of the date of her sailing shall proceed upon her voyage to such port of a foreign country not contiguous to the United States without first having procured a new certificate of inspection or the temporary certificate required by this section." [36 Stat. L. 831.]

For R. S. sec. 4421, see 7 Fed. Stat. Annot. 172.

For R. S. secs. 4423, 4424, 4425, 4426, 4498, see 7 Fed. Stat. Annot. 173, 197.

[SEC. 1.] [*Temporary designations of supervising inspectors.*] * * * Hereafter in the case of the absence of any supervising inspector of steamboats from his official station the Secretary of Commerce and Labor may designate some officer of the Steamboat-Inspection Service to perform the duties of such officer during his absence. [36 Stat. L. 1229.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1911, ch. 237.

SUPERVISING ARCHITECT.

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.*

SUPPLIES.

See *PUBLIC CONTRACTS.*

SUPREME COURT.

See *JUDICIARY.*

SURETY COMPANIES.

Act of March 23, 1910, Ch. 109, 386.

Surety Bonds by Corporations — Copy of Charter to Be Filed with Secretary of the Treasury — Authority to Act — Reports to Be Filed — Revoking Authority — Inquiries, etc., 386.

An Act To amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled "An Act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon."

[Act of March 23, 1910, ch. 109.]

[Surety bonds by corporations — copy of charter to be filed with Secretary of the Treasury — authority to act — reports to be filed — revoking authority — inquiries, etc.] That sections three and four of the Act entitled "An Act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," be, and they are hereby, amended so as to read as follows:

"SEC. 3. That every company, before transacting any business under this Act, shall deposit with the Secretary of the Treasury of the United States a copy of its charter or articles of incorporation, and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. If the said Secretary of the Treasury shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid-up capital of not less than two hundred and fifty thousand dollars,

in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act.

"SEC. 4. That every such company shall, in the months of January, April, July, and October of each year, file with the said Secretary of the Treasury a statement, signed and sworn to by its president and secretary, showing its assets and liabilities, as is required by section three of this Act. And the said Secretary of the Treasury shall have the power, and it shall be his duty, to revoke the authority of any such company to transact any new business under this Act whenever in his judgment such company is not solvent or is conducting its business in violation of this Act. He may institute inquiry at any time into the solvency of said company and may require that additional security be given at any time by any principal when he deems such company no longer sufficient security." [*36 Stat. L. 241.*]

For secs. 3 and 4 of the Act of Aug. 13, 1894, as originally enacted, see 7 Fed. Stat. Annot. 200.

TARIFF.

See *CUSTOMS DUTIES.*

TAXES.

Exemption from, see PUBLIC DEBT.

And see generally, *CUSTOMS DUTIES; INTERNAL REVENUE; TONNAGE DUTIES.*

TELEGRAPH, TELEPHONE, CABLE, AND ELECTRIC LINES.

Act of March 4, 1911, Ch. 238. 388.

Sec. 1. Rights of Way for Electric Lines — Grants Allowed for Fifty Years over Public Lands, National Forests, etc. — Official Approval Required — Forfeiture — Existing Permits, 388.

CROSS-REFERENCES.

*Application of Interstate Commerce Act to, see INTERSTATE COMMERCE
Wireless on Ocean Steamers, see SHIPPING AND NAVIGATION.*

[Sec. 1.] [*Rights of way for electric lines — grants allowed for fifty years over public lands, national forests, etc. — official approval required — forfeiture — existing permits.*] * * * That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute. [36 Stat. L. 1253.]

This is from the Agricultural Department Appropriation Act of March 4, 1911, ch. 238.

TERRITORIES.

Act of March 12, 1910, Ch. 93, 389.

New Mexico — Assignment of Justices to Districts Permitted — Residence, 389.

Act of Aug. 22, 1911, Ch. 43, 389.

Local or Special Laws in the Territories — Irrigation Districts, 389.

CROSS-REFERENCES.

Admission of Arizona and New Mexico, see STATES.

And see generally, *ALASKA; HAWAIIAN ISLANDS; PORTO RICO.*

An Act Authorizing the chief justice and associate justices of the supreme court of the Territory of New Mexico to assign the said judges to the several judicial districts of the Territory.

[Act of March 12, 1910, ch. 93.]

[*New Mexico — assignment of justices to districts permitted — residence.*]

That the chief justice and associate justices of the supreme court of the Territory of New Mexico are hereby vested with power and authority to assign from time to time, as they may deem proper, any or either of said judges to any or either of the respective judicial districts of said Territory, and each judge, after assignment, shall reside in the district to which, for the time being, he may be assigned. [36 Stat. L. 237.]

An Act To amend an Act entitled "An Act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes."

[Act of Aug. 22, 1911, ch. 43.]

[*Local or special laws in the territories — irrigation districts.*] That section four of the Act entitled "An Act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes," approved July thirtieth, eighteen hundred and eighty-six, be, and the same is hereby, amended as follows, to wit, by adding to said section the following:

"*Provided*, That the prohibitions and limitations contained in this section shall not be construed to apply to irrigation districts heretofore or hereafter organized in accordance with Territorial laws." [37 Stat. L. 33.]

For sec. 4 of the Act of July 30, 1886, see 7 Fed. Stat. Annot. 267.

TIMBER LANDS AND FOREST RESERVES.

Act of March 1, 1911, Ch. 186, 390.

- Sec. 1. Conservation of Navigable Waters, etc.—Agreement between States for Authorized, 390.*
- 2. Appropriation for Co-operating with States for Fire Protection—Forest Lands on Watersheds of Navigable Rivers—State Law Required—Expenditures Limited, 391.*
- 3. Appropriations for Acquiring, etc., Lands at Headwaters of Navigable Streams—Limited to 1915, 391.*
- 4. National Forest Reservation Commission—Members—To Pass on Purchase of Lands, etc.—Service of Members, 391.*
- 5. Annual Reports, 391.*
- 6. Location of Lands, etc.—Examination by Geological Survey, 391.*
- 7. Purchase of Lands Approved by Commission—Consent of States, 392.*
- 8. Title, etc., 392.*
- 9. Timber and Mineral Rights May Be Reserved—Regulations Governing, 392.*
- 10. Sale of Agricultural Tracts Not Needed for Public Uses—Limit of Tracts—State Jurisdiction Resumed—All Rights, etc., Subject to Provisions of this Act, 392.*
- 11. Lands Reserved Permanently as National Forests—Designation of Divisions, 392.*
- 12. State Jurisdiction Not Affected—Offenses against the United States Excepted, 393.*
- 13. Payment from Receipts to States for County Schools and Roads—Division—Maximum to Counties, 393.*
- 14. Appropriation for Expenses of Commission—Accounts, 393.*

Act of March 4, 1911, Ch. 288, 393.

- Sec. 1. Purchase of Timber, etc.—Refunds to Depositors, 393.*

CROSS-REFERENCES.

Allotments to Indians Living in National Forests, see INDIANS.

Forest Service, Statements of Expenditure, etc., see AGRICULTURE.

Right of Way over Electric Lines, see TELEGRAPH, TELEPHONE, CABLE, AND ELECTRIC LINES.

And see generally, PUBLIC LANDS; PUBLIC PARKS.

An Act To enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

[Act of March 1, 1911, ch. 186.]

[SEC. 1.] [Conservation of navigable waters, etc.—agreement between states for, authorized.] That the consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact. [36 Stat. L. 961.]

SEC. 2. [*Appropriation for co-operating with states for fire protection — forest lands on watersheds of navigable rivers — state law required — expenditures limited.*] That the sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or state forest lands within such State or States and situated upon the watershed of a navigable river: *Provided*, That no such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection: *Provided further*, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year. [36 Stat. L. 961.]

SEC. 3. [*Appropriations for acquiring, etc., lands at headwaters of navigable streams — limited to 1915.*] That there is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may be developed for navigable purposes: *Provided*, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen. [36 Stat. L. 961.]

SEC. 4. [*National Forest Reservation Commission — members — to pass on purchase of lands, etc. — service of members.*] That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the President of the Senate, and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: *Provided*, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment. [36 Stat. L. 962.]

SEC. 5. [*Annual reports.*] That the commission hereby appointed shall, through its president, annually report to Congress, not later than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year. [36 Stat. L. 962.]

SEC. 6. [*Location of lands, etc. — examination by Geological Survey.*] That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: *Provided*, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a

report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie. [36 Stat. L. 962.]

SEC. 7. [*Purchase of lands approved by commission — consent of states.*] That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided*, That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. [36 Stat. L. 962.]

SEC. 8. [*Title, etc.*] That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this Act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney-General and shall be vested in the United States. [36 Stat. L. 962.]

SEC. 9. [*Timber and mineral rights may be reserved — regulations governing.*] That such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date of the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting, and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed. [36 Stat. L. 962.]

SEC. 10. [*Sale of agricultural tracts not needed for public uses — limit of tracts — state jurisdiction resumed — all rights, etc., subject to provisions of this Act.*] That inasmuch as small areas of land chiefly valuable for agriculture, may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided. [36 Stat. L. 962.]

SEC. 11. [*Lands reserved permanently as national forests — designation of divisions.*] That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered

as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes. [36 Stat. L. 963.]

For the Act of March 3, 1891, see 7 Fed. Stat. Annot. 310. For amendatory and supplemental Acts, see the title TIMBER LANDS

AND FOREST RESERVES, 10 Fed. Stat. Annot. 404, and 1909 Supp. Fed. Stat. Annot. 661.

SEC. 12. [*State jurisdiction not affected — offenses against the United States excepted.*] That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State. [36 Stat. L. 963.]

SEC. 13. [*Payment from receipts to states for county schools and roads — division — maximum to counties.*] That five per centum of all moneys received during any fiscal year from each national forest into which the lands acquired under this Act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further*, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources. [36 Stat. L. 963.]

SEC. 14. [*Appropriation for expenses of commission — accounts.*] That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission. [36 Stat. L. 963.]

[SEC. 1.] [*Purchase of timber, etc. — refunds to depositors.*] * * * That so much of an Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight," approved March fourth, nineteen hundred and seven (Thirty-fourth Statutes at Large, pages twelve hundred and fifty-six and twelve hundred and seventy), which provides for refunds by the Secretary of Agriculture to depositors of moneys to secure the purchase price of timber or the use of lands or re-

sources of the national forests such sums as may be found to be in excess of the amounts found actually due the United States, be, and is hereby, amended hereafter to appropriate and to include so much as may be necessary to refund or pay over to the rightful claimants such sums as may be found by the Secretary of Agriculture to have been erroneously collected for the use of any lands, or for timber or other resources sold from lands located within, but not a part of, the national forests, or for alleged illegal acts done upon such lands, which acts are subsequently found to have been proper and legal; and the Secretary of Agriculture shall make annual report to Congress of the amounts refunded hereunder. [36 Stat. L. 1253.]

This is from the Agricultural Department
Appropriation Act of March 4, 1911, ch.
238.

For that part of the Act of March 4, 1907,
above referred to, see 1909 Supp. Fed. Stat.
Annot. 665.

TONNAGE DUTIES.

Act of March 8, 1910, Ch. 86, 395.

Exemption of Vessels Not Entering by Sea, 395.

An Act Concerning tonnage duties on vessels entering otherwise than by sea.

[Act of March 8, 1910, ch. 86.]

[*Exemption of vessels not entering by sea.*] That vessels entering otherwise than by sea from a foreign port at which tonnage or light-house dues or other equivalent tax or taxes are not imposed on vessels of the United States shall be exempt from the tonnage duty of two cents per ton, not to exceed in the aggregate ten cents per ton in any one year, prescribed by section thirty-six of the Act approved August fifth, nineteen hundred and nine, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes." [36 Stat. L. 234.]

For sec. 36 of the Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Annot. 828.

TOWN SITES.

See *PUBLIC LANDS.*

TRADEMARKS.

Act of Feb. 18, 1911, Ch. 113, 396.

Registration of Names Permitted — Marks Permitted Entry — Prohibitions — Immoral, etc., Matter — Flags, Insignia, etc. — Similar to Known Trademarks — Marks with Only Names of Individuals, etc. — Unauthorized Portraits — Marks in Use Ten Years Permitted — Permissible Use of Names, 396.

An Act Revising and amending the statutes relative to trade-marks.

[Act of Feb. 18, 1911, ch. 113.]

[*Registration of names permitted — marks permitted entry — prohibitions — immoral, etc., matter — flags, insignia, etc. — similar to known trademarks — marks with only names of individuals, etc. — unauthorized portraits — marks in use ten years permitted — permissible use of names.*] That section five of the Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," approved February twentieth, nineteen hundred and five, and amended by an Act approved March second, nineteen hundred and seven, be, and the same hereby is, further amended by adding at the end of the section the words: "*Provided further*, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof," so that the section as amended will read as follows:

"SEC. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark —

"(a) Consists of or comprises immoral or scandalous matter.

"(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem: *Provided*, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: *Provided further*, That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: *And*

provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes which was in actual and exclusive use as a trademark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: *Provided further*, That nothing herein shall prevent the registration of a trademark otherwise registrable because of its being the name of the applicant or a portion thereof." [36 Stat. L. 918.]

For sec. 5 of the Act of Feb. 20, 1905, hereby amended, see 10 Fed. Stat. Annot. 410.

TRANSPORTATION.

See *INTERSTATE COMMERCE*.

TREASURY DEPARTMENT.

Act of March 2, 1910, Ch. 71, 398.

Sec. 1. Treasury Warrants—Secretary May Delegate Assistant Secretaries, or a Clerk, to Sign—Effect, 398.

2. Repeal, 398.

Act of June 25, 1910, Ch. 384, 399.

Sec. 1. Enforcing Laws Relating to the Treasury—Details Permitted, 399.

Act of June 25, 1910, Ch. 385, 399.

Sec. 1. Contingent Expenses—Secretary to Designate Officers to Control, 399.

CROSS-REFERENCES.

Disbursements for Construction of Public Buildings, see PUBLIC MONEY.

Licensing Custom-house Brokers, see CUSTOMS DUTIES.

Regulations Concerning Insecticides, see AGRICULTURE.

Special Agents, see CUSTOMS DUTIES.

Supplies for Executive Departments, see PUBLIC CONTRACTS.

Surety Bonds by Corporations, see SURETY COMPANIES.

And see generally REVENUE MARINE—REVENUE CUTTER SERVICE.

An Act Amending sections two hundred and forty-six and two hundred and forty-seven Revised Statutes.

[*Act of March 2, 1910, ch. 71.*]

[**SEC. 1.**] [*Treasury warrants—secretary may delegate assistant secretaries, or a clerk, to sign—effect.*] That section two hundred and forty-six of the Revised Statutes be so amended as to read as follows:

[**SEC. 246.**] “The Secretary of the Treasury may, by an appointment under his hand and official seal, delegate authority to the Assistant Secretaries of the Treasury to sign in his stead, and he may in like manner delegate such authority to a clerk in his office to sign in his name, all warrants for the payment of money into the Public Treasury and all warrants for the disbursement from the Public Treasury of money certified by the proper accounting officers of the Treasury to be due upon accounts duly audited and settled by them; also all accountable warrants placing money in the Treasury to the credit of disbursing and other fiscal officers, and all appropriations, repay, and transfer warrants. The warrants so signed by either of the Assistant Secretaries of the Treasury or by the designated clerk shall be in all cases of the same validity as if they had been signed by the Secretary of the Treasury himself.” [36 Stat. L. 231.]

R. S. sec. 246, as it read prior to this amendment, is given in 7 Fed. Stat. Annot. 368.

SEC. 2. [*Repeal.*] That section two hundred and forty-seven of the Revised Statutes be, and the same is hereby, repealed. [36 Stat. L. 231.]

R. S. sec. 247 is set forth in 7 Fed. Stat. Annot. 368.

[SEC. 1.] [*Enforcing laws relating to the Treasury — details permitted.*]
* * * The Secretary of the Treasury is authorized to use for, and in connection with, the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time, three persons paid from the appropriation for the collection of customs, three persons paid from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and three persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding four persons so detailed shall be employed at any one time hereunder: *Provided*, That nothing herein contained shall be construed to deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law. [36 Stat. L. 713.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

[SEC. 1.] [*Contingent expenses — Secretary to designate officers to control.*] * * * The Secretary of the Treasury is authorized to place the control and expenditure of the various appropriations made for contingent expenses of the Treasury Department at Washington, District of Columbia, under such officer or officers of the Treasury Department as he may from time to time determine proper or necessary, and the requirements and authority imposed by sections two hundred and forty and two hundred and forty-one of the Revised Statutes of the United States shall hereafter be applicable to the person or persons designated hereunder as fully as they have heretofore applied to the superintendent of the Treasury building with reference to said appropriations. [36 Stat. L. 776.]

This is from the Deficiencies Appropriation Act of June 25, 1910, ch. 385.
For R. S. secs. 240, 241, see 7 Fed. Stat. Annot. 364, 365.

TRUST MONEY.

Making False Report of, see FALSE ACCOUNTS AND REPORTS.

UNIFORMS.

Act of March 1, 1911, Ch. 187. 400.

Uniforms of United States — Punishment for Discriminations by Theatres, etc., against Wearers of, 400.

An Act To protect the dignity and honor of the uniform of the United States.

[Act of March 1, 1911, ch. 187.]

[*Uniforms of United States — punishment for discriminations by theatres, etc., against wearers of.*] That hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska or Insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. [*36 Stat. L. 963.*]

UNITED STATES ATTORNEYS.

See *JUDICIAL OFFICERS.*

UNITED STATES BONDS.

See *PUBLIC DEBT.*

UNITED STATES COMMISSIONERS.

See *JUDICIAL OFFICERS.*

UNITED STATES COURTS.

Suing as Poor Person, see COSTS.
And see generally, *JUDICIARY.*

UNITED STATES PRISONS.

See *PRISONS AND PRISONERS.*

VESSELS.

See *SHIPPING AND NAVIGATION; STEAM VESSELS; TONNAGE DUTIES.*

WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Act of March 23, 1910, Ch. 115, 402.

Sec. 1. Leaves of Absence to Officers at Service Schools, 402.

Horseshoers and Farriers — Pay, 402.

Assignments to Duty in War Department, 403.

Additional Assistant to Chief of Bureau of Insular Affairs Authorized — Rank, Pay, and Allowances — Title of Officers, 403.

Nurses — Pay Established — Cumulative Leaves of Absence — Allowances to Superintendent, 403.

Allowance to Officers Separated from Their Horses, 403.

Interments of Officers and Men — Expenses, 403.

Purchases of Horses from Officers Ordered to Distant Duty, 404.

Transportation of Army — Excess Baggage, 404.

Transportation of Officers' Horses, 404.

Transportation Privileges to Young Men's Christian Association — Transportation to Guam, 404.

Quartermaster's Supplies — Proceeds from Sales Available for Following Year, 404.

Ordinance Contracts — Writing Required, 404.

Act of April 19, 1910, Ch. 174, 405.

Sec. 1. Volunteers — Decision of Department as to Date of Muster Conclusive, 405.

Act of May 6, 1910, Ch. 200, 405.

Commissions to Officers Advanced on Retired List, 405.

Act of June 25, 1910, Ch. 384, 405.

Sec. 1. Limit of Quarters for Officers, 405.

Act of June 25, 1910, Ch. 393, 405.

Sec. 1. Army and Navy — Discharge Certificates — Issued in True Name, to Persons Serving as Minors under Assumed — War with Spain and in Philippines Added — Restriction, 405.

2. Title Amended, 406.

Act of Jan. 19, 1911, Ch. 22, 406.

Officers to Be Dropped if Absent without Leave, etc., 406.

Act of Feb. 27, 1911, Ch. 166, 406.

Sec. 5. Engineer Corps Increased—Extended over Five Years—Original Vacancies—Officers on River and Harbor Duty to Be Paid from Appropriation for the Work—Details of Assistant Engineers—Filling Vacancies in Grade of Second Lieutenants—Assignment of Graduating Cadets—Eligibility for Appointments from Civil Life—Examinations, etc., 406.

Act of March 3, 1911, Ch. 209, 407.

Sec. 1. Detail to American Red Cross, 407.

Veterinarians—Retirement, 407.

Paymasters' Clerks—Pay and Allowances, 407.

Details of Instructors, etc., for Organized Militia—Vacancies from Details—Number Limited—Proportion of Detached Officers—Filling Vacancies in Grade of Second Lieutenants—Order of Appointment—Quartermaster's Department—Officers Added, 408.

Supplies to Other Bureaus, etc.—Payment, 408.

Remount Detachments—Restriction, 408.

Transportation to Revenue-cutter Service—Young Men's Christian Association—Transportation to Guam—Officers on Official Duties, 409.

Retired Officers May Serve as Road Commissioners for Alaska—Pay, 409.

Dental Corps, 409.

Disbursing Officer of Engineer Department—Payment of Pressing Obligations from Available Balances, 410.

Issue of Automatic Pistols for Organized Militia, 410.

Line Officers—Promotion to Rank Lost by Regimental Promotion, 411.

Act of March 4, 1911, Ch. 242, 411.

Sec. 1. Chief of Ordnance—Interchange of Material Allowed, 411.

Act of March 4, 1911, Ch. 252, 411.

Medical Reserve Corps—Retirement, 411.

Act of March 4, 1911, Ch. 266, 412.

Retired Army, Navy, and Marine Corps Officers to Receive Commissions for Increased Rank, 412.

Act of Dec. 22, 1911, Ch. —, 412.

Sec. 1. Claims by Volunteers for Pay, Bounty, etc., 412.

CROSS-REFERENCES.

ARTICLES OF WAR, see that title.

Soldiers' Homes, see HOSPITALS AND ASYLUMS.

Soldiers' Uniforms, Protection of, see UNIFORMS.

And see generally, MILITARY ACADEMY; MILITIA; NATIONAL DEFENSE SECRETS; RIVERS, HARBORS, AND CANALS.

An Act Making appropriation for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and eleven.

[Act of March 23, 1910, ch. 115.]

[SEC. 1.] [*Leaves of absence to officers at service schools.*] * * * That the provisions of section thirteen hundred and thirty, Revised Statutes, authorizing leaves of absence to certain officers of the Military Academy, during the period of the suspension of the ordinary academic studies, without deduction from pay and allowances, be, and are hereby, extended to include officers on duty exclusively as instructors at the service schools on approval of the officer in charge of said schools. [36 Stat. L. 244.]

[*Horseshoers and farriers—pay.*] * * * That one of the two "blacksmiths and farriers" now authorized by law for each troop of cavalry shall

hereafter be designated as "horseshoer" and receive the pay of a sergeant of cavalry, and the other shall hereafter be designated as "farrier" and receive the pay of a corporal of cavalry; and that one of the "mechanics" now authorized by law for each battery of field artillery shall hereafter be designated as "horseshoer" and receive the pay of a sergeant of artillery. [*36 Stat. L. 245.*]

[*Assignments to duty in War Department.*] * * * That no clerk, messenger, or laborer at headquarters of divisions, departments, posts commanded by general officers, or office of the Chief of Staff, shall be assigned to duty with any bureau in the War Department. [*36 Stat. L. 247.*]

[*Additional assistant to Chief of Bureau of Insular Affairs authorized — rank, pay, and allowances — title of officers.*] The Secretary of War is hereby authorized to detail one additional officer of the army as assistant to the Chief of the Bureau of Insular Affairs, under the same provisions of law in regard to the vacancy in the line thus created and return to the line as govern in the case of the assistant authorized by the Act of March second, nineteen hundred and seven; and the assistant herein authorized while serving in this capacity shall have the rank, pay, and allowances of colonel; and both officers detailed in the Bureau of Insular Affairs shall hereafter be designated, while on this duty, as assistants to the chief of the bureau. [*36 Stat. L. 248.*]

[*Nurses — pay established — cumulative leaves of absence — allowances to superintendent.*] * * * For pay of one hundred nurses (female) sixty-seven thousand eight hundred and eighty dollars; and the Superintendent and members of the Female Nurse Corps shall hereafter be paid at the following rates: Superintendent Nurse Corps, one thousand eight hundred dollars per annum; female nurses, fifty dollars per month for the first period of three years' service; fifty-five dollars per month for the second period of three years' service; sixty dollars per month for the third period of three years' service; and sixty-five dollars per month after nine years' service in said Nurse Corps; and all female nurses shall hereafter be entitled, in addition to the rates of pay as herein provided, to ten dollars per month when serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), and to cumulative leave of absence with pay at the rate of thirty days for each calendar year of service in said corps; and when serving as chief nurses their pay may be increased by authority of the Secretary of War, such increase not to exceed thirty dollars per month; and the superintendent shall be entitled to the same allowances, when on duty, as the members of the Nurse Corps. [*36 Stat. L. 249.*]

[*Allowance to officers separated from their horses.*] * * * and hereafter, when an officer is separated from his authorized number of owned horses through the nature of the military service upon which employed, they shall not be deprived of forage, bedding, shelter, shoeing, or medicines therefor, because of such separation. [*36 Stat. L. 252.*]

[*Interments of officers and men — expenses.*] * * * expenses of the interment of officers killed in action or who die when on duty in the field, or at military posts or on the frontiers, or when traveling under orders, and of non-commissioned officers and soldiers; and in all cases where such expenses would have been lawful claims against the Government, reimbursement may be made of expenses heretofore or hereafter incurred by individuals of burial and trans-

portation of remains of officers, including acting assistant surgeons, not to exceed the amount now allowed in the cases of officers, and for the reimbursement in the cases of enlisted men not exceeding the amount now allowed in their cases, may be paid out of the proper funds appropriated by this Act, and the disbursing officers shall be credited with such reimbursement heretofore made; but hereafter no reimbursement shall be made of such expenses incurred prior to the twenty-first day of April, eighteen hundred and ninety-eight. [36 Stat. L. 253.]

[*Purchases of horses from officers ordered to distant duty.*] * * * That hereafter when a mounted officer is ordered to duty beyond the seas or to make a change of station in the United States in which the cost of transportation for his authorized number of owned horses exceeds the sum at the time allowed for that purpose in the Army Regulations, the Secretary of War is authorized, under such regulations in respect to inspection and valuation as he may prescribe, in his discretion to permit the purchase of said horses by the Quartermaster's Department, at a price not exceeding the average contract price paid for horses during the preceding fiscal year, the exact price to be fixed by a board of officers. [36 Stat. L. 254.]

[*Transportation of army—excess baggage.*] * * * For transportation of the army and its supplies, including transportation of the troops when moving either by land or water, and of their baggage, including the cost of packing and crating: *Provided*, That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess. [36 Stat. L. 255.]

[*Transportation of officers' horses.*] * * * and hereafter transportation may be furnished for the owned horses of an officer, not exceeding the number authorized by law, from point of purchase to his station, when he would have been entitled to and did not have his authorized number of owned horses shipped upon his last change of station, and when the cost of shipment does not exceed that from his old to his new station. [36 Stat. L. 255.]

[*Transportation privileges to Young Men's Christian Association—transportation to Guam.*] * * * That when, in the opinion of the Secretary of War, accommodations are available, transportation on vessels of the army transport service may be furnished the secretaries and supplies of the army and navy department of the Young Men's Christian Association: *Provided, further*, That when there is cargo space available without displacing military supplies, transportation may be provided for merchandise of American production consigned to residents and mercantile firms of the island of Guam, rates and regulations therefor to be prescribed by the Secretary of War. [36 Stat. L. 256.]

[*Quartermaster's supplies—proceeds from sales available for following year.*] * * * Hereafter all moneys arising from disposition of serviceable quartermaster's supplies or stores, authorized by law and regulations, shall remain available throughout the fiscal year following that in which the disposition was effected, for the purposes of that appropriation from which such supplies were authorized to be supplied at the time of the disposition. [36 Stat. L. 257.]

[*Ordnance contracts—writing required.*] * * * Hereafter whenever contracts which are not to be performed within sixty days are made on behalf

of the Government by the Chief of Ordnance, or by officers under him authorized to make them, and are in excess of five hundred dollars in amount, such contracts shall be reduced to writing and signed by the contracting parties with their names at the end thereof. In all other cases contracts shall be prepared under such regulations as may be prescribed by the Chief of Ordnance. [36 Stat. L. 261.]

[SEC. 1.] [*Volunteers—decision of Department as to date of muster conclusive.*] * * * Hereafter in administering the Act of Congress approved February twenty-fourth, eighteen hundred and ninety-seven, entitled "An Act to provide for the relief of certain officers and enlisted men of the volunteer forces," the decision of the War Department as to the right of any person to be held and considered to have been mustered into the service of the United States under the provisions of said Act shall be conclusive, and no claims shall be allowed or considered under said Act after the first day of January, nineteen hundred and eleven. [36 Stat. L. 324.]

This is from the Military Academy Appropriation Act of April 19, 1910, ch. 174.

An Act To authorize commissions to issue in the cases of officers of the army retired with increased rank.

[Act of May 6, 1910, ch. 200.]

[*Commissions to officers advanced on retired list.*] That officers of the army on the retired list whose rank has been, or shall hereafter be, advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank. [36 Stat. L. 347.]

[SEC. 1.] [*Limit of quarters for officers.*] * * * That hereafter no money appropriated for military posts shall be expended for the construction of quarters for officers of the army, or for barracks and quarters for the artillery the total cost of which, including the heating and plumbing apparatus, wiring and fixtures, shall exceed, in the case of quarters of a general officer, the sum of fifteen thousand dollars, of a colonel or an officer above the rank of captain, twelve thousand dollars, and of an officer of and below the rank of captain, nine thousand dollars. [36 Stat. L. 721.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

An Act For the relief of soldiers and sailors who enlisted or served under assumed names, while minors or otherwise, in the army or navy, during the war of the rebellion, the war with Spain, or the Philippine insurrection.

[Act of June 25, 1910, ch. 393.]

[SEC. 1.] [*Army and Navy—discharge certificates—issued in true name, to persons serving as minors under assumed—war with Spain and in Philippines added—restriction.*] That the Act entitled "An Act for the relief of soldiers and sailors who enlisted or served under assumed names, while

minors or otherwise, in the army or navy, during the war of the rebellion," approved April fourteenth, eighteen hundred and ninety, be, and the same is hereby, amended to read as follows:

That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the army and navy during the war of the rebellion, the war with Spain, or the Philippine insurrection, and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of acceptance of resignation may be made by, or on behalf of, persons entitled to them; but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequence. [36 Stat. L. 824.]

SEC. 2. [*Title amended.*] That the title of said act be amended so as to read as follows: "An Act for the relief of soldiers and sailors who enlisted or served under assumed names, while minors or otherwise, in the army or navy, during the war of the rebellion, the war with Spain, or the Philippine insurrection." [36 Stat. L. 825.]

For the Act of April 14, 1890, hereby amended, see 7 Fed. Stat. Annot. 1077.

An Act Authorizing the President to drop officers from the rolls of the army under certain conditions.

[Act of Jan. 19, 1911, ch. 22.]

[*Officers to be dropped if absent without leave, etc.*] That the President be, and he is hereby, authorized to drop from the rolls of the army any officer who is absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction; and no officer so dropped shall be eligible for reappointment. [36 Stat. L. 894.]

SEC. 5. [*Engineer Corps increased — extended over five years — original vacancies — officers on river and harbor duty to be paid from appropriation for the work — details of assistant engineers — filling vacancies in grade of second lieutenants — assignment of graduating cadets — eligibility for appointments from civil life — examinations, etc.*] That the Corps of Engineers of the United States Army is hereby increased by five colonels, six lieutenant colonels, nineteen majors, seventeen captains, and thirteen first lieutenants. The increase in each grade hereby provided for shall be extended over a period of five years as nearly as practicable, and the original vacancies hereby created in each grade shall be filled by promotion from the next lower grade in accordance with existing law: *Provided*, That officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements may, while so employed, be paid their pay and commutation of quarters from the appropriations for the work or works upon which they are employed: *Provided further*, That whenever it shall be necessary, in order to properly prosecute works of river and harbor improvement, the Chief of Engineers is authorized to detail for duty in charge of river and harbor districts

or as members of boards of engineers any assistant engineers in the employ of the Engineer Bureau of the War Department. Vacancies in the grade of second lieutenant in the Corps of Engineers shall hereafter be filled, as far as may be consistent with the interests of the military service, by promotions from the Corps of Cadets at the United States Military Academy: *Provided*, That vacancies remaining in any fiscal year after the assignment of cadets of the class graduating in that fiscal year may be filled from civil life as hereinafter provided: *And provided further*, That the proportion of any graduating class assigned to the Corps of Engineers shall not be less than the proportion which the total number of officers authorized at date of graduation for that corps bears to the total number of officers authorized at same date for all branches of the Army to which cadets are eligible for promotion upon graduation, except when such a proportionate number is more than the number of vacancies existing at date of graduation plus the number of retirements due to occur in the Corps of Engineers prior to the first day of the following January. To become eligible for examination and appointment, a civilian candidate for the appointment as second lieutenant must be an unmarried citizen of the United States between the ages of twenty-one and twenty-nine, who holds a diploma showing graduation in an engineering course from an approved technical school, and is eligible for appointment as a junior engineer under the Engineer Bureau of the War Department. Selection of eligible civilians for appointment, including term of probation, shall be made as the result of such competitive examination into the mental, moral, and physical qualifications, and under such rules and regulations as shall be recommended by the Chief of Engineers and approved by the Secretary of War. [36 Stat. L. 957.]

The above sec. 5 is from the River and Harbor Appropriation Act of Feb. 27, 1911, ch. 166.

An Act Making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and twelve.

[Act of March 3, 1911, ch. 309.]

[SEC. 1.] [Detail to American Red Cross.] * * * That hereafter the Secretary of War is hereby authorized to detail an officer of the Medical Corps to take charge of the first-aid department of the American Red Cross. [36 Stat. L. 1041.]

[Veterinarians — retirement.] * * * That hereafter so much of section twenty, of the Act approved February second, nineteen hundred and one, as provides that veterinarians shall receive the pay and allowances of second lieutenants, mounted, shall be interpreted to authorize their retirement under the laws governing the retirement of second lieutenants. [36 Stat. L. 1042.]

For the Act of Feb. 2, 1901, see 7 Fed. Stat. Annot. 948.

[Paymasters' clerks — pay and allowances.] * * * Hereafter the pay and allowances of Army paymasters' clerks shall be the same as provided by law for Navy paymasters' clerks on shore duty, and they shall also be entitled to the same right of retirement with the same retired pay as is now allowed Navy paymasters' clerks: *Provided*, That Army paymasters' clerks shall be subject to the rules and articles of war. [36 Stat. L. 1044.]

[*Details of instructors, etc., for organized militia — vacancies from details — number limited — proportion of detached officers — filling vacancies in grade of second lieutenants — order of appointment — Quartermaster's Department — officers added.*] * * * Upon the request of the governors of the several States and Territories concerned, the President may detach officers of the active list of the Army from their proper commands for duty as inspectors and instructors of the Organized Militia, as follows, namely: Not to exceed one officer for each regiment and separate battalion of infantry, or its equivalent of other troops: *Provided*, That line officers detached for duty with the Organized Militia under the provisions hereof, together with those detached from their proper commands, under the provisions of law, for other duty the usual period of which exceeds one year, shall be subject to the provisions of section twenty-seven of the Act approved February second, nineteen hundred and one, with reference to details to the staff corps, but the total number of detached officers hereby made subject to these provisions shall not exceed two hundred: *And provided further*, That the number of such officers detached from each of the several branches of the line of the Army shall be in proportion to the authorized commissioned strength of that branch; they shall be of the grades first lieutenant to colonel, inclusive, and the number detached from each grade shall be in proportion to the number in that grade now provided by law for the whole Army. The vacancies hereby caused or created in the grade of second lieutenant shall be filled in accordance with existing law, one-half in each fiscal year until the total number of vacancies shall have been filled: *Provided*, That hereafter vacancies in the grade of second lieutenant occurring in any fiscal year shall be filled by appointment in the following order, namely: First, of cadets graduated from the United States Military Academy during that fiscal year; second, of enlisted men whose fitness for promotion shall have been determined by competitive examination; third, of candidates from civil life between the ages of twenty-one and twenty-seven years. The President is authorized to make rules and regulations to carry these provisions into effect: *Provided*, That the Quartermaster's Department is hereby increased by two colonels, three lieutenant colonels, seven majors, and eighteen captains, the vacancies thus created to be filled by promotion and detail in accordance with section twenty-six of the Act approved February second, nineteen hundred and one. [36 Stat. L. 1045.]

[*Supplies to other bureaus, etc. — payment.*] * * * That hereafter when under the Army Regulations subsistence supplies are furnished to another bureau of the War Department, or to another executive department of the Government or employees thereof, payment therefor shall be made in cash by the proper disbursing officer of the bureau, office, or department concerned, or by the employee to whom the sale is made. When the transaction is between two bureaus of the War Department the price to be charged shall be the contract or invoice price of the supplies. When the transaction is between the Subsistence Department and another executive department of the Government or employees thereof, the price to be charged shall include the contract or invoice price and ten per centum additional to cover wastage in transit, and the cost of transportation. [36 Stat. L. 1047.]

[*Remount detachments — restriction.*] * * * That hereafter from the enlisted force of the Army now provided by law the President may authorize the organization of remount detachments at each of the remount depots, and may authorize the appointment therein of such noncommissioned officers, mechanics,

artificers, farriers, horseshoers, and cooks as may be necessary for the administration of such remount depots: *Provided*, That nothing herein shall be so construed as to authorize an increase in the total number of enlisted men of the Army now authorized by law. [36 Stat. L. 1049.]

[*Transportation to revenue-cutter service — Young Men's Christian Association — transportation to Guam — officers on official duties.*] * * * That hereafter when, in the opinion of the Secretary of War, accommodations are available, transportation on vessels of the Army transport service may be furnished the officers, employees, and enlisted men of the Revenue-Cutter Service, and their families, without expense to the United States, and also secretaries and supplies of the Army and Navy department of the Young Men's Christian Association: *Provided further*, That hereafter when there is cargo space available without displacing military supplies, transportation may be provided for merchandise of American production consigned to residents and mercantile firms of the island of Guam, rates and regulations therefor to be prescribed by the Secretary of War: *Provided further*, That hereafter in the performance of their official and military duties officers of the Army are authorized, under such regulations as may be established by the Secretary of War, to use means of transportation herein provided for. [36 Stat. L. 1051.]

[*Retired officers may serve as road commissioners for Alaska — pay.*] * * * That hereafter the Secretary of War may, in his discretion, assign suitable retired officers of the Army to active duty as members of the board of road commissioners for Alaska, and in the case of any officer so assigned the provisions of so much of the Act of Congress approved April twenty-third, nineteen hundred and four, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes," as relates to the assignment of retired officers to active duty shall apply. [36 Stat. L. 1052.]

[*Dental corps.*] * * * Hereafter there shall be attached to the Medical Department a dental corps, which shall be composed of dental surgeons and acting dental surgeons, the total number of which shall not exceed the proportion of one to each thousand of actual enlisted strength of the Army; the number of dental surgeons shall not exceed sixty, and the number of acting dental surgeons shall be such as may, from time to time, be authorized by law. All original appointments to the dental corps shall be as acting dental surgeons, who shall have the same official status, pay, and allowances as the contract dental surgeons now authorized by law. Acting dental surgeons who have served three years in a manner satisfactory to the Secretary of War shall be eligible for appointment as dental surgeons, and, after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War, may be commissioned with the rank of first lieutenant in the dental corps to fill the vacancies existing therein. Officers of the dental corps shall have rank in such corps according to date of their commissions therein and shall rank next below officers of the Medical Reserve Corps. Their right to command shall be limited to the dental corps. The pay and allowances of dental surgeons shall be those of first lieutenants, including the right to retirement on account of age or disability, as in the case of other officers: *Provided*, That the time served by dental surgeons as acting dental or contract dental surgeons shall be reckoned in computing the increased service pay of such as are commissioned under this Act. The appointees as acting dental surgeons must be citizens of the United

States between twenty-one and twenty-seven years of age, graduates of a standard dental college, of good moral character and good professional education, and they shall be required to pass the usual physical examination required for appointment in the Medical Corps, and a professional examination which shall include tests of skill in practical dentistry and of proficiency in the usual subjects of a standard dental college course: *Provided*, That the contract dental surgeons attached to the Medical Department at the time of the passage of this Act may be eligible for appointment as first lieutenants, dental corps, without limitation as to age: *And provided further*, That the professional examination for such appointment may be waived in the case of contract dental surgeons in the service at the time of the passage of this Act whose efficiency reports and entrance examinations are satisfactory. The Secretary of War is authorized to appoint boards of three examiners to conduct the examinations herein prescribed, one of whom shall be a surgeon in the Army and two of whom shall be selected by the Secretary of War from the commissioned dental surgeons. [36 Stat. L. 1054.]

[*Disbursing officer of Engineer Department — payment of pressing obligations from available balances.*] * * * Hereafter whenever pressing obligations are required to be paid by a disbursing officer of the Engineer Department and there is an insufficient balance to his official credit under the proper appropriation or appropriations for the purpose, he is authorized to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriation or appropriations have been allotted by the Chief of Engineers for the expenditure. When such disbursements are made the accounts of the disbursing officer shall show the charging of the proper appropriations, the balances under which will be adjusted by the disbursing officer on receipt of funds or by the accounting officers of the Treasury. [36 Stat. L. 1056.]

[*Issue of automatic pistols for Organized Militia.*] * * * That whenever in his opinion a sufficient number of automatic pistols of the standard service type, holsters, and pistol-cartridge boxes therefor, shall have been procured and be available for the purpose, the Secretary of War is hereby authorized to issue, on the requisition of the governors of the several States and Territories, or of the commanding general of the Militia of the District of Columbia, such number of standard pistols, holsters, and pistol-cartridge boxes therefor as are required for arming all of the Organized Militia in said States, Territories, and District of Columbia, without charging the cost or value thereof, or any expense connected therewith, against the allotment to said State, Territory, or District of Columbia, out of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes, as amended, or requiring payment therefor, and to exchange, without receiving any money credit therefor, ammunition, or parts thereof, suitable to the new standard pistol, round for round, for corresponding ammunition suitable to the old revolver theretofore issued to said States, Territory, or District by the United States: *Provided*, That the said standard pistols, holsters, and pistol-cartridge boxes therefor shall be receipted for and shall remain the property of the United States and be annually accounted for by the governors of the States and Territories and the commanding general of the Militia of the District of Columbia as now required by law, and that each State, Territory, and District shall, on receipt of the new pistols, holsters, and pistol-cartridge boxes, and ammunition, turn in to the Ordnance Department of the United States Army, without receiving any

money credit therefor and without expense for transportation, all United States revolvers and ammunition therefor, holsters, and revolver-cartridge boxes now in its possession. [36 Stat. L. 1057.]

[*Line officers — promotion to rank lost by regimental promotion.*] * * *
On and after the passage of this Act, every line officer on the active list below the grade of colonel who has lost in lineal rank through the system of regimental promotion in force prior to October first, eighteen hundred and ninety, may, in the discretion of the President, and subject to examination for promotion as prescribed by law, be advanced to higher grades in his arm up to and including the grade of colonel, in accordance with the rank he would have been entitled to hold had promotion been lineal throughout his arm or corps since the date of his entry into the arm or corps to which he permanently belongs: *Provided*, That officers advanced to higher grades under the provisions of this Act shall be additional officers in those grades: *Provided further*, That nothing in this Act shall operate to interfere with or retard the promotion to which any officer would be entitled under existing law: *And provided further*, That the officers advanced to higher grades under this Act shall be junior to the officers who now rank them under existing law, when these officers have reached the same grade. [36 Stat. L. 1058.]

[SEC. 1.] [*Chief of Ordnance — interchange of material allowed.*] * * *
The Chief of Ordnance, in conducting manufacturing or similar operations under any particular appropriation heretofore or hereafter made, is authorized to use material procured under any appropriation and to replace the same in kind or otherwise: *Provided*, That in doing so the methods shall be such that each appropriation will be charged with the full value of the material used in carrying out its object. [36 Stat. L. 1344.]

This is from the Fortifications, etc., Appropriation Act of March 4, 1911, ch. 242.

An Act To amend an Act entitled "An Act providing for the retirement of certain medical officers of the Army," approved June twenty-second, nineteen hundred and ten.

[Act of March 4, 1911, ch. 252.]

[*Medical Reserve Corps — retirement.*] That the Act approved June twenty-second, nineteen hundred and ten, entitled "An Act providing for the retirement of certain medical officers of the Army," be, and the same is hereby, amended as follows:

Strike out the words "in the War of the Rebellion," following the words "enlisted man," in said Act, so that the Act as amended will read:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any officer of the Medical Reserve Corps who shall have reached the age of seventy years, and whose total active service in the Army of the United States, Regular or Volunteer, as such officer, and as contract or acting assistant surgeon, and as an enlisted man, shall equal forty years, may thereupon, in the discretion of the President, be placed upon the retired list of the Army with the rank, pay, and allowances of a first lieutenant." [36 Stat. L. 1348.]

The Act of June 22, 1910, as originally passed, read as follows:

"That any officer of the Medical Reserve Corps who shall have reached the age of seventy years, and whose total active service in the Army of the United States, regular or volunteer, as such officer, and as contract or

acting assistant surgeon, and as an enlisted man in the war of the rebellion, shall equal forty years, may thereupon, in the discretion of the President, be placed upon the retired list of the army with the rank, pay, and allowances of a first lieutenant." [36 Stat. L. 580.]

An Act To authorize commissions to issue in the cases of officers retired or advanced on the retired list with increased rank.

[Act of March 4, 1911, ch. 266.]

[Retired Army, Navy, and Marine Corps officers to receive commissions for increased rank.] That commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank. [36 Stat. L. 1354.]

[SEC. 1.] [Claims by volunteers for pay, bounty, etc. — limitation of time for presenting — fees to agents and attorneys.] * * * No claim for arrears of pay, bounty, or other allowances growing out of the service of Volunteers who served in the Army of the United States during the Civil War shall be received or considered by the accounting officers of the Treasury unless filed in the office of the Auditor for the War Department on or before December thirty-first, nineteen hundred and twelve: *Provided*, That hereafter no agent or attorney shall demand or accept, for his services in connection with the prosecution of claims for arrears of pay, bounty, or other allowances due on account of the services during the Civil War of an officer or enlisted man of the Regular or Volunteer Armies of the United States, filed after the passage of this Act, any fee for any services rendered in connection therewith. Whoever shall violate this provision upon conviction shall be punished by a fine of not exceeding five hundred dollars or imprisonment for a period not exceeding six months, or both, and shall be disbarred from practice before the Treasury Department. [37 Stat. L. —.]

This is from the Urgent Deficiencies Appropriation Act of Dec. 22, 1911.

WARRANTS.

See *TREASURY DEPARTMENT*.

WATERS.

Act of June 23, 1910, Ch. 359, 413.

Lake Michigan — Dumping Refuse in, Near Chicago, Ill., Unlawful, 413.

Act of June 25, 1910, Ch. 407, 414.

Sec. 1. Reclamation Fund — Transfers from Treasury Authorized for Projects — Aggregate — Appropriation — Limited to Work Performed — Reimbursement — Examination and Approval of Projects Required, 414.

2. Issue of Certificates of Indebtedness Authorized — Disposal of — Aggregate Limited — Exempt from Taxation — Appropriation for Preparing, etc., 415.

3. Fifty per cent. of Reclamation Receipts to Be Paid into the Treasury, 415.

4. Limitation on Use of Fund — Order of President Required for New Projects, 415.

5. No Entries Allowed until Units, etc., Fixed — Disposal of Relinquished Lands, 415.

6. Former Provision for Expenditures Repealed, 416.

Act of Feb. 2, 1911, Ch. 32, 416.

Sec. 1. Reclamation Act — Sale of Lands Not Needed for Works under — Appraisal, etc., 416.

2. Conveyance of Title, etc. — Limitation, 416.

3. Proceeds to Credit of Irrigation Project, 416.

Act of Feb. 13, 1911, Ch. 49, 417.

Reclamation Act — Withdrawal of Public Notices of Charges, etc., Permitted — Authority of Secretary of Interior, 417.

Act of Feb. 21, 1911, Ch. 141, 417.

Sec. 1. Reclamation Projects — Irrigation Systems under Carey Act May Contract for Excess Waters — Distribution to Individual Users — Restriction on Impounded Water — Charges — Maximum, 417.

2. Co-operation with Water Users for Reservoirs, etc. — Title to Works, etc. — Limit of Water Allowed — Right to Control Streams Not Affected, 418.

3. Moneys to Be Available for Reclamation Fund, 418.

Act of Feb. 24, 1911, Ch. 155, 418.

Reclamation Act — Leases of Surplus Water Power — Terms, etc. — Impairing Irrigation Projects Prohibited — Longer Term on Rio Grande Project, 418.

CROSS-REFERENCES.

Conservation of Navigable Waters, Forests, etc., see TIMBER LANDS AND FOREST RESERVES.

Irrigation Projects on Indian Lands, see INDIANS.

And see generally RIVERS, HARBORS, AND CANALS.

Ad Act To prevent the dumping of refuse material in Lake Michigan at or near Chicago.

[Act of June 23, 1910, ch. 359.]

[*Lake Michigan — dumping refuse in, near Chicago, Ill., unlawful.*] That it shall not be lawful to throw, discharge, dump, or deposit, or cause, suffer, or procure, to be thrown, discharged, dumped, or deposited, any refuse matter

of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into Lake Michigan, at any point opposite or in front of the county of Cook, in the State of Illinois, or the county of Lake in the State of Indiana, within eight miles from the shore of said lake, unless said material shall be placed inside of a breakwater so arranged as not to permit the escape of such refuse material into the body of the lake and cause contamination thereof; and no officer of the Government shall dump or cause or authorize to be dumped any material contrary to the provisions of this Act: *Provided, however,* That the provisions of this Act shall not apply to work in connection with the construction, repair, and protection of breakwaters and other structures built in aid of navigation, or for the purpose of obtaining water supply. Any person violating any provision of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not exceeding one thousand dollars. [36 Stat. L. 593.]

An Act To authorize advances to the "reclamation fund," and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes.

[Act of June 25, 1910, ch. 407.]

[SEC. 1.] [*Reclamation fund — transfers from Treasury authorized for projects — aggregate — appropriation — limited to work performed — reimbursement — examination and approval of projects required.*] That to enable the Secretary of the Interior to complete government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the Act entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided,* That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: *And provided further,* That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as hereinafter provided: *And provided further,* That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the Army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project. [36 Stat. L. 835.]

SEC. 2. [*Issue of certificates of indebtedness authorized — disposal of — aggregate limited — exempt from taxation — appropriation for preparing, etc.*] That for the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of fifty dollars, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest, payable semiannually, at not exceeding three per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under state, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this Act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same. [36 Stat. L. 835.]

SEC. 3. [*Fifty per cent of reclamation receipts to be paid into the Treasury.*] That beginning five years after the date of the first advance to the reclamation fund under this Act, fifty per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payment so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on the certificates of indebtedness issued under this Act and any expense incident to preparing, advertising, and issuing the same. [36 Stat. L. 836.]

SEC. 4. [*Limitation on use of fund — order of President required for new projects.*] That all money placed to the credit of the reclamation fund in pursuance of this Act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said Act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States. [36 Stat. L. 836.]

SEC. 5. [*No entries allowed until units, etc., fixed — disposal of relinquished lands.*] That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an Act entitled "An Act appropriating the receipts from the sale and disposal of the public lands in certain

States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight). [36 Stat. L. 917.]

The above section 5 was amended to read as here given by the Act of Feb. 18, 1911, ch. 111. Originally this section read as follows: "Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall

have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same." [36 Stat. L. 836.]

For the Act of June 17, 1902, above referred to, see 7 Fed. Stat. Annot. 1098.

SEC. 6. [*Former provision for expenditures repealed.*] That section nine of said Act of Congress, approved June seventeenth, nineteen hundred and two, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," is hereby repealed. [36 Stat. L. 836.]

For sec. 9 of the Act of June 17, 1902, hereby repealed, see 7 Fed. Stat. Annot. 1101.

An Act To provide for the sale of lands acquired under the provisions of the reclamation Act and which are not needed for the purposes of that Act.

[Act of Feb. 2, 1911, ch. 32.]

[SEC. 1.] [*Reclamation Act — sale of lands not needed for works under — appraisal, etc.*] That whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the "reclamation Act," or under the provisions of any Act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said reclamation Act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land. [36 Stat. L. 895.]

For the Act of June 17, 1902, see 7 Fed. Stat. Annot. 1098.

SEC. 2. [*Conveyance of title, etc. — limitation.*] That upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided*, That not over one hundred and sixty acres shall be sold to any one person. [36 Stat. L. 895.]

SEC. 3. [*Proceeds to credit of irrigation project.*] That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired. [36 Stat. L. 895.]

An Act To authorize the Secretary of the Interior to withdraw public notices issued under section four of the reclamation Act, and for other purposes.

[Act of Feb. 18, 1911, ch. 49.]

[*Reclamation Act — withdrawal of public notices of charges, etc., permitted — authority of Secretary of Interior.*] That the Secretary of the Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the reclamation Act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others, entered into prior to the passage of this Act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given. [36 Stat. L. 902.]

For the Act of June 17, 1902, see 7 Fed. Stat. Annot. 1098.

An Act To authorize the Government to contract for impounding, storing, and carriage of water, and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes.

[Act of Feb. 21, 1911, ch. 141.]

[SEC. 1.] [*Reclamation projects — irrigation systems under Carey Act may contract for excess waters — distribution to individual users — restriction on impounded water — charges — maximum.*] That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works. [36 Stat. L. 925.]

The Carey Act of Aug. 18, 1904, is given in 6 Fed. Stat. Annot. 397.

SEC. 2. [*Co-operation with water users for reservoirs, etc. — title to works, etc. — limit of water allowed — right to control streams not affected.*] That in carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section six of said Act: *Provided further*, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, That nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State. [36 Stat. L. 926.]

SEC. 3. [*Moneys to be available for reclamation fund.*] That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation Act and the Acts amendatory thereof or supplementary thereto. [36 Stat. L. 926.]

An Act To amend an Act entitled "An Act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six.

[Act of Feb. 24, 1911, ch. 155.]

[*Reclamation Act — leases of surplus water power — terms, etc. — impairing irrigation projects prohibited — longer term on Rio Grande project.*] That section five of an Act entitled "An Act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six, be amended so as to read as follows:

"SEC. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further*, That the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the reclamation Act approved June seventeenth, nineteen hundred and two." [36 Stat. L. 930.]

For sec. 5 of the Act of April 16, 1906, hereby amended, see 1909 Supp. Fed. Stat. Annot.

WATERSHEDS.

See *TIMBER LANDS AND FOREST RESERVES.*

WHITE SLAVE TRAFFIC.

Act of June 25, 1910, Ch. 395, 419.

Sec. 1. White Slave Traffic Act—Application of Interstate and Foreign Commerce to Transportation, 419.

2. Transporting, etc., Females for Immoral Practices a Felony—Furnishing Tickets, etc., Included—Punishment, 419.

3. Inducing, etc., Transportation of Women for Immoral Purposes a Felony—Punishment, 420.

4. Inducing, etc., Interstate Transportation of Females under Eighteen for Immoral Practices a Felony—Punishment, 420.

5. Jurisdiction of Courts, 421.

6. Alien Prostitutes—Information Bureau Established—Authority of Commissioner-General of Immigration—Statements Required—Statements of Alien Inmates to Be Made by Keepers of Houses of Prostitution—Failure to File Statement a Misdemeanor—Punishment—Presumption if Statement Not on File—Immunity for Truthful Statements, 421.

7. Alaska, Insular Possessions, and Canal Zone Included in "Territory"—"Persons" Construed—Corporations, etc., Responsible for Agents, etc., 422.

8. Title, 422.

An Act To further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.

[*Act of June 25, 1910, ch. 395.*]

[**SEC. 1.**] [*White slave traffic Act—application of interstate and foreign commerce to transportation.*] That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia. [*36 Stat. L. 825.*]

SEC. 2. [*Transporting, etc., females for immoral practices a felony—furnishing tickets, etc., included—punishment.*] That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become

a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. [36 Stat. L. 825.]

Constitutionality of Act. — This Act is not unconstitutional as an attempted infringement of the police powers of the states, and is within the powers conferred on Congress by the commerce clause of the Constitution. *U. S. v. Westman*, (1910) 182 Fed. 1017; *U. S. v. Hoke*, (1911) 187 Fed. 992.

Indictment. — A count in an indictment under this Act for transporting women from one state to another for immoral purposes is not bad for duplicity because it charges the transportation of two women at the same time for the same purpose. *U. S. v. Westman*, (1910) 182 Fed. 1017.

SEC. 3. [*Inducing, etc., transportation of women for immoral purposes a felony — punishment.*] That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court. [36 Stat. L. 825.]

SEC. 4. [*Inducing, etc., interstate transportation of females under eighteen for immoral practices a felony — punishment.*] That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court. [36 Stat. L. 826.]

SEC. 5. [*Jurisdiction of courts.*] That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections. [36 Stat. L. 826.]

SEC. 6. [*Alien prostitutes — information bureau established — authority of Commissioner-General of Immigration — statements required — statements of alien inmates to be made by keepers of houses of prostitution — failure to file statement a misdemeanor — punishment — presumption if statement not on file — immunity for truthful statements.*] That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner-General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their declarations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner-General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner-General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail, within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner-General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality,

or parentage of any such alien woman or girl, or concerning her procurement to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner-General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section. [36 Stat. L. 826.]

SEC. 7. [*Alaska, insular possessions, and Canal Zone included in "Territory" — "persons" construed — corporations, etc., responsible for agents, etc.*] That the term "Territory," as used in this Act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself. [36 Stat. L. 827.]

SEC. 8. [*Title.*] That this Act shall be known and referred to as the "White-slave traffic Act." [36 Stat. L. 827.]

WIRELESS TELEGRAPHY.

See *SHIPPING AND NAVIGATION*.

WITNESSES.

See *EVIDENCE*.

WRITS OF ERROR.

See *JUDICIARY*.

SUPPLEMENTAL NOTES.



ALASKA.

Vol. I, p. 22, sec. 1.

Removal of seat of government.—The ownership and occupation by the United States of a court-house at Juneau, Alaska, by court officials, and the granting of permission by the judge of the first Alaskan judicial district to the governor and surveyor-general of Alaska to use two rooms of such building for offices, was held not to constitute such a compliance with the proviso in this Act as would authorize the Secretary of the Interior to order the removal of the seat of govern-

ment of Alaska from Sitka to Juneau. (1906) 25 Op. Atty.-Gen. 613.

But in (1906) 26 Op. Atty.-Gen. 3, it was held that the provision in the Act of June 22, 1906, 34 Stat. L. 416, appropriating \$5,000 for clerk hire, rent of office and quarters at Juneau, etc., superseded the legislation embraced in this Act to the extent that the Secretary of the Interior was authorized to direct the removal of the seat of government of Alaska from Sitka to Juneau.

Vol. I, p. 23, sec. 4.

Jurisdiction.—A prosecution for murder, pending at the time of the passage of the Act of March 3, 1899, 1 Fed. Stat. Annot. 303, establishing a criminal code and code of criminal procedure for Alaska, must, in view of the provision therein for the preservation of pending causes, be regarded as within the "general jurisdiction" in criminal cases conferred upon the District Court for the district of Alaska by this section, whether that court be one newly created by that Act, which

contains no provision for a transfer of pending causes, or be an existing tribunal continued thereby. *Bird v. U. S.*, (1902) 187 U. S. 118, 23 S. Ct. 42, 47 U. S. (L. ed.) 100.

Under this section it is held that the court in each division is given jurisdiction throughout the district and that an indictment returned in either division is not defective because it fails to charge that the offense was committed in that particular division. *Griggs v. U. S.*, (1908) 158 Fed. 572.

Vol. I, p. 24, sec. 6.

No presumption of regularity of decrees, judgments, etc.—*Sylvester v. Willson*, (1905) 2 Alaska 325.

Probate Court an inferior court of limited jurisdiction.—*Sylvester v. Willson*, (1905) 2 Alaska 325.

Vol. I, p. 30, sec. 15, proviso.

Recording location notice.—This section does not require, but merely permits, the recording of notices of mining locations, nor does it provide that the failure to record shall work a forfeiture of rights, and such forfeiture does not follow in the absence of a

well-established rule or custom of the miners of the district to that effect. *Sturtevant v. Vogel*, (1909) 167 Fed. 448.

Under this proviso, see also *Butler v. Good Enough Min. Co.*, (1901) 1 Alaska 246.

Vol. I, p. 30, sec. 16.

Under this section, see *Butler v. Good Enough Min. Co.*, (1901) 1 Alaska 246.

Vol. I, p. 37, sec. 7.

Construction adopted.—The congressional adoption of the Oregon laws for Alaska implied the adoption of their prior construction by the Oregon courts. *Nelson v. Meehan*, (1905) 2 Alaska 484.

For cases decided under this section, see

also *Mackay v. Fox*, (1903) 121 Fed. 487; *Ebner v. Heid*, (1903) 125 Fed. 680; *Griffin v. American Gold Min. Co.*, (1905) 136 Fed. 69; *Alaska Exploration Co. v. Northern Min., etc., Co.*, (1907) 152 Fed. 145; *Alaska Gold Min. Co. v. Ebner*, (1905) 2 Alaska 611.

Vol. I, p. 38, sec. 8.

The general land laws are not applicable to Alaska, though the government recognizes and sanctions the actual possession and use

of public land in Alaska by any Indian or other person as provided by this section. *Martin v. Burford*, (1910) 181 Fed. 922.

[Mining laws to apply.]

Section 2339 of Revised Statutes included by this section. — *McFarland v. Alaska Perseverance Min. Co.*, (1907) 3 Alaska 309.

[Persons in possession not to be disturbed, etc.]

"Future legislation." — In *McGrath v. Valentine*, (1909) 167 Fed. 473, it was held that as to land within the town site of Juneau, future legislation mentioned in this proviso was prescribed by Act of March 3, 1891, ch. 561, secs. 11-14, 28 Stat. L. 1099, 1100, 1 Fed. Stat. Annot. 53, 54, under which such town site was located, and which provided the manner in which occupants could obtain title and for the determination of possessory rights by the trustee.

Rights of settlers in Alaska. — No intention on the part of Congress to permit rights to public lands in Alaska to be initiated by a settlement made after the enactment of this Act can be gathered from the first proviso of this section, especially when considered with the last clause of the section that "nothing contained in this Act shall be construed to put in force in said district the general land laws," and with the provision of section 12 (1 Fed. Stat. Annot. 40), for the appointment of a commission to report the facts to enable Congress to determine what limitations or conditions should be imposed

when the land laws should be extended to the district. *Russian-American Packing Co. v. U. S.*, (1905) 199 U. S. 570, 28 S. Ct. 157, 50 U. S. (L. ed.) 314.

Possession acquired subsequent to Act. — The provision in this section that Indians or other persons shall not be disturbed in the possession of any lands "actually in their use or occupation or now claimed by them," refers only to possession held at the time of its passage, and does not protect possession acquired since. *Columbia Canning Co. v. Hampton*, (1908) 161 Fed. 60.

Tide lands. — The first proviso of this section applies to all lands, including tide lands, over which the federal government has exclusive jurisdiction and power of disposal, and protects possessory rights which were then exercised and claimed for fishing or other purposes by occupants of adjoining uplands against others who assert a common right to fish thereon. *Heckman v. Sutter*, (1904) 128 Fed. 394. See also *McCloskey v. Pacific Coast Co.*, (1908) 160 Fed. 794.

Vol. I, p. 45, sec. 2.

Railroad right of way—prior claims. — Where, prior to a survey, certain oil claims had been located on the public land in controversy in Alaska, such claims, if valid, withdrew the land from entry, so that a railroad company could not obtain a right of way over the same under this section. *Alaska Pac. R., etc., Co. v. Copper River, etc., R. Co.*, (1908) 160 Fed. 862.

Rights of riparian owner. — While the owner or locator of lands in Alaska which border on navigable or tidal waters has under the general law the right of access to such waters for the purpose of navigation, he has no right or title in the soil below high-water mark, and no right of possession which will

support an action against an intruder for interfering with or obstructing him in the erection and use of a structure upon the shore below such high-water mark, unless it prevents or obstructs his access to the navigable waters. *Columbia Canning Co. v. Hampton*, (1908) 161 Fed. 60.

Right of fishery. — An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishery in such waters, nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters, to the exclusion of others. *Columbia Canning Co. v. Hampton*, (1908) 161 Fed. 60.

Vol. I, p. 46, sec. 4.

Under this section, see *Steele v. Tanana Mines R. Co.*, (1905) 2 Alaska 451.

Vol. I, p. 47, sec. 5.

Validity of mortgages. — In *Washington Trust Co. v. Dunaway*, (1909) 169 Fed. 37, it appeared that the Council City & Solomon River Railroad Company, under its then corporate name, filed its preliminary map of location under this Act in 1903, and afterward commenced the actual construction of its road. In 1905 it executed a mortgage on all of its property then owned or to be thereafter acquired to secure bonds to be used for construction purposes, which mortgage was recorded as required by the Act. It had not at that time complied with the provision re-

quiring the filing of map and profile of definite survey, but the time for doing so and for completion of its road was afterward extended by special Act of Congress, with which it complied. It was held that having in view the purpose of the legislation to encourage the building of roads, the mortgage was within the scope of its provisions and constituted a valid lien on the company's property.

Under this section, see also *Steele v. Tanana Mines R. Co.*, (1905) 2 Alaska 451.

Vol. I, p. 49, sec. 6.

Record of mortgage.—The provision in this section regarding the recording of mortgages on railroads contemplates a mortgage on the road as an entirety, including right of way, roadbed, track, rolling stock, and appurtenant property, and the general provisions of the Alaska Code of June 6, 1900, secs. 314, 315 1 Fed Stat. Annot. 292, 293, requiring

chattel mortgages to be recorded in the precinct where the mortgagor resides and where the property is, and to be renewed each year, do not apply to such a railroad mortgage nor repeal the special provisions for its recording. *Washington Trust Co. v. Dunaway*, (1909) 169 Fed. 37.

Vol. I, p. 50, sec. 10. [*Roadway parallel to shore reserved.*]

Roadway through reserved lands.—This section refers to a roadway through the reserved land previously described, and not

other lands granted in fee under the homestead laws. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

Vol. I, p. 51, sec. 10. [*Time for filing adverse claim, etc.*]

Action maintainable in District Court.—*Gavigan v. Crary*, (1905) 2 Alaska 370.

Vol. I, p. 51, sec. 11.

Under this section, see *McQuillan v. Tanana Election Co.*, (1906) 3 Alaska 110.

Vol. I, p. 53, sec. 11.

Conclusiveness of trustee's decision.—Under this Act and regulations promulgated thereunder providing for the disposition of town site lots in Alaska, and authorizing the trial of conflicting claims before the trustee on notice with an appeal to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, the decision of the trustee is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding, except as the same may be reversed by the Commissioner of the General Land Office or the Secretary of the Interior. *Miller v. Margerie*, (1907) 149 Fed. 694. See also *McGrath v. Valentine*, (1909) 167 Fed. 473.

Abandonment of possession.—In *Gordon v. Ross-Higgins Co.*, (1908) 162 Fed. 637, it appeared that plaintiff staked out a lot in the mining camp of Fairbanks, Alaska, and built a log cabin thereon in which he resided for some three months, and then left and did not return for three years. He left some tools, a stove, etc., in the cabin, and asked two duerent persons to look after the property for him, but neither of them took possession of or occupied the same. No steps had been taken to locate a town site at Fairbanks, and there was no law under which titles were recorded, but books were kept for the benefit of settlers in which locations were recorded, and plaintiff's was recorded therein. About a year after he left, other persons located the lot

and went into possession, which was continuous thereafter; their rights having been subsequently acquired in good faith by defendants, who with their grantors had made valuable improvements on the property. It was held that plaintiff's acts amounted to an abandonment of the lot, and that he was not an occupant or in possession and had no right therein which could ripen into a title under the town site law at the time of its location by defendants' predecessor in interest, or which would support an action to recover the property from them.

Acquisition of town site title.—Under this and the three following sections the legal title to town lots can only be acquired from the town site trustee, and his decision on all questions of fact is conclusive, in the absence of fraud, unless reversed on appeal to the land department. *McGrath v. Valentine*, (1909) 167 Fed. 473.

Title mere possessory right.—The right of locators within an alleged town site, not shown to have been entered for that purpose, is at most a mere possessory right, with the privilege of regularly entering the town site in the future, if the citizens so desire, and is insufficient on which to base a suit to remove a cloud on title. *Ripinsky v. Hinchman*, (1910) 181 Fed. 786.

Under this section, see also *Foss v. Dam*, (1901) 1 Alaska 346.

Vol. I, p. 54, sec. 14.

Recovery for improvements.—The value of improvements made on public lands in Alaska by a mere trespasser, occupying the land without a shadow of title, cannot be recovered from the United States upon the selec-

tion of the land in question by the government, in accordance with this section, for a fish culture station. *Russian-American Packing Co. v. U. S.*, (1905) 199 U. S. 570, 26 S. Ct. 157, 50 U. S. (L. ed.) 314.

Termination of rights acquired by settlement and survey.—Any rights previously acquired under sections 12 and 13 of this Act, by settlement upon and survey of public lands in Alaska, were terminated by the proclamation of the President that the land in question was reserved for the purpose of establishing a fish culture station, in accordance with the declaration of this section that the

provisions of the last two preceding sections shall not be so construed as to warrant the sale of any lands belonging to the United States which shall be reserved for public purposes or selected for fish culture stations. *Russian-American Packing Co. v. U. S.*, (1905) 199 U. S. 570, 26 S. Ct. 157, 50 U. S. (L. ed.) 314.

Vol. I, p. 55, sec. 1.

Applicability of rules of federal equity court.—By the provisions of this section the rule of the federal courts in equity, requiring both the legal and equitable title to support a suit to quiet title, is not applicable. *Fulkerson v. Chisna Min., etc., Co.*, (1903) 122 Fed. 782.

Uniting causes of action.—In *Bruce v. Murray*, (1903) 123 Fed. 366, it was held that a cause of action at law could not be united

with a cause of action in equity, or either with one in admiralty, so that it was improper to unite a cause of action for foreclosure of a mortgage on a vessel with one to enforce liens for wages of seamen against the vessel.

Under this section, see also *Thompson v. Burk*, (1904) 2 Alaska 249; *Pacific Coast Co. v. Brown*, (1905) 2 Alaska 621.

Vol. I, p. 56, sec. 4.

Time adverse possession begins.—Adverse possession of a mining claim in the territory of Alaska, as against the locator or his successors in interest, cannot be instituted before the issuance of a patent therefor by the

United States. *Tyee Consol. Min. Co. v. Jennings*, (1905) 137 Fed. 863.

Under this section, see also *Tyee Consol. Min. Co. v. Langstedt*, (1902) 1 Alaska 439.

Vol. I, p. 56, sec. 6.

Nonresidents.—Where at the time a cause of action accrued the debtor was a nonresident of Alaska, but later removed thereto, it was held that the action was barred after six years from the time it accrued, notwithstanding

ing the law of the state where the debtor first lived suspended the statute of limitations of that state during a debtor's absence. *Murray v. Farrell*, (1905) 2 Alaska 360.

Vol. I, p. 57, sec. 17.

Under this section, see *Murray v. Farrell*, (1905) 2 Alaska 360.

Vol. I, p. 58, sec. 25.

The real party in interest, within the meaning of this section, is the person who will be entitled to the benefits of the action if successful; one who is actually and substantially interested in the subject-matter, as

different from one who has only a nominal, formal, or technical interest in or connection with it. *Dryden v. Sewell*, (1904) 2 Alaska 182.

Vol. I, p. 62, sec. 47.

Necessity for affirmative showing that property is attached.—In an application under this section for an order for substituted service of summons it is not necessary to

make an affirmative showing by affidavit that there has been any property attached. *Nowell v. International Trust Co.*, (1907) 3 Alaska 255.

Vol. I, p. 63, sec. 51.

Under this section, see *Shoup v. Sabin*, (1906) 3 Alaska 51.

Vol. I, p. 65, sec. 62.

Under this section, see *Kimball v. Miller*, (1901) 1 Alaska 347.

Vol. I, p. 65, sec. 64.

Construction.—The proper construction of this section is that the nominal or technical form of pleading shall be by answer, while those defenses shall only be joined which will create issues that may be properly tried together; and that answers in the nature of pleas in abatement should now, as formerly,

be pleaded and determined before the answer to the merits is interposed. *Elliott v. Kuzek*, (1905) 2 Alaska 587.

A claim to recover usurious interest cannot be set up as a counterclaim to an action upon the original debt. *Lorentzen v. Warner*, (1906) 3 Alaska 218.

Vol. I, p. 66, sec. 68.

Demurrer to answer.—Under this section it has been held that a general demurrer to an answer on the ground that it did not state facts sufficient to constitute a defense was erroneously sustained where the answer con-

sisted of two parts, the first of which denied the material allegations of the complaint, and the second pleaded a defense of new matter. *Heid v. Ebner*, (1904) 133 Fed. 156.

Vol. I, p. 66, sec. 69.

Sufficiency of reply.—A denial in a reply on information and belief of affirmative matter alleged in the answer is sufficient, under this section, to prevent a judgment on the

pleadings for want of a reply thereto. *Walton v. Wild Goose Min., etc., Co.*, (1903) 123 Fed. 209.

Vol. I, p. 66, sec. 70.

Under this section, see *Ebner v. Heid*, (1905) 2 Alaska 600.

Vol. I, p. 67, sec. 75.

Sufficiency of complaint in ejectment.—A complaint in ejectment which alleged an oral contract for the sale of the property by plaintiff to defendant, and that, in pursuance thereof, defendant entered into possession,

and ousted and ejected the plaintiff from the premises, sufficiently alleged a delivery of possession under this section. *Pacey v. McKinney*, (1903) 125 Fed. 675.

Vol. I, p. 68, sec. 84.

Uniting causes of action.—See under p. 55, sec. 1.

Vol. I, p. 68, sec. 84, cl. 5.

The true construction of this clause is that different causes of action for the recovery of real estate may be joined although some may seek to recover damages for withholding,

while others do not, and it requires only that these different causes be separately stated. *Kimball v. Miller*, (1901) 1 Alaska 347.

Vol. I, p. 69, sec. 92.

Substitution of new plaintiff.—This section does not allow an amendment that substitutes an entirely new party plaintiff. Thus where a suit was brought in the name of the Willamette Tent & Awning Co., the plaintiff was not allowed to amend by sub-

stituting the name of Henry Wemme, doing business in the name of the Willamette Tent & Awning Co. *Willamette Tent, etc., Co. v. West Coast Grocery Co.*, (1903) 2 Alaska 4.

Under this section, see also *Nowell v. Behrends*, (1908) 3 Alaska 495.

Vol. I, p. 70, sec. 93.

Setting aside nonsuit.—This section authorizes the court to set aside a nonsuit and reopen a case where the defendant has been surprised by some defect which he did not find out in time to remedy before the motion

for a nonsuit was granted. *Debney v. Iles*, (1907) 3 Alaska 438.

Under this section, see also *Banks v. Wilson*, (1901) 1 Alaska 241.

Vol. I, p. 72, sec. 100, cl. second.

Under this section, see *Alaska Commercial Co. v. Raymond*, (1901) 1 Alaska 154.

Vol. I, p. 78, sec. 135.

Under this section, see *Seattle First Nat. Bank v. Fish*, (1905) 2 Alaska 344.

Vol. I, p. 78, sec. 136.

Under this section, see *Whitehead v. N. Y., etc., Min. Co.*, (1901) 1 Alaska 245.

Vol. I, p. 78, sec. 137.

Conclusiveness of judgment in original action.—In an action on an attachment bond given under this section, conditioned, as therein provided, for the payment of "all costs that may be adjudged to the defendant and all damages that he may sustain by reason of the attachment if the same be wrongful or without sufficient cause," a judgment in favor of the defendant in the attachment suit is con-

clusive that the attachment was without sufficient cause, and of the liability of the obligors upon the bond. *Anvil Gold Min. Co. v. Hoxsie*, (1903) 125 Fed. 724.

The costs of the suit on the merits are not included in the attachment bond. *Elwell v. Seattle Scandinavian Fish Co.*, (1905) 2 Alaska 617.

Vol. I, p. 81, sec. 150.

Effect of bond.—A defendant in an attachment suit who gives the undertaking provided for by this section for the release of the attachment is not thereby estopped to maintain an action on the attachment bond to recover his costs and the damages he may

have sustained by reason of the attachment, if it is finally determined that plaintiff had no cause of action, although he may be held to have waived irregularities or defects in the attachment proceedings. *Anvil Gold Min. Co. v. Hoxsie*, (1903) 125 Fed. 724.

Vol. I, p. 81, sec. 151.

Under this section, see *Seattle First Nat. Bank v. Fish*, (1905) 2 Alaska 344.

Vol. I, p. 84, sec. 171.

Proviso unconstitutional.—Alaska was so incorporated into the United States by the treaty under which it was acquired and subsequent congressional legislation as to render repugnant to the United States Constitution,

6th Amendment, the provision of this section that in trials for misdemeanors in Alaska six jurors shall constitute a legal jury. *Rasmussen v. U. S.*, (1905) 197 U. S. 516, 25 S. Ct. 514, 49 U. S. (L. ed.) 862.

Vol. I, p. 87, sec. 187, cl. sixth.

Necessity for written charge.—A provision in this section that on request the charge of the court "shall be reduced to writing and given to the jury by the court as written, without any oral explanation," is to be reasonably construed with reference to the purpose intended to be secured thereby, and a

judgment will not be reversed because the court orally answered a question asked by the jury after they had retired, where it could not have prejudiced the plaintiff in error. *Walton v. Wild Goose Min., etc., Co.*, (1903) 123 Fed. 209.

Vol. I, p. 90, sec. 208.

Necessity for writing.—Where it appeared both in the bill of exceptions and in the judgment that a jury was waived by stipulation of the parties in open court, the Circuit Court of Appeals was not precluded from reviewing assignments of error relating to the admis-

sion or exclusion of evidence, because the waiver was not in writing and filed as provided by R. S. secs. 649, 700, 4 Fed. Stat. Annot. 393, 450. *Shields v. Mongollon Exploration Co.*, (1905) 137 Fed. 539.

Vol. I, p. 90, sec. 209.

A written opinion discussing the law and the facts is not to be taken as the formal findings of facts and conclusions of law re-

quired by this section. *Juneau Water Co. v. Jualpa Co.*, (1907) 3 Alaska 382.

Vol. I, p. 92, sec. 223.

Necessary delay.—A delay in settling and signing a bill of exceptions until after the expiration of the time fixed for filing the same as extended, caused by the inability of the court stenographer to make a transcript of his notes of the evidence and exceptions within the time so extended, is an extraordinary circumstance within an exception to the rule that a bill not presented within such time cannot be signed thereafter, so that, on such

facts appearing, it is the duty of the judge to sign and allow the bill. *Dalton v. Gunnison*, (1908) 165 Fed. 873.

"Signing."—The signature of the judge to orders allowing and settling bills of exceptions does not constitute a "signing" of the bills within this section. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

Under this section, see also *Chase v. Alaska Fish, etc., Co.*, (1903) 2 Alaska 82.

Vol. I, p. 93, sec. 226.

Under this section, see *Williams v. Alaska Commercial Co.*, (1903) 2 Alaska 43; *Marks v. Shoup*, (1903) 2 Alaska 66; *Barnette v. Free-*

man, (1904) 2 Alaska 286; *Runner v. Woltke*, (1905) 2 Alaska 469.

Vol. I, p. 93, sec. 228.

Applicable to both law and equity.—*Cascaden v. Dunbar*, (1909) 3 Alaska 671.
Time for filing.—See *Cascaden v. Dunbar*, (1909) 3 Alaska 671.

Vol. I, p. 93, sec. 229.

This section means that the motion for a new trial must be something beyond the mere repetition of statutory provisions or statutory language in a motion for a new trial. *Marks v. Shoup*, (1903) 2 Alaska 66.

Insufficiency of evidence.—A motion for a new trial on the ground of insufficiency of evidence should state wherein the evidence

is insufficient. *Williams v. Alaska Commercial Co.*, (1903) 2 Alaska 43.

Under this section, see also *Marks v. Shoup*, (1903) 2 Alaska 66; *Chase v. Alaska Fish, etc., Co.*, (1903) 2 Alaska 82; *Barnette v. Freeman*, (1904) 2 Alaska 286; *Runner v. Woltke*, (1905) 2 Alaska 469.

Vol. I, p. 111, sec. 301.

Under this section, see *Kimball v. Miller*, (1901) 1 Alaska 347.

Vol. I, p. 112, sec. 303.

Complaint.—Under this section the plaintiff is not required to state the nature of his estate in the property. *Brosnan v. White*, (1905) 136 Fed. 74.

Vol. I, p. 115, sec. 322.

Applicable to locator and owner of valid placer mining claim.—*McQuillan v. Tanana Electric Co.*, (1906) 3 Alaska 110.

Vol. I, p. 117, sec. 334.

Under this section, see *Krause v. Juneau*, (1905) 2 Alaska 633.

Vol. I, p. 119, sec. 340.

On a collateral proceeding a court of equity will not inquire into the validity of an election of a town officer, as this section affords an adequate remedy at law for challenging

the title of an officer to his seat, and until such a direct attack is successful the courts will sustain the acts of a *de facto* officer. *Monahan v. Lynch*, (1903) 2 Alaska 132.

Vol. I, p. 121, sec. 353.

Construction.—Under this section it is no defense to an action for wrongful death that the decedent left him surviving neither wife, children, nor family. *Jennings v. Alaska Treadwell Gold Min. Co.*, (1909) 170 Fed. 146.

Measure of damages.—Under this section the damages recoverable for wrongful death,

in the absence of wife or children, are the value of decedent's life to the estate, measured by his earning capacity, thriftiness, and probable length of life. *Jennings v. Alaska Treadwell Gold Min. Co.*, (1909) 170 Fed. 146.

Under this section, see also *Linge v. Alaska Treadwell Co.*, (1906) 3 Alaska 9.

Vol. I, p. 122, sec. 361.

Equitable defenses. — Where defendants pleaded an equitable title to an interest in a mining claim sought to be recovered in ejectment, and prayed reformation of a deed to plaintiff's prior grantor for mutual mistake,

the trial court's findings of fact on a jury being waived did not have the conclusive effect on appeal of a verdict of a jury. *Shields v. Mongollon Exploration Co.*, (1905) 137 Fed. 539.

Vol. I, p. 124, sec. 369.

Uniting causes of action. — See under p. 55, sec. 1.

Vol. I, p. 124, sec. 371.

Jury trial not a matter of right. — *Elbing v. Hastings*, (1906) 3 Alaska 125.

In an action to quiet title to a mine a jury trial may be demanded upon the question of title, ouster, and damages. *Seliner v. McKay*, (1905) 2 Alaska 564.

Nature of jury. — The jury provided for by this section is not a common-law jury for the trial of the issues in ejectment or any other fact at law. Nor is it the constitutional jury provided for by section 1, article 6, of the Constitution of the United States. *Elbing v. Hastings*, (1906) 3 Alaska 125.

Vol. I, p. 125, sec. 372.

A written opinion discussing the law and the facts is not to be taken as the formal findings of facts and conclusions of law required by this section. *Juneau Water Co. v. Jualpa Co.*, (1907) 3 Alaska 382.

Time of filing exceptions. — Under the provision in this section that exceptions prepared and settled shall be filed with the clerk with-

in ten days from the entering of the decree or such time as the court may allow, it was held that exceptions not filed with the clerk until more than six months after the entering of the decree, without an order extending the time, were nugatory. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

Vol. I, p. 125, sec. 378.

Absence of evidence on record. — Where an action was dismissed without prejudice for a failure of proof, and on appeal none of the evidence was contained in the record, it was held that the Circuit Court of Appeals could not say that the dismissal without prejudice was an abuse of the court's discretion. *Ebner v. Zimmerly*, (1902) 118 Fed. 818.

Dismissal for lack of proof. — A motion under this section by the defendant at the close of plaintiff's case, to dismiss a suit of

an equitable nature on the ground that plaintiff has failed to make a *prima facie* case, like a motion in an action at law for a nonsuit or direction of a verdict on the same ground, admits every fact which the evidence proves, or tends to prove, as well as the facts which may naturally and rationally be inferred from the facts proved. *Cook v. Klonos*, (1908) 164 Fed. 529, *modified* (1909) 168 Fed. 700.

Vol. I, p. 127, sec. 384.

Damages recoverable on bond. — In an action on an injunction bond given in a court in the territory of Alaska, attorney's fees expended in obtaining a dissolution of the in-

junction do not constitute a proper element of damage. *Lindeberg v. Howard*, (1906) 146 Fed. 467.

Vol. I, p. 127, sec. 386.

Under this section, see *Karl v. Pilkington*, (1904) 2 Alaska 191.

Vol. I, p. 131, sec. 404.

As to partition of mining claim, see *Boone v. Manley*, (1905) 2 Alaska 552.

Vol. I, p. 142, sec. 475.

Possessory title. — Under this section and R. S. sec. 910, 5 Fed. Stat. Annot. 35, which provides that no possessory action for the recovery of any mining title shall be affected by the fact that the paramount title to the land

is in the United States, but each case shall be adjudged by the law of possession, one in possession of a mining claim in Alaska under a valid location has such title as will support an action to quiet title against an adverse

claimant. *Fulkerson v. Chisna Min., etc., Co.*, (1903) 122 Fed. 782.

A plaintiff who was living in a tent on one of a number of adjoining mining claims owned by him, and had commenced the sinking of a shaft thereon, had sufficient possession to en-

title him to maintain a suit under Alaska Code of June 6, 1900, c. 786, 31 Stat. L. 321, against an adverse claimant of the ground. *Lange v. Robinson*, (1906) 148 Fed. 799.

Actual possession necessary. — *Delaney v. Kiernan*, (1906) 3 Alaska 191.

Vol. I, p. 147, sec. 504.

The portions of this section which authorize appeals direct to the Supreme Court have been revised and superseded by Judicial Code, sec. 247, *ante*, title JUDICIARY, p. 234 of this Supplement. As to review by the Circuit Court of Appeals the section is evidently superseded by Judicial Code, sec. 134, *ante*, p. 197 of this Supplement.

Filing judgment as prerequisite to appeal. — There is no provision in the Alaska Code requiring that a judgment shall be filed as a prerequisite to the perfecting of an appeal therefrom. *Mackay v. Fox*, (1903) 121 Fed. 487.

Appeals to Circuit Court of Appeals. — The appellate jurisdiction of the Circuit Court of Appeals for the Ninth Circuit over appeals and writs of error from the District Courts of Alaska is not ruled by Act of April 7, 1874, ch. 80; 18 Stat. L. 27, 4 Fed. Stat. Annot. 460, relating to appeals from judg-

ments and decrees of territorial courts, but by this section of the Alaska Code of Civil Procedure authorizing such appeals. *Shields v. Mongollon Exploration Co.*, (1905) 137 Fed. 539.

Amount in controversy. — In determining the appellate jurisdiction of the Circuit Court of Appeals the amount of the judgment from which the appeal or writ of error may be prosecuted, and not the amount originally involved in the suit, is the amount in controversy. *J. P. Jorgenson Co. v. Rapp*, (1907) 157 Fed. 732, 85 C. C. A. 364. See note to section 507 of the Alaska Code, *infra*.

Mode of review. — Under this section and section 508, it was held that the Ninth Circuit Court of Appeals had jurisdiction to review a decree in an action to recover an interest in a mining claim tried to the court by writ of error. *Shields v. Mongollon Exploration Co.*, (1905) 137 Fed. 539.

Vol. I, p. 148, sec. 506.

Under this section, see *Woods v. Beaton*, (1901) 1 Alaska 344.

Vol. I, p. 148, sec. 507.

This section and section 7 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. L. 828, 4 Fed. Stat. Annot. 423, note, "are in accord and should be read *in pari materia*. . . . The purpose of Congress in this legislation has been to enlarge and not to restrict the jurisdiction of the Circuit Court of Appeals with respect to interlocutory injunctions. . . . It is plain that the jurisdiction of the Circuit Court of Appeals on appeal from an interlocutory order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, under section 507 of the Alaska Code, is not limited by the provisions of section 504 of that Code

respecting appeals from final judgments or orders of the District Court." The limitation of five hundred dollars does not apply to section 507. *J. P. Jorgenson Co. v. Rapp*, (1907) 157 Fed. 732, 85 C. C. A. 364.

Supersedeas. — The inherent power of the Circuit Court of Appeals to grant a supersedeas on appeal from an order appointing a receiver is not interfered with by this section. *In re McKenzie*, (1901) 180 U. S. 536, 21 S. Ct. 468, 45 U. S. (L. ed.) 657, holding also that a writ of supersedeas issued by the clerk of a Circuit Court of Appeals is not void because its issue was directed by a judge of the court, and not by the court as a court.

Vol. I, p. 148, sec. 508.

A judgment in a case tried without a jury is reviewable by a writ of error under this section, instead of by appeal, and is not governed in that regard by the Act of April 7,

1874, ch. 80, sec. 2, 18 Stat. L. 27, 4 Fed. Stat. Annot. 460. *Shields v. Mongollon Exploration Co.*, (1905) 137 Fed. 539.

Vol. I, p. 155, sec. 554.

A citizen is "beneficially interested" and is entitled to be a relator in a mandamus action where the object of the writ is to en-

force the performance of a public duty. *Brand v. Nome*, (1906) 3 Alaska 29.

Vol. I, p. 160, sec. 581.

Under this section, see *In re Burkell*, (1903) 2 Alaska 108.

Vol. I, p. 160, sec. 583.

Under this section, see *In re Burkell*, (1903) 2 Alaska 108.

Vol. I, p. 164, sec. 609.

An attorney is guilty of contempt who wrongfully, corruptly, and in a spirit of resistance counsels a client to disobey a proper

subpoena. *U. S. v. Pratt*, (1907) 3 Alaska 400.

Under this section, see also *U. S. v. Price*, (1901) 1 Alaska 204.

Vol. I, p. 165, sec. 610.

Provisions penal.—While the provisions limiting the jurisdiction of the courts of Alaska to punish for contempt of their authority and fixing the penalty therefor are found in this section of the Code of Civil

Procedure, they are penal in their nature and the practice in relation thereto should be governed by the Criminal Code. *U. S. v. Richards*, (1902) 1 Alaska 613.

Vol. I, p. 175, sec. 673, cl. fourth.

Under this section, see *Copper River Min. Co. v. McClellan*, (1903) 2 Alaska 134.

Vol. I, p. 176, sec. 682.

Under this section, see *Steen v. Wild Goose Min. Co.*, (1901) 1 Alaska 255; *Price v. McIntosh*, (1901) 1 Alaska 286; *Nodine v. Han-*

num, (1901) 1 Alaska 302; *U. S. v. Yakutat, etc., R. Co.*, (1905) 2 Alaska 628.

Vol. I, p. 183, sec. 724.

Form of taking testimony.—Under the Code of Alaska, an order of reference need not require that the witnesses who testify

before the referee shall read over and subscribe their testimony. *Copper River Min. Co. v. McClellan*, (1905) 138 Fed. 333.

Vol. I, p. 188, sec. 751.

Under this section, see *Nodine v. Hannum*, (1901) 1 Alaska 302.

Vol. I, p. 188, sec. 753.

Must be suit pending.—*Decker v. Berner's Bay Min. Co.*, (1907) 3 Alaska 230.

Vol. I, p. 190, sec. 763.

Supervision of District Court appellate only.—*Decker v. Decker*, (1906) 3 Alaska 121.

Vol. I, p. 191, sec. 765.

Jury trial.—Under this section and section 371, 1 Fed. Stat. Annot. 124, providing that, except as otherwise provided, both issues of law and fact shall be tried by the court unless referred, a contestant of a claim against a decedent's estate in proceedings to establish the same in a District Court sitting in

probate is not entitled to a jury trial under the Constitution, Seventh Amendment, providing that in suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, as it is not a suit at common law. *Esterly v. Runa*, (1903) 122 Fed. 609.

Vol. I, p. 195, sec. 783.

Under this section, see *Sylvester v. Willson*, (1905) 2 Alaska 325.

Vol. I, p. 199, sec. 809.

Under this section, see *In re McCarty*, (1907) 3 Alaska 242.

Vol. I, p. 202, sec. 823.

Jurisdiction to determine claim involving accounting.—It has been held that the District Court had jurisdiction to determine a claim by a surviving partner against the estate of his deceased partner which involved an accounting of partnership affairs. *Esterly v. Rua*, (1903) 122 Fed. 609.

Jury trial.—This section does not entitle either party to a jury trial of a proceeding in a District Court to establish a claim after it has been rejected by the administrator *Esterly v. Rua*, (1903) 122 Fed. 609.

Under this section, see also *In re Gladough* (1902) 1 Alaska 649.

Vol. I, p. 214, sec. 895.

Effect of Act of Jan. 27, 1905.—This section is not modified, amended, or repealed by the Act of Jan. 27, 1905, ch. 277, sec. 8, 23

Stat. L. 616, 10 Fed. Stat. Annot. 20. *White v. Martin*, (1905) 2 Alaska 471.

Vol. I, p. 216, sec. 905.

Duty of giving notice imposed on probate judge.—*In re Corcoran*, (1907) 3 Alaska 263.

Vol. I, p. 224, sec. 962.

Necessity for filing proofs.—This section does not require the defendant to file a formal answer; it expressly excuses him from

so doing; but it does require that he file his proofs. *Everton v. Smith*, (1902) 1 Alaska 422.

Vol. I, p. 229, sec. 995.

Under this section, see *Everton v. Smith*, (1902) 1 Alaska 422.

Vol. I, p. 229, sec. 996.

Under this section, see *Weitzman v. Handy*, (1902) 1 Alaska 658.

Vol. I, p. 229, sec. 997.

Under this section, see *Weitzman v. Handy*, (1902) 1 Alaska 658.

Vol. I, p. 231, sec. 1012.

Under this section, see *Everton v. Smith*, (1902) 1 Alaska 422.

Vol. I, p. 232, sec. 1015.

Under this section, see *Steil v. Dessmore*, (1907) 3 Alaska 392.

Vol. I, p. 235, sec. 1042.

Sufficiency of answer.—An allegation in an answer in an action in ejectment that defendant and his grantors had been for more than twenty years "in the actual, open, notorious, and exclusive possession" of the premises is not sufficient to raise the issue of adverse possession under this section, even with the

additional allegation that defendant and his grantors were the actual owners during said time. *McGrath v. Valentine*, (1909) 167 Fed. 473.

Under this section, see also *Tyee Consol. Min. Co. v. Langstedt*, (1905) 136 Fed. 124.

Vol. I, p. 236, sec. 1044, cl. (6) and (7).

Sale of partnership real estate.—See *Runner v. Woltke*, (1905) 2 Alaska 391.

Vol. I, p. 236, sec. 1046.

Sale of partnership real estate.—See *Runner v. Woltke*, (1905) 2 Alaska 391.
Under this section, see also *Williams v. Jualpa Co.*, (1906) 3 Alaska 222.

Vol. I, p. 237, sec. 1.

Authority to abolish precincts. — In *Cheney v. Alaska Treadwell Gold Min. Co.*, (1906) 148 Fed. 808, it appeared that pursuant to the provision of this section six precincts, including Douglas Island and Juneau precincts, were established in the first division, and a commissioner appointed in each. Subsequently an order was entered by the judge of the division, abolishing Douglas Island precinct, and providing that the territory embraced therein should become a part of the Juneau precinct. It also accepted the resignation of the commissioner and directed him to "deliver the records and property pertaining to his office" to the commissioner of the

Juneau precinct. It was held that the effect of such order was to extend the limits of Juneau precinct, to constitute the commissioner thereof the successor in office of the former commissioner of Douglas Island precinct, and to transfer to him all the pending probate cases in said precinct, with power to proceed therein; that an order thereafter made by him removing an administrator appointed by the commissioner of Douglas Island precinct and appointing a new administrator of the estate was within his jurisdiction and valid.

Under this section, see also *Linge v. Alaska Treadwell Co.*, (1906) 3 Alaska 2.

Vol. I, p. 242, sec. 36.

Under this section, see *Bechtol v. Bechtol*, (1905) 2 Alaska 397.

Vol. I, p. 245, sec. 62.

Under this section, see *Binswanger v. Henninger*, (1902) 1 Alaska 509; *Johnson v. Berger*, (1906) 3 Alaska 151.

Vol. I, p. 248, sec. 82.

Competency of witnesses. — The witnesses required by this section need not be disinterested persons; the ancient rules so requiring being based on the fact that, under the law at that time, interested persons were not competent to testify in court to such execution in case of any controversy respecting it, which law has been generally abrogated, and is not in force in Alaska. Thus an assignment of a lease of mining property in Alaska, required by Code Civ. Proc. Alaska, sec. 1046, 31 Stat. L. 493, 1 Fed. Stat. Annot. 236, to be executed with the formality of a deed, is not invalid because the subscribing witnesses

thereto were members of the partnership which was the assignee. *Halla v. Cowden*, (1909) 170 Fed. 559.

Necessity of attestation as between parties. — The requirement of this section that deeds of lands or any interest in lands executed within the district shall be executed in the presence of two witnesses, who shall subscribe the same as such, does not make such attestation necessary to the validity of the deed as between the parties, but is a formality necessary to entitle the deed to record. *Eadie v. Chambers*, (1909) 172 Fed. 73.

Vol. I, p. 250, sec. 98.

"Conveyance." — Under Civ. Code Alaska, sec. 181, 1 Fed. Stat. Annot. 262, which defines "real property" as including "all lands, tenements, and hereditaments, and rights thereto, and all interests therein, whether in fee simple or for the life of another," a lease of a mining claim for years conveys a chattel interest only and not an interest in the land, and is not a "conveyance" within the meaning of this section, the recording of which

will protect the lessee against a prior unrecorded deed; nor is such lessee an innocent purchaser in good faith for a valuable consideration within such section, where he is to work the claim and pay the lessor a royalty. *Eadie v. Chambers*, (1909) 172 Fed. 73.

Applicable to mortgages as well as deeds. — *Nestor v. Holt*, (1902) 1 Alaska 567.

Under this section, see also *Crossly v. Champion Min. Co.*, (1901) 1 Alaska 391.

Vol. I, p. 259, sec. 168.

Under this section, see *Binswanger v. Henninger*, (1902) 1 Alaska 509.

Vol. I, p. 261, sec. 169, cl. (4).

Gold dust received by the administrator from the lessees of a mine owned by the wife at her death is personal property within this

clause of section 169. *In re McCarty*, (1907) 3 Alaska 242.

Vol. I, p. 266, sec. 197.

Title of section misleading.—This section is, despite the title, a classification of foreign bills of exchange for the purpose of fixing damages where the bills are drawn on a person in some state or territory of the United States. The damages in this class of bills are fixed at a less sum than in the class given in section 196, for the reason that the rates of exchange and the expenses and cost of collection are less between the states than they would be between foreign countries.

The mere fact that the compiler of the code has denominated the bills in section 196 as "foreign," and those in section 197 as "inland," in no way makes them such. These are merely arbitrary titles, given by the compiler or editor, which the text of the law does not warrant. This code in no way changes the distinctions or definitions of the law merchant regarding foreign and inland bills of exchange. *Miller v. American Gold Min. Co.*, (1906) 3 Alaska 1.

Vol. I, p. 267, sec. 200.

Councilmen elected at large.—All members of the common council must be elected at large by all the electors of the town. *Bates v. Nome*, (1901) 1 Alaska 208.

Filling vacancies in office of councilman.—The provision in this section that a council-

man shall hold office for one year or until his successor is elected or qualified, clearly excludes any power on the part of the common council to fill vacancies in the council except by an election. *Bates v. Nome*, (1901) 1 Alaska 208.

Vol. I, p. 267, sec. 201.

No power to establish municipal courts.—*In re Munro*, (1901) 1 Alaska 279.
Under this section, see also *Macintosh v. Nome*, (1902) 1 Alaska 492.

Vol. I, p. 267, sec. 201, cl. fourth.

Duty to maintain sidewalks.—Under this clause it has been held that a municipality in Alaska was liable for injuries caused by its

negligence in failing to keep sidewalks in repair. *Krause v. Juneau*, (1905) 2 Alaska 633.

Vol. I, p. 268, sec. 202.

Under this section, see *Chambers v. Solner*, (1901) 1 Alaska 271; *Brace v. Solner*, (1901) 1 Alaska 361.

Vol. I, p. 268, sec. 203.

The word "provided," as used at the beginning of the first proviso of this section is used with the ordinary meaning of "but" or "and." *Brace v. Solner*, (1901) 1 Alaska 361.

Under this section, see *Chambers v. Solner*, (1901) 1 Alaska 271; *Brace v. Solner*, (1901) 1 Alaska 361.

Vol. I, p. 269, sec. 204, cl. (3).

The words "roads, streets, and alleys," as used in this clause, are used independently as within the possible uses defined by the statute, and relate to properties clearly made the subject of condemnation without further legislation of Congress. The words "which may be authorized by Congress or other legis-

lative authority of the district" qualify and limit the words "and all other public uses for the benefit," etc., but do not relate to roads, streets, and alleys, or the public uses just before specified and enumerated. *Ashby v. Juneau*, (1910) 174 Fed. 737.

Vol. I, p. 269, sec. 204, cl. (4).

Public use.—Under this and the following clause it was held that a corporation organized for the purpose of working mines and maintaining an artificial waterway had power to condemn a right of way for the purpose

of carrying water to work mining claims owned by it, claims owned by others, and for private and public uses. *Miocene Ditch Co. v. Jacobsen*, (1906) 140 Fed. 680.

Vol. I, p. 269, sec. 204, cl. (5).

Eminent domain by domesticated foreign corporations.—It has been held that a domesticated foreign corporation organized under the laws of California was entitled to ex-

ercise the right of eminent domain in Alaska to acquire land for a public pipe line to supply water for mining. *Miocene Ditch Co. v. Lyng*, (1905) 138 Fed. 544.

Vol. I, p. 270, sec. 207.

Appeal.—Under this section a party may appeal from findings made in condemnation proceedings, and an order of condemnation

based thereon, without waiting for the assessment of damages. *Van Dyke v. Midnight Sun Min., etc., Co.*, (1910) 177 Fed. 85.

Vol. I, p. 275, sec. 225.

A suit to collect a note is not "doing business" within the meaning of this section. *Seattle First Nat. Bank v. Fish*, (1906) 2 Alaska 345.

Who Is Agent.—See *American Gold Min. Co. v. Giant Powder Co.*, (1902) 1 Alaska 664.

Vol. I, p. 276, sec. 228.

Under this section, see *Ames v. Kruzner*, (1902) 1 Alaska 598.

Vol. I, p. 276, sec. 231.

Under this section, see *Ames v. Kruzner*, (1902) 1 Alaska 598.

Vol. I, p. 281, sec. 255.

Construction.—This section has been construed to limit the contract rate to twelve per cent. "per annum." *Hemple v. Raymond*, (1906) 144 Fed. 796.

Vol. I, p. 281, sec. 257.

Construction.—The phrase "double the amount of the interest so received or collected," as used in this section, should not be construed as referring to and qualifying the words "usurious interest," so as to authorize judgment only for double the amount of the excess of the interest above the statutory rate, but that the section authorized re-

covery of twice the entire interest paid. *Hemple v. Raymond*, (1906) 144 Fed. 796. See also *Fish v. Hemple*, (1903) 2 Alaska 175.

Before an action may be maintained under this provision of the Alaska Code, the debtor must have actually paid an amount in excess of the principal and legal interest. *Werner v. Lorentzen*, (1907) 3 Alaska 275.

Vol. I, p. 281, sec. 258.

Contract before Act passed—action afterwards.—The Oregon interest statutes, in force in Alaska from 1884 to 1900, limited the rate of interest which might be lawfully contracted for to ten per cent., and provided that contracts by which a higher rate was reserved should be usurious, and the entire debt should be forfeited. *Hill's Ann. Laws Ore.* 1892, secs. 3587-3590. Sections 255-259 of the Alaska Code contain similar provisions,

except that the contract rate may be twelve per cent., and the penalty for usury is the forfeiture of the interest only. It has been held that a mortgage executed in Alaska in 1898, securing notes in which interest at the rate of twelve per cent. was reserved, on which suit was there brought in 1903, was not subject to the defense of usury. *Petterson v. Berry*, (1903) 125 Fed. 902.

Vol. I, p. 282, sec. 262.

Construction.—This section and sections 265 and 266, providing for and authorizing the foreclosure of mechanics' liens, should be liberally construed, but such lien, being of purely statutory creation, can be established only by a substantial compliance with the statute. *Russell v. Hayner*, (1904) 130 Fed. 90; *Jorgensen Co. v. Sheldon*, (1905) 2 Alaska 607.

Labor done upon claim.—Work done in cleaning up and washing gold taken from a mining claim is "labor done upon the claim," for which the workmen are entitled to a lien under this section. *Cascaden v. Wimbish*, (1908) 161 Fed. 241.

Nature of work.—Where men were hired

to work in making improvements on a mining claim at a certain sum per day and their board, one who devoted a part of his time to cooking for himself and the others was held to be entitled equally with the others to a mechanic's lien for his wages. *Cascaden v. Wimbish*, (1908) 161 Fed. 241.

Work done for lessee of mining claim.—The lien given by this section and sections 263 and 265, construed together, extends to and binds the interest of the owner of a mining claim for improvements made thereon under direction of a lessee with the owner's knowledge and in the absence of any disclaimer of responsibility by him. *Cascaden v. Wimbish*, (1908) 161 Fed. 241.

Complaint — Statement of owner's name. — This section provides that every builder shall have a lien on a building erected or material furnished or labor performed thereon at the instance of the owner of the building, etc., and section 266 makes it the duty of every original contractor within a specified time to file with the recorder a claim, with the name of the owner or reputed owner, if known. It has been held that a statement of a lien, and a complaint to foreclose the same, which failed to state the name of the owner of the building, or to state that the name of the owner was unknown, was insufficient, though it stated the name of the holder of the legal

title to the land, and the name of a vendee at whose instance the building was erected. *Russell v. Hayner*, (1904) 130 Fed. 90.

At instance of owner. — In order to establish a mechanic's lien under this section it must be alleged and proved that the work or labor was done "at the instance of the owner of the building or his agent;" a mere allegation that plaintiffs erected the structure at the instance of one who was in possession of the land under a contract to purchase with the owners being insufficient. *Russell v. Hayner*, (1904) 130 Fed. 90.

Under this section, see also *Morris v. Marsh*, (1906) 3 Alaska 140.

Vol. I, p. 283, sec. 264.

Under this section, see *Copper River Lumber Co. v. Clark*, (1909) 3 Alaska 635.

Vol. I, p. 283, sec. 265.

Knowledge of owner. — A mechanic's lien cannot be established under this section where it does not appear from the complaint that the owners of the lot on which the building was erected had any knowledge of the contract made by the person in possession, under a contract of purchase, with the contract-

ors, for the construction of a building, or that the building was constructed at the instance of such owners. *Russell v. Hayner*, (1904) 130 Fed. 90.

Under this section, see also *Morris v. Marsh*, (1906) 3 Alaska 140; *Wimbish v. Cascaden*, (1906) 3 Alaska 147.

Vol. I, p. 284, sec. 268.

Necessary parties. — In a suit against the owner of a mining claim to establish a laborer's lien thereon for work done at the instance of lessees, such lessees are not necessary parties, and it is within the discretion of the court to refuse to permit the filing of

an amended answer setting up their non-joinder as a defense, after the case is ready for trial and after such lessees have left the jurisdiction of the court. *Cascaden v. Wimbish*, (1908) 161 Fed. 241.

Vol. I, p. 284, sec. 269.

Under this section, see *Nome v. Lang*, (1902) 1 Alaska 593.

Vol. I, p. 284, sec. 270.

Attorney's fees. — The provision in this section authorizing the court to allow the plaintiff a reasonable attorney's fee on entry of

judgment foreclosing a mechanic's or laborer's lien is constitutional and valid. *Cascaden v. Wimbish*, (1908) 161 Fed. 241.

Vol. I, p. 302, sec. 367.

The term "common law," as used in this section, means both the common law of England, as opposed to written or statute law, and the statutes passed before the immigra-

tion of the first settlers to America. *Valentine v. Roberts*, (1902) 1 Alaska 536. See also *In re Burkell*, (1903) 2 Alaska 106.

Vol. I, p. 302, sec. 368.

Cases pending in United States Supreme Court. — The saving clause in this section preserved the right of all plaintiffs who had commenced actions in the District Court for Alaska to prosecute such actions to final judgment under the law which was in force at the time of the passage of the Act or under the provisions of such Act, and such right was not lost because at the time the Act took effect an action was pending in the Su-

preme Court of the United States into which it had been removed from the District Court for Alaska by writ of error. *Shoup v. Marks*, (1904) 128 Fed. 32.

Oregon corporation law. — This section did not repeal the Oregon corporation laws in force in Alaska by operation of Act of May 17, 1884, ch. 53, sec. 7, 23 Stat. L. 25, 1 Fed. Stat. Annot. 37. *Alaska Gold Min. Co. v. Ebner*, (1905) 2 Alaska 611.

Vol. I, p. 309, sec. 41.

A dog is a subject of larceny under this section. *In re Burkell*, (1903) 2 Alaska 108.

Vol. I, p. 324, sec. 119.

Sufficiency of complaint.—Under this section a complaint charging the offense of adultery must aver that the accused was married

at the date of its alleged commission. *Cartier v. U. S.*, (1906) 148 Fed. 804.

Vol. I, p. 325, sec. 127.

Jurisdiction of offenses.—See under vol. 10, p. 17, sec. 4, cl. 10.

Vol. I, p. 329, sec. 152.

Jurisdiction of offense.—An ordinance prohibiting gambling and prescribing punishment for the same, enacted by a town of Alaska under authority conferred by Act April 28, 1904, ch. 1778, 33 Stat. L. 529, 10 Fed. Stat. Annot. 17, does not deprive the District Courts

of jurisdiction of a prosecution for gambling within the limits of the town, instituted under the Penal Code of the district, which makes the same a criminal offense. *Hornstein v. U. S.*, (1907) 155 Fed. 48.

Vol. I, p. 336, sec. 180.

Misdemeanor.—The offense described by this section is a misdemeanor, not a felony. *U. S. v. Doo-Noch-Keen*, (1905) 2 Alaska 628,

overruling on this point *U. S. v. Alaska Packers' Assoc.*, (1901) 1 Alaska 217.

Criminal intent not necessary.—*U. S. v. Doo-Noch-Keen*, (1905) 2 Alaska 624.

Vol. I, p. 341, sec. 218.

The term "common law."—See under p. 302, sec. 367.

Vol. I, p. 344, sec. 13.

No jurisdiction to inquire into crimes committed in another judicial district.—*U. S. v. Beasley*, (1903) 2 Alaska 93.

Vol. I, p. 348, sec. 45.

Allegation of ownership of money obtained by false pretenses.—Under this section and sections 49 and 50 of this Act, which require defects in form in indictments that do not tend to prejudice the substantial rights of the defendant to be disregarded, an indictment for obtaining money by false pretenses is sufficient although it does not state the own-

ership of the money by direct allegation, if facts are alleged which sufficiently show the ownership, as where it alleges that the false pretenses were made with intent to defraud a person named of a certain sum of money, and that, by relying thereon, he paid such sum to defendants. *Griggs v. U. S.*, (1906) 158 Fed. 572.

Vol. I, p. 353, sec. 85.

Under this section, see *U. S. v. Manthei*, (1905) 2 Alaska 459.

Vol. I, p. 359, sec. 127.

Opinion founded on testimony.—Under the provision of this section that an opinion upon the merits of the case, formed or expressed by a juror "from what he may have heard or read," shall not disqualify him unless the court is satisfied that he cannot disregard such opinion and try the case impartially, the source of the information from which a juror's opinion is derived is an important consideration, and a challenge for

bias should be allowed against a juror who has formed or expressed an opinion as to the guilt or innocence of a defendant charged with crime, based upon the testimony of witnesses sworn in court bearing directly on the issue to be tried, notwithstanding his declaration under oath that he could try the case fairly and impartially. *Dolan v. U. S.*, (1903) 123 Fed. 62.

Vol. I, p. 370, sec. 202.

In *Carter v. U. S.*, (1906) 148 Fed. 804, 78 C. C. A. 494, it was said that this section adopts for criminal actions the provision in section 5 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 398, authorizing appeals direct to the Supreme Court "in any case in which the jurisdiction of the court is

in issue." But see now Judicial Code, sec. 247, *ante*, title JUDICIAL, p. 234 of this Supplement, in connection with Judicial Code, sec. 134, *ante*, p. 197, the latter section vesting appellate jurisdiction in the Circuit Court of Appeals "in all criminal cases."

Vol. I, p. 376, sec. 237.

Under this section, see *U. S. v. Manthei*, (1905) 2 Alaska 459.

Vol. I, p. 401, sec. 430.

Costs of summoning jurors, and the jurors' fees and mileage, are taxable against a convicted defendant as "costs" under this section. *U. S. v. Madigan*, (1906) 3 Alaska 72.

Vol. I, p. 403, sec. 442.

Sufficiency of notice. — The notice required by this section should describe either the class or the species of crime of which the

defendant was convicted. *U. S. v. Larsen*, (1905) 2 Alaska 577.

Vol. I, p. 403, sec. 443.

Sufficiency of undertaking. — See *U. S. v. Rice*, (1902) 1 Alaska 676; *U. S. v. Sheep Creek John*, (1902) 1 Alaska 682.

Vol. I, p. 403, sec. 445.

Sufficiency of proceedings for appeal. — In *Cartier v. U. S.*, (1906) 148 Fed. 804, the proceedings taken by a defendant convicted of a criminal offense before a commissioner in

Alaska, as *ex officio* justice of the peace, for perfecting an appeal, were held to be sufficient and to require the District Court to try the cause anew.

Vol. I, p. 404, sec. 451.

Under this section, see *U. S. v. Rice*, (1902) 1 Alaska 676.

Vol. I, p. 406, sec. 460.

This section is constitutional. — *U. S. v. Binns*, (1902) 1 Alaska 553; *In re Johnson*, (1902) 1 Alaska 630.

Uniformity in taxation. — License fees imposed on certain lines of business by this section are not "excises" levied "to pay the debts and provide for the common defense and general welfare," which, under U. S. Const., art. I, sec. 8, must be uniform throughout the United States, although the proceeds are, by section 463 of this Act, to be paid into the treasury of the United States, and are not specifically appropriated to the expenses of the territory; but such fees must be deemed local taxes, imposed under the plenary power of Congress over the territories, for the purpose of defraying the expense of the territorial government, where the total sum derived from these and all other revenues of the territory does not equal the cost of maintaining such government. *Binns v. U. S.*, (1904) 194 U. S. 486, 24 S. Ct. 816, 48 U. S. (L. ed., 1087.

"Freight handled." — In *John J. Sesnon Co. v. U. S.*, (1910) 182 Fed. 573, it appeared that

the defendant maintained a wharf structure at Nome, and was also engaged in the sale of coal for the joint account of itself and the seller. The defendant guaranteed the seller's advances in a sufficient sum to realize a net profit of fifty cents a ton on the coal sold and a further interest in the net proceeds of the sale of the coal and the profit in excess of fifty cents a ton; defendant regulating the selling price of the coal. It was held that coal handled under such contract from vessels by means of defendant's wharf structure constituted "freight handled," within this section, requiring persons maintaining public docks, wharves, and warehouses in Alaska to pay a license fee of ten cents per ton on freight handled or stored.

"Public wharf." — In *John J. Sesnon Co. v. U. S.*, *supra*, it appeared that the defendant operated a lighterage business in Nome, consisting of an aerial tramway operated from towers anchored on permanent concrete foundations several hundred feet out to sea. Along this tramway cargoes were discharged from vessels by means of lighters; defendant

contracting with each vessel for lighterage services at an agreed price per ton. It was held that such structure constituted a "public wharf," which defendant had no right to operate without payment of the fee.

"Meat market."—The term "meat market," as used in this section, refers only to what is commonly known as a "butcher

shop" or a place where meats are cut in small quantities and sold to individual customers. It does not include a cold storage plant nor does it cover general sales of meat in bulk to other meat markets. *In re Pacific Cold Storage Co.*, (1902) 1 Alaska 429.

As to refund of license money, see *In re Hills Bottling License*, (1902) 1 Alaska 436.

Vol. I, p. 408, sec. 461.

This section is constitutional. — *In re Johnson*, (1902) 1 Alaska 630.

Vol. I, p. 411, sec. 468.

Under this section, see *U. S. v. Powers*, (1901) 1 Alaska 180.

Vol. I, p. 412, sec. 474.

Choice of manner of prosecution. — Under section 474, the district attorney or the marshal has the power to say whether or not the commissioner shall take jurisdiction of that particular crime, and, if that power is exercised by electing to prosecute through the grand jury, he has the right to all the machinery of the law to aid him, and the commissioner should, when such election has been

made, act in accordance therewith. *Decker v. Pacific Coast Steamship Co.*, (1906) 3 Alaska 230.

Only misdemeanors may be prosecuted by information. Felonies must be prosecuted by indictment. *U. S. v. Powers*, (1901) 1 Alaska 180.

Verification unnecessary. — *U. S. v. John J. Senon Co.*, (1908) 3 Alaska 595.

Vol. X, p. 6, sec. 2.

Construction. — To be an inhabitant of the district for two years immediately prior to the date of the commencement of the action, within the meaning of this amended section, means that the plaintiff had his domicile and fixed abiding place therein for the whole of the two calendar years preceding that date. It does not necessarily mean that he was actually and personally present in the territory during the whole time, but that it was his recognized home, domicile, or place of residence, and that he had during that period no other established home, domicile, or abiding place outside of the district at which he per-

manently remained with his family. *Terrill v. Terrill*, (1906) 2 Alaska 475.

Residence. — Not only must it affirmatively appear from the pleading and the proofs that the plaintiff was an inhabitant at the time of commencing his action for divorce, and for two years prior thereto, but it must as clearly appear that he had a residence within the territory for the two years prior thereto. Residence means a place of abode, and within the meaning of this statute it is the place where the plaintiff resides. *Terrill v. Terrill*, (1906) 2 Alaska 475.

Vol. X, p. 6, sec. 3.

Repeal. — This section regarding the powers of town councils was repealed by implication by the Act of April 28, 1904, ch. 1778, sec. 4,

33 Stat. L. 529, 10 Fed. Stat. Ann. 16. *Nome v. Schneider*, (1906) 3 Alaska 58.

Vol. X, p. 8, sec. 4. [*Disposition of license money.*]

Repeal. — The power given to the District Court of Alaska by this section to apportion the license moneys collected from persons for doing business within an incorporated town, and thereby required to be paid over by the clerk of the court to the treasurer of the municipality, and to designate by order the proportion that should be used for school and for municipal purposes, respectively, was taken away by Act of April 28, 1904, ch. 1778, 33 Stat. L. 529, 10 Fed. Stat. Annot. 18, 19, which for the first time authorized the common

council of incorporated towns to levy a general tax for school purposes, and required it to establish and maintain schools and provide the necessary funds therefor, and which also provided that the license moneys should be paid over to the municipal treasurer without qualification, "to be used for school and municipal purposes," and repealed all inconsistent Acts. Since such Act the apportionment of such fund rests with the common council of the town. *Freeding v. Allen*, (1909) 173 Fed. 263.

Vol. X, p. 16, sec. 4.

Repeal. — See under vol. 10, p. 6, sec. 3.

Vol. X, p. 17, sec. 4, cl. fourth.

Right of eminent domain.—The right of a municipality to proceed in eminent domain is conferred by this section taken in connec-

tion with section 204, subsection 3, of the Alaska Civ. Code, 1 Fed. Stat. Annot. 209. *Ashby v. Juneau*, (1910) 174 Fed. 737.

Vol. X, p. 17, sec. 4, cl. tenth.

Jurisdiction of offenses.—Under the rule that when a court has jurisdiction of a crime a statute which merely confers the same jurisdiction on another court, or authorizes a municipality to define and punish the same act, does not deprive the first court of its jurisdiction unless there is an express provision or clear implication to that effect, this section conferring power on municipalities in Alaska to prohibit certain things and punish

the same as misdemeanors, and which repeals all prior Acts and parts of Acts inconsistent therewith, although acted upon by a town, does not affect the jurisdiction of the District Court over prosecutions for the same acts which are made offenses by the Alaska Code of March 3, 1899, ch. 429, 30 Stat. L. 1253, 1 Fed. Stat. Annot. 325, there being no inconsistency between the dual jurisdictions. *Rosencrans v. U. S.*, (1907) 155 Fed. 38.

Vol. X, p. 18, sec. 4, cl. twelfth.

Apportionment of license moneys.—This clause, taken in connection with sections 7 and 8 of this Act and section 4 of the Act of Jan. 27, 1905, ch. 277, 33 Stat. L. 616, 10 Fed. Stat. Annot. 21, had the effect of repeal-

ing that part of section 4 of the Act of March 2, 1903, ch. 978, 32 Stat. L. 944, 10 Fed. Stat. Annot. 8, relating to the disposition of license money. *Freeding v. Allen*, (1909) 173 Fed. 263.

Vol. X, p. 24, sec. 8.

Jury trial.—This section does not require a jury trial in an action to have a person declared insane and a guardian appointed for

his property and person. *White v. Martin*, (1905) 2 Alaska 471.

Vol. X, p. 26. [*Reservations on navigable waters.*]

The "shore" of navigable water is the ground lying between ordinary high-water and low-water mark. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

Shore lands acquired before Act passed.—This Act amending Act of May 14, 1898, ch. 299, 30 Stat. L. 409, 1 Fed. Stat. Annot. 50, extending the homestead laws to Alaska, limits the extent of a homestead entry to 320 acres, and provides that no entry shall be allowed extending more than 160 rods along the shore of any navigable water, and that

along such shore a space of at least 80 rods shall be reserved from entry between all such claims, and declares that nothing therein contained shall be construed to authorize entries to be made or title to be acquired to the shore of any navigable waters within the district. It was held that where shore land was acquired under such amended Act, there was no reservation of a roadway above high-water mark. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

1909 Supp., p. 30, sec. 1.

Good faith.—The benefits of the Act authorizing the consolidation of claims or locations of coal lands in Alaska can be shared only by persons who made such locations in good faith—that is, honestly and lawfully—prior to Nov. 16, 1906, in their own interests individually, without fraud, collusion, or deceit, or any purpose to violate any provision of the law. Therefore if it can be shown that agreements or arrangements for transferring entries to a company or corporation were entered into by locators of coal lands

in Alaska after they had made their locations in good faith and in their own interest alone, such locations may, under the provisions of this Act, lawfully pass to entry and patent in accordance with the terms of said Act; but if such agreements or arrangements were entered into prior to such locations being made, the locations do not come within the provisions of the Act and cannot be lawfully passed to entry and patent. (1909) 27 Op. Atty.-Gen. 412.

ALIENS.

Vol. I, p. 437, sec. 1.

Mining property.—The fact that a mining claim is located by an alien does not render the location illegal or void, but, at most, it is only voidable at the instance of the government; and a subsequent declaration of intention to become a citizen by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location or acquisition of the alien's interest and validates the transaction. *Shea v. Nilima*, (1904) 133 Fed. 209.

Agreement to locate claims.—An agreement between two aliens to acquire or locate mining claims in Alaska for their joint benefit is not void; nor does the fact of their alienage prevent one who subsequently declared his intention to become a citizen from enforcing the contract by recovering his interest in a claim located in the name of the other pursuant to such agreement. *Shea v. Nilima*, (1904) 133 Fed. 209.

ANIMALS.

Vol. I, p. 444, sec. 4386.

Repeal.—Sections 4386–4390, R. S. were expressly repealed by Act of June 29, 1906, ch. 3594, sec. 5, 34 Stat. L. 607, 1909 Supp. Fed. Stat. Annot. 46.

For cases under this section, see *Illinois Cent. R. Co. v. Curry*, (1907) 127 Ky. 643, 106 S. W. 297; *Baltimore, etc., R. Co. v. Wood*, (1908) 130 Ky. 839, 114 S. W. 735; *Ecton v. Chicago, etc., R. Co.*, (1907) 125 Mo. App. 223, 102 S. W. 575; *Chicago, etc., R. Co. v.*

Slattery, (1906) 76 Neb. 721, 107 N. W. 1045; *International, etc., R. Co. v. Startz*, (1904) 37 Tex. Civ. App. 51, 82 S. W. 1071; *St. Louis Southwestern R. Co. v. Dolan*, (Tex. 1903) 77 S. W. 415; *St. Louis, etc., R. Co. v. Smith*, (Tex. 1911) 135 S. W. 597; *Southern R. Co. v. Forgey*, (1906) 105 Va. 599, 54 S. E. 477; *Reynolds v. Great Northern R. Co.*, (1906) 40 Wash. 163, 82 Pac. 161.

Vol. I, p. 447, sec. 4387.

For a case under this section, see *Southern R. Co. v. Tollerson*, (1910) 135 Ga. 74, 68 S. E. 798.

Vol. I, p. 447, sec. 4388.

For a case under this section, see *St. Louis Southwestern R. Co. v. Dolan*, (Tex. 1903) 77 S. W. 415.

Vol. I, p. 449, sec. 3.

Purpose of inspection.—The inspection of cattle and meats at packing houses by the government under the federal statutes is for the purpose of preventing traffic in diseased and unwholesome meats, and does not relieve a corporation engaged in slaughtering cattle from the duty of exercising reasonable care

to see that its employees engaged in handling its meats are not exposed to infectious diseases. If it relies on the government inspection, it is responsible to its servants in that regard for the efficiency of such inspection. *O'Connor v. Armour Packing Co.*, (1906) 158 Fed. 241.

Vol. I, p. 452, sec. 3.

Effect in states.—Rules of the Bureau of Animal Industry of the Department of Agriculture, organized by this Act for the suppression of contagious diseases among domestic animals, have not, apart from the action of a state, any binding force upon the state. *Eshleman v. Union Stockyards Co.*, (1908) 222 Pa. St. 20, 70 Atl. 899.

State laws.—The Arkansas statute (Act May 28, 1907) to prevent the introduction and spread of contagious and infectious diseases of animals in that state is not in conflict with this Act, which does not attempt to assume exclusive control over the quarantine of diseased animals, nor cover the transportation of live stock from state to state, so as to preclude state action, but merely authorizes the Commissioner of Agriculture to co-operate with state authorities, and to prescribe rules and regulations in that regard, nor does it conflict with rules and regulations so prescribed. *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288.

In *Reid v. Colorado*, (1902) 187 U. S. 137, 23 S. Ct. 92, 47 U. S. (L. ed.) 108, affirming

(1902) 29 Colo. 333, 68 Pac. 228, it was held that the subject of transportation of cattle from one state to another was not so far covered by the provisions of this Act, or those relating to the exportation of diseased cattle to ports in foreign countries, and the transportation between the states of live stock known to be diseased, as to preclude the enactment of a statute (Colo. Sess. Laws 1885, p. 335) prohibiting the importation of cattle from south of the 36th parallel of north latitude between April 1 and Nov. 1, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board.

Rules and regulations.—This Act being limited to cases where the animal in question was affected with an infectious or contagious disease, the Secretary of Agriculture has no authority to extend the same by a rule prohibiting the taking of any horse outside of a quarantine district without first having it inspected by the Bureau of Animal Industry,

etc., regardless of whether it is diseased or has been exposed to disease. *U. S. v. Hoover*, (1904) 133 Fed. 950.

Judicial notice of regulations.—The courts will take judicial notice of regulations adopted by the Commissioner of Agriculture

under this Act locating a quarantine line for cattle. *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288.

Delegation of power by Congress, see *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288.

Vol. I, p. 453, sec. 6.

Validity of Act.—This Act making it a misdemeanor for one to drive live stock on foot from one state to another knowing them to have a contagious disease, is within the power given to Congress to regulate interstate commerce. *U. S. v. Slater*, (1903) 123 Fed. 115.

Rules and regulations.—An order of the Department of Agriculture giving notice that scabies exists among sheep in the United States, and that it is a violation of law to receive for transportation, to transport or to deliver for transportation from one state to another, any stock affected with such disease, or to drive from one state to another

any sheep knowing them to be affected with such disease, is proper, though not specifying any particular district within which a quarantine has been established. *U. S. v. Slater*, (1903) 123 Fed. 115.

Driving diseased cattle from district not quarantined.—This Act makes it a misdemeanor to transport or drive on foot from one state to another any live stock known to be affected with any of the diseases specified in the Act, irrespective of the question whether or not the Secretary of Agriculture has established as an "infected district" the district from which the live stock are driven. *U. S. v. Slater*, (1903) 123 Fed. 115.

Vol. I, p. 455, sec. 9.

Information.—Though it may be better practice, it is not necessary that an information for driving diseased animals from one state to another, contrary to the statute and

the rules and regulations of the Department of Agriculture, set out such rules and regulations; the court may take judicial notice of them. *U. S. v. Slater*, (1903) 123 Fed. 115.

Vol. X, p. 34, sec. 1.

Validity of regulations.—Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of this Act are void as in excess of the powers conferred by that Act, where, on their face, they apply as well to intrastate as to interstate commerce. *Illinois Cent. R. Co. v. McKendree*, (1906) 203 U. S. 514, 27 S. Ct. 153, 51 U. S. (L. ed.) 298.

Shipment of animals free from disease.—This section does not prohibit the shipment of animals free from disease, and the Secretary of Agriculture has no power thereunder to make rules and regulations with reference to such animals, the violation of which alone would constitute a crime. *U. S. v. Hoover*, (1904) 133 Fed. 950.

State laws.—In *Asbell v. Kansas*, (1908) 209 U. S. 251, 28 S. Ct. 485, 53 U. S. (L. ed.) 778, it was held that nothing in the provision of this Act that, when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected animals and found them free from disease, such animals may be introduced into any state without further inspection, or exaction of fees of any kind except such as may be ordered or exacted by the Secretary of Agriculture, precluded the enactment of Kansas Laws 1905, ch. 495, sec. 27, making it a misdemeanor for any person to transport into that state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.

But in *Chicago, etc., R. Co. v. Frye-Bruhn Co.*, (1910) 184 Fed. 15, it was held that the

provisions of orders Nos. 106 and 107 of the Secretary of Agriculture, promulgated March 10 and 13, 1903, respectively, under authority of this Act, establishing quarantine districts for cattle and regulations to be observed by carriers in the shipment of cattle from such districts, and which provided (order No. 107, sec. 4) that "cattle from said area may be transported by rail or boat for immediate slaughter" subject to such regulations, had the force of law and were paramount with respect to interstate shipments; and that the Washington statute (Code Wash. 1896, secs. 3216, 6431), which absolutely prohibits the introduction of Texas cattle into the state, without regard to their condition, so far as it conflicts with such federal regulations was void.

Effect of departmental regulations on state laws.—A regulation promulgated by the Secretary of Agriculture under the authority of this Act, which is directed to the transportation of cattle from quarantined states, and which in terms recognizes restrictions imposed by the state of destination, does not invalidate—at least, where no quarantined areas are involved—the provision of Kansas Laws 1905, ch. 495, sec. 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States. *Asbell v. Kansas*, (1908) 209 U. S. 251, 28 S. Ct. 485, 53 U. S. (L. ed.) 778.

Vol. X, p. 35 [Act of March 3, 1905], sec. 2.

Connecting carriers outside quarantine district. — The receipt outside a quarantine district and subsequent transportation by a railroad company of live stock that was received for transportation, and was transported by a previous carrier from a quarantine district in one state into another state, has been held not an offense under this Act. *St. Louis Merchants' Bridge Terminal R. Co. v. U. S.*, (1911) 188 Fed. 191; *U. S. v. El Paso, etc., R. Co.*, (1910) 178 Fed. 846; *U. S. v. Chicago, etc., R. Co.*, (1910) 181 Fed. 882.

But in a case arising in the Circuit Court in the District of South Carolina a contrary view was reached. *U. S. v. Southern R. Co.*, (1911) 187 Fed. 209, wherein the court said: "The purpose of the Act of March 3, 1905, is to prevent the dissemination of contagious, infectious, or communicable diseases of live stock, by prohibiting the interstate transportation from infected areas. By section 2 of the Act, the receiving for transportation is made an offense, and the actual transportation itself is made an offense. It is evident, therefore, that the Congress had in view that the act of transportation, as well as the act of receiving for transportation, should be subject to such regulations as the Secretary of Agriculture should prescribe. If a connecting carrier, which receives cattle under a continuous shipment, is not subject to these regulations, then the object that the Congress had in view may, as far as the connecting carrier is concerned, be defeated. In other words, the contention is that, although the secretary may make regulations concerning this continuous shipment, the connecting carrier is not bound to observe them. Such a construction would defeat the purposes of the Act. The construction placed upon the Act in the two cases cited and relied upon, that where the transportation is over several connecting roads the railroad only whose tracks lie in the quarantined area, and which received the cattle therein and transported them, interstate, into that territory, is liable, is too narrow. This contention is based upon the interpretation of the phrase 'from any quarantined state,' etc., which would restrict the offense to the original movement of the cattle from a quarantined area of a state to another state. The phrase 'from any quarantined state,' etc., must be taken in connection with the succeeding words 'into any other state,' etc., and both must be construed in aid of the remedial purpose of the Act. To constitute the offense of transportation under this Act, the transportation must not only be 'from' a quarantined territory, but

it must be 'into' prohibited territory. The act of transportation is a continuous one, and, where there is a through shipment, each successive carrier which takes up and transports the cattle towards its final destination in the prohibited territory is engaged in transporting, and is therefore amenable to the Act."

Duty imposed on both carrier and shipper. — In *Wakefield v. Chicago, etc., R. Co.*, (Ky. 1907) 104 S. W. 779, it was held that under this section and a rule of the Secretary of Agriculture forbidding shipment of sheep from a state quarantine for scabies, unless inspected by a government inspector, and requiring a certificate of health to accompany the sheep, the same duty was imposed on the shipper and the carrier as to obtaining a certificate, and if the shipper moved his sheep without a sufficient certificate and the alleged certificate was not signed by an inspector, he violated the Act as well as the carrier, and could not maintain an action for damages suffered by the loss of such paper by the carrier.

Delegation of legislative power. — Section 1 of this Act authorizes the Secretary of Agriculture to establish quarantine limits for the transportation of live stock, and section 2 prohibits transportation companies from receiving for transportation or transporting from any quarantined territory in one state to another state "any cattle or other live stock except as hereinafter provided," and section 6 makes a violation of section 2 a misdemeanor. The exception referred to in section 2 is that, in the event the secretary shall deem that public safety permits, he shall establish rules and regulations under which live stock may be lawfully moved from quarantined territory in one state to another state. It was held that the exception was not to be construed to be as broad as the prohibition, and equivalent to a general prohibition against all shipments accompanied by a general permission of all shipments on compliance with departmental rules, but rather as containing a general prohibition, together with a limited and conditional exception, applicable only to such epidemics determined by the secretary to be of such a character as to justify shipments under particular safeguards; and hence that section 2 was not invalid as attempting to create an offense for violation of the departmental rule. *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

Knowledge an essential element of offense. — *U. S. v. Chicago, etc., R. Co.*, (1910) 181 Fed. 882.

Vol. X, p. 36, sec. 3.

Regulations. — Regulations of the Secretary of Agriculture under this section are ineffective to add to the class of railroad companies or to the acts denounced by that statute, and railroad companies that in violation of such regulations receive and transport outside a quarantined district live stock which has been

received for transportation, and has been transported by a previous carrier from the quarantined district in one state into another state, are not punishable therefor. *St. Louis Merchants' Bridge Terminal R. Co. v. U. S.* (1911) 188 Fed. 191.

Amendment No. 2 of order No. 143 of the

regulations of the Agricultural Department, covering shipments of cattle from quarantined territory, only modified, and did not revoke, order No. 143, by revoking regulations 13 and 14 and substituting two new regulations therefor. *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

Must show due publication of notice.—An indictment charging a railroad company with having transported live stock from a quarantined district into another state, in violation of this Act, which avers that the Secretary of Agriculture gave notice of the establishment of such quarantine to the "proper officers" of defendant, is insufficient, as alleging a mere legal conclusion; nor is the establishment of such quarantine sufficiently alleged by stating that the secretary "duly and legally established" it, but it must further show that he published the notice required by

section 1 of the Act, which is prerequisite to a criminal conviction. *U. S. v. El Paso, etc., R. Co.*, (1910) 178 Fed. 846.

Prospective operation.—In *U. S. v. Hoover*, (1904) 133 Fed. 950, it was held that this provision affected only rules and regulations made thereafter, and did not have the retroactive effect of giving validity to a prior void order.

"Make and promulgate."—The words "make" and "promulgate," as used in this section are not synonymous; the duty to "make" rules and regulations is sufficiently accomplished by writing them and signing them officially, but to "promulgate" them requires the giving notice thereof to the officers of transportation companies, etc., and their publication in the selected newspapers within the affected district. *U. S. v. Louisville, etc., R. Co.*, (1908) 165 Fed. 936.

Vol. X, p. 36, sec. 4.

Delegation of legislative power.—The offense denounced by this section is defined merely by rules and regulations thereafter to be established by the Department of Agriculture, and hence no offense was created by such section, because of the rule that Congress has no power to intrust to the executive the power to declare by a departmental rule or regulation that to be unlawful and to constitute a crime which would otherwise not be so, nor itself to declare a violation of rules or regulations, thereafter to be promulgated

by the executive, a criminal offense. *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

Indictment.—An indictment against a carrier for moving cattle from a quarantined district, contrary to and in violation of the secretary's rules and regulations, failing to directly allege facts showing the promulgation of such rules, or otherwise than that the rules and regulations were "duly and legally made and promulgated," was insufficient. *U. S. v. Louisville, etc., R. Co.*, (1908) 165 Fed. 936.

1909 Supp., p. 43, sec. 1.

What law governs.—To the extent that this Act fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is obviously controlling, and displaces any state law on the subject. *Gilliland v. Southern R. Co.*, (1910) 85 S. C. 26, 67 S. E. 20.

Construction of second proviso.—The meaning of the second proviso of this section regarding sheep is that if the twenty-eight-hour limit expires at night, the transit may be continued to a suitable place for unloading, without the consent of the owner or custodian, except that in no case shall the thirty-six-hour limit be exceeded. *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 360; *U. S. v. Atchison, etc., R. Co.*, (1911) 185 Fed. 105.

Connecting carrier.—There has been considerable discussion among the judges of various districts as to whether or not the "twenty-eight-hour law," respecting the interstate shipment of live stock, admits of the construction that the length of time consumed in the transportation by the antecedent carrier can be carried over and charged to the connecting carrier, who does not run over the twenty-eight or thirty-six hours' time without unloading, feeding, and watering. In *U. S. v. Stockyards Terminal Co.*, (1909) 172 Fed. 452, Judge Willard held that where the initial carrier of live stock has been subjected to the penalty imposed by this Act

for confining live stock longer than permitted without unloading, rest, water, and feeding, in a second action against a connecting carrier to recover for the same confinement, the first twenty-eight hours or thirty-six hours which were necessarily included in the first action cannot be counted against the defendant or the connecting line.

In *Northern Pac. Terminal Co. v. U. S.*, (1911) 184 Fed. 603, it appeared that the defendant, a terminal railroad company, received a car load of horses from a connecting railroad company, which had transported them in interstate commerce. Such carrier had kept them confined in the car for more than twenty-eight hours without unloading for rest, water, and feeding, in violation of the twenty-eight hour law, and was indicted and fined therefor. The defendant received them for transportation over its line for some 1,300 feet to stockyards, and moved them to such yards with all speed possible, and there unloaded them for rest, water, and feed. It was held that defendant was not chargeable with violation of the statute, but that, on the contrary, its action aided in giving effect to its object and purpose.

But in *U. S. v. Northern Pac. Terminal Co.*, (1911) 186 Fed. 947, it was held that where a terminal company's railroad formed a part of a continuous line of interstate transportation over which live stock was

transported, and the animals had been confined in the cars without being unloaded for food, water, and rest for a period longer than that prescribed by the twenty-eight-hour law before being delivered to the terminal company for transportation to the stockyards for unloading, the terminal company could not relieve itself from liability for continuing such transportation on the ground that it found the cattle so confined at a place where they could not be unloaded except by being taken to the stockyards, nor, except in exceptional cases, because its violation of the law would subserve a humane purpose; the terminal company being under no obligation to accept the cattle from its connecting carrier under such circumstances.

So in *U. S. v. Lehigh Valley R. Co.*, (1911) 184 Fed. 971, it was held that where animals have been confined for the entire statutory period before being delivered to a connecting carrier, it is not necessary that a new period equal to the statutory time must again expire before the connecting carrier can be held guilty of violating the Act; the liability being complete on the connecting carrier's continuing the transportation toward the destination except to transport them to the yards at the junction point to unload them, under the provision that, in estimating the confinement, the time consumed in loading and unloading shall not be considered, but the time during which they have been confined on connecting roads is to be included.

Extraterritorial operation. — This Act, though construed to apply to interstate shipments from one state to another through a foreign country, is not objectionable as extraterritorial in operation, since the offense is complete by continued confinement only after the statutory time has expired; it being immaterial that a part of the time has been consumed by transportation in a foreign country. *U. S. v. Lehigh Valley R. Co.*, (1911) 184 Fed. 971.

Negligence of employees no defense. — It is no defense to an action for "knowingly and wilfully" violating this statute that the defendant made rules requiring its employees to comply with the same, and that its failure to do so was through the negligence of an employee and in violation of its rules. *U. S. v. Atlantic Coast Line R. Co.*, (1909) 173 Fed. 764.

Liability to shipper for injuries to stock. — In *Gilliland v. Southern R. Co.*, (1910) 85 S. C. 26, 67 S. E. 20, it was held that in the absence of federal decisions on the question, this Act, which is substantially the same as the state statute regulating shipments of stock within the state, must be given the same construction and effect, and the carrier of an interstate shipment be held liable for injuries resulting from its failure to supply proper shelter and protection when stock are unloaded to be fed and watered.

Equipment of stock pens. — This Act does not require a carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise, except in so far as to render them suitable for the humane purpose of properly feeding, watering, and rest-

ing the particular shipment of stock unloaded into them. *U. S. v. St. Louis, etc., R. Co.*, (1910) 177 Fed. 205.

Sufficiency of request. — (a) A legal request under this Act may be made by the authorized agent of the owner, or by the person in custody of the particular shipment. (b) Such a request may be printed, engraved, or stamped and partly in handwriting. (c) A legal request may be made on or in a railroad form separate and apart from a printed bill of lading or other railroad form than one which contains the request alone. (d) Such a request may be made before the transportation of the shipment commences. (e) Such a request may be made although it is not induced by any unforeseen contingency that arises after the transportation commences. *Wabash R. Co. v. U. S.*, (1910) 178 Fed. 5; *Achison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

Authority to request extension of time. — There is a legal presumption that one to whom an owner of animals has intrusted their possession and control for delivery to a railroad company for shipment, and who actually delivers and ships them, is authorized by the owner to make the request specified in this law, and to do any other usual act relevant to such a transaction. A railroad company is justified in relying upon this presumption, and cannot be held to have violated the law knowingly and wilfully because it confines animals more than twenty-eight and less than thirty-six hours in reliance upon this presumption, without notice or knowledge of any defect in the authority of the agent. *Wabash R. Co. v. U. S.*, (1910) 178 Fed. 5.

Request for each shipment. — To justify confinement for a longer term than twenty-eight hours the shipper must file a written request for each shipment, and may not file a single general request applicable to all future shipments of his cattle. *U. S. v. Pere Marquette R. Co.*, (1909) 171 Fed. 586.

Delegation of legislative power. — The provision of the twenty-eight-hour law authorizing the shipper of cattle or the person accompanying them to extend the time of their confinement to thirty-six hours, is not such a delegation of legislative power as would render the law unconstitutional. *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 360.

The time consumed in loading and unloading stock is not to be considered as a part of their confinement in the cars permitted by the twenty-eight-hour law. *U. S. v. Northern Pac. Terminal Co.*, (1911) 186 Fed. 947.

Compliance with statute not negligent delay. — Where the person in charge refused to sign the thirty-six-hour release, and cattle were shipped from Arkansas through Missouri to East St. Louis, and upon arrival at a point in Arkansas it became apparent that the shipment could not be carried to destination within the prescribed twenty-eight hours, and it was unlawful to unload such cattle in Missouri, the carrier was not negligent in unloading the cattle at the Arkansas point reached, resulting in a delay in their delivery

at destination, where the only train which they could have been shipped on, which passed through the place of feeding after a lapse of the five-hour period, was a slow train which reached destination at the same time as did the faster train upon which they were carried. *St. Louis, etc., R. Co. v. Davenport*, (Ark. 1910) 133 S. W. 186.

"Contingencies hereinbefore stated."—The

phrase "contingencies hereinbefore stated" as used in this section includes both the case where the carrier was prevented from unloading by storm or other accidental or unavoidable causes and the contingency of the owner's having filed a written request extending the time of confinement to thirty-six hours. *U. S. v. Pere Marquette R. Co.*, (1909) 171 Fed. 586.

1909 Supp., p. 45, sec. 3.

The terms "knowingly and wilfully" describe an essential element of the offense on account of which the penalties are prescribed, without proof of which they cannot be recovered. Thus where a stockyards company, which, without actual knowledge that cattle have been confined nearly twenty-eight hours, and without making any effort to find out whether they have been or not, receives them from a common carrier, and with diligence hauls them a few miles to its stockyards, and there unloads them for rest, food, and water, when these stockyards are nearer to the place of the receipt of the cattle than any other place where they could be unloaded, fed, and watered, it is not guilty of "knowingly and wilfully" confining the cattle in violation of the twenty-eight-hour law. *St. Joseph Stockyards Co. v. U. S.*, (1911) 187 Fed. 105.

Where defendant, a terminal railroad company, received cattle from a connecting carrier for the sole purpose of transporting them to certain stockyards to feed, water, and rest them, and then to return them to the carrier from which they had been received, not knowing that such carrier had already confined them in the cars exceeding the time allowed by this Act, the terminal carrier, having used due diligence in carrying the cattle to the stockyards and unloading them, was not guilty of itself "knowingly and wilfully" violating such Act; such words being intended to mean either an intentional violation of the statute or an indifferent disregard of its requirements. *U. S. v. Stockyards Terminal R. Co.*, (1910) 178 Fed. 19, affirming (1909) 172 Fed. 452.

A carrier that delivers a shipment of cattle to a connecting carrier in time, according to the usual course of transportation, for their carriage to and unloading within the twenty-eight hours at pens suitably equipped for unloading, feeding, watering, and resting them, either at their destination or on their way, without notice or knowledge that they must be or will be delayed in their arrival beyond that time, cannot be held to have violated this Act of Congress knowingly and wilfully. *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

Penalty.—The number of the penalties recoverable under this Act is not measured by the number of shipments on the same train, nor is the train the unit of offense; but where the same train contains five stock loaded at different periods, one penalty accrues when the period of lawful confinement for the cattle first loaded expires, and other separate and distinct penalties accrue as the time for the

lawful confinement of the cattle loaded at later periods successively expires. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 95, 31 S. Ct. 368.

But one penalty may be recovered against a carrier violating the provisions of the Act where the time for the required unloading of two shipments loaded at different times coincides, because one shipment was forwarded under the thirty-six-hour rule, and the other was made eight hours later, under the twenty-eight-hour rule, from a different station. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 95, 31 S. Ct. 368.

To the same effect as the original note, see *U. S. v. Oregon R., etc., Co.*, (1908) 163 Fed. 642; *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 360.

Fixing amount of penalty.—It is the province and duty of the court to fix the amounts of the recoveries in actions for violations of the twenty-eight-hour law, and that of the jury to determine whether or not the defendants have violated that law. *Atchison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

Sufficiency of evidence.—The greater weight of the evidence is sufficient to sustain an action by the United States for a violation of the twenty-eight-hour law, and it is not required to establish its case by proof beyond a reasonable doubt. *Atchison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

Failure to furnish water in patent cars.—Where cattle were transported in patent cattle cars, equipped with troughs affording an opportunity to water them without unloading, but the cattle were kept in the cars for a period longer than that authorized by statute, without water being introduced in the troughs, for at least a part of the cattle, the carrier was held to be liable for the penalty provided by the twenty-eight-hour law. *U. S. v. New York Cent., etc., R. Co.*, (1911) 186 Fed. 541.

Proviso.—Where, in the shipment of cattle from Chicago to New York, one of the cars, thirty-six feet long, contained twenty-one bulls, tied side by side in alternate sides of the car, and in a number of other cars from eighteen to nineteen large cattle were carried, it was held that the cars were too heavily loaded, it appearing by uncontradicted proof that cattle under transportation should have at least two and one-half feet of space for each animal. *U. S. v. New York Cent., etc., R. Co.*, (1911) 186 Fed. 541.

Jurisdictional amount of penalties.—The

aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under this Act, and consolidated, is the amount in dispute for the

purpose of sustaining the appellate jurisdiction of the federal Supreme Court. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 95, 31 S. Ct. 368.

1909 Supp., p. 45, sec. 4.

Nature of proceeding.—To the same effect as the original note, *U. S. r. Atlantic Coast Line R. Co.*, (1909) 173 Fed. 767.

Venue.—To the same effect as the original note, see *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 364, *affirming* (1908) 162 Fed. 412, cited in the original note.

ARTICLES FOR THE GOVERNMENT OF THE NAVY.

Vol. I, p. 464, art. 8, cl. twenty-second.

Desertion by minor.—The civil courts should not interfere by habeas corpus to discharge a minor under eighteen years of age who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the presentation of the petition for the writ the

minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a military or naval court. *U. S. v. Reaves*, (1903) 126 Fed. 127; *Dillingham v. Booker*, (1908) 163 Fed. 696, 16 Ann. Cas. 127.

Vol. I, p. 469, art. 22. [*Punishment for fraudulent enlistment.*]

Enlistment by person under eighteen without consent of parent or guardian.—Where an infant, not eligible to enlistment in the navy, enlisted without the consent of his parents or guardian, it was held that he was not "a person belonging to the navy" and was not punishable as for fraudulent enlistment under this section. *Ex p. Lisk*, (1906) 145 Fed. 800.

Habeas corpus.—In a habeas corpus proceeding to recover possession of a minor under eighteen years of age, who had enlisted in the navy without the consent of his parents or guardian, it was held to be no answer to the writ that the naval authorities were entitled to retain the custody of the minor for the purpose of having him tried by a naval court-martial for fraudulent enlistment. *Ex p. Lisk*, (1906) 145 Fed. 800.

Vol. I, p. 472, art. 38.

"Waters of the United States."—The prohibition against the convocation of a general court-martial by the commander of a fleet or squadron without the previous authorization of the President, which is made by article 38, when such fleet or squadron is "in the waters of the United States," applies only to those waters which are within what is termed by the Act of March 3, 1901, 31 Stat. L. 1106, ch. 852, 5 Fed. Stat. Annot. 332, the continental limits of the United States. In other words, the provision in question does not take into view the dominion or sovereignty

of the United States over territory beyond the seas and far removed from the seat of government, but contemplates waters within the United States in the stricter and popular sense of the term. The prohibition against the convocation by the commander of a fleet or squadron of a general court-martial, without the previous authorization of the President, was intended to be operative only when the fleet or squadron is in a home port. *U. S. v. Smith*, (1905) 197 U. S. 386, 25 S. Ct. 489, 49 U. S. (L. ed.) 801.

Vol. I, p. 474, art. 43.

Time for service of charges.—The arrest referred to in this article as the time when the person accused is to be furnished with a copy of the charges and specifications on which he is to be tried by a naval court-martial, is not the preliminary arrest or detention while awaiting the action of higher au-

thority to frame charges and specifications and order the court-martial, but is the arrest resulting from the preferring of the charges by the proper authority and the convening of the court-martial. *U. S. v. Smith*, (1905) 197 U. S. 386, 25 S. Ct. 489, 49 U. S. (L. ed.) 801.

Vol. I, p. 475, art. 53.

Review by civil court.—Civil courts are not courts of error to review the proceedings and sentences of courts-martial, where they are legally organized and have jurisdiction of the offense and of the person of the ac-

cused, and have complied with the statutory requirements governing their proceedings. *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

ARTICLES FOR THE GOVERNMENT OF THE NAVY.

Vol. I, p. 476, art. 54.

"Mitigation of sentence."—Reducing the sentence of a court-martial which dismissed a naval officer from the service, to suspension for five years on one-half sea pay, with a reduction in rank to the foot of the list of officers of his grade, is a mitigation of the sentence within the meaning of this article, that "every officer who is authorized to convene a

general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm." *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

Vol. I, p. 477, art. 60.

Waiver of objection to admission of record of court of inquiry.—A court-martial convened at the request of a naval officer to investigate charges against him is not without jurisdiction because such officer was required, as a condition precedent, to waive the protec-

tion of this article, by consenting to the admission in evidence of the record of the testimony introduced before a prior court of inquiry, with the right to call additional witnesses. *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

ARTICLES OF WAR.

Vol. I, p. 480, sec. 1342.

Review of courts-martial by civil courts.—To the same effect as the original note, see *U. S. v. Praeger*, (1907) 149 Fed. 474.

Vol. I, p. 483, art. 4.

Authority of President.—The contract of a soldier of the United States, made by his enlistment and oath to serve for a definite term, "unless sooner discharged by proper authority," is one terminable by the government at will, acting through an officer having proper authority; and this article, which provides that "no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general

court-martial," confers such authority upon, or recognizes it as existing in, the President of the United States. *Reid v. U. S.*, (1906) 161 Fed. 469.

Terms of discharge.—The terms of a discharge given to a soldier by order of the President, not being prescribed by any statute, are discretionary with the President, and such discretion, exercised by directing a discharge "without honor," cannot be reviewed by the courts. *Reid v. U. S.*, (1906) 161 Fed. 469.

Vol. I, p. 485, art. 17.

Sale of clothing.—The sale of military clothing issued to a soldier during his term of service constitutes an offense against the

military law, for which he may be punished by a court-martial. *U. S. v. Michael*, (1907) 153 Fed. 609.

Vol. I, p. 493, art. 59.

Homicide by military guard.—Where, on a writ of habeas corpus to obtain the discharge of two members of the United States army from an indictment for murder, found by the courts of the state where the offense was committed, it appeared that the shooting of the deceased occurred in the streets of a city, outside the military reservation, while the petitioners were endeavoring to arrest deceased for depredations committed on such reservation, but the evidence was conflicting as to whether the shooting was done while deceased was endeavoring to escape or after he had stopped, thrown up his hands, and offered to surrender, the determination of whether the shooting was justifiable was within the exclusive jurisdiction of the state courts. *U. S. v. Lewis*, (1904) 129 Fed. 823, *affirmed* (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343.

Jurisdiction of civil courts.—In *U. S. v. Lewis*, (1904) 129 Fed. 823, *affirmed* (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.)

343, it was held that the enactment of this article was a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of the state over persons in the United States military service accused of offenses against citizens of the state.

A District Court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by R. S. sec. 5414, 2 Fed. Stat. Annot. 298, although he was at the time an officer of the army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where the accused has since been discharged from the army without any action against him having been taken by the military authorities; there being no provision, either constitutional or statutory, conferring exclusive jurisdiction on courts-martial to punish such offense. *Neall v. U. S.*, (1902) 118 Fed. 699.

Vol. I, p. 495, art. 62.

Trial of soldier acquitted by civil court.—Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the state was prosecuted for murder and acquitted, such acquittal, though a final de-

termination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial, for conduct "to the prejudice of good order and military discipline," in vio-

lation of this article, though based on the same Act. *In re Stubbs*, (1905) 133 Fed. 1012.

Offenses under this section.—A charge of assault with a rifle and the infliction of a

mortal wound by accused upon a fellow soldier, with particulars of the time and place clearly stated, sufficiently alleged an offense within the sixty-second article. *In re Stubbs*, (1905) 133 Fed. 1012.

Vol. I, p. 495, sec. 3.

Fraudulent enlistment and receipt of pay.—A minor, who by misrepresenting his age has fraudulently enlisted in the army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the ap-

plication of his parents, even though the military prosecution is not instituted until after the writ is issued. *Ex p. Lewkowitz*, (1908) 163 Fed. 646, *overruling In re Carver*, (1900) 103 Fed. 624, set out in the original note. See also *In re Scott*, (1906) 144 Fed. 79.

Vol. I, p. 498, art. 77.

Officer on indefinite leave of absence with volunteer forces.—An officer of the regular army is within the provision of this article that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," al-

though such officer has been granted an indefinite leave of absence from the regular army in order to enable him to accept a commission in the volunteer forces. *U. S. v. Brown*, (1907) 206 U. S. 240, 27 S. Ct. 620, 51 U. S. (L. ed.) 1046.

Vol. I, p. 501, art. 86.

Civilian witness.—To the same effect as the original note, see *U. S. v. Praeger*, (1907) 149 Fed. 474.

Vol. I, p. 504, art. 103.

"Time of peace."—A soldier who deserted after the signing of the protocol between the United States and Spain, and while a state of peace actually existed, and nothing remained to be done to conclude peace except the settlement of the details of the treaty, was held to be within the provision of this section that no person shall be court-mar-

tialed for desertion in time of peace, and not in the face of an enemy, committed more than two years before his arraignment therefor. *In re Cadwallader*, (1904) 127 Fed. 881.

A plea of the statute of limitations.—To the same effect as the original note, see *In re Cadwallader*, (1904) 127 Fed. 881.

Vol. I, p. 510. [*Punishment on conviction by courts-martial.*]

Sentence.—The President having fixed a term of ten years as the maximum of imprisonment in cases prosecuted under the sixty-second article of war, as authorized by this paragraph, it was held that a court-martial, on convicting a soldier of conduct prejudicial to good order and military dis-

cipline in violation of such article, had jurisdiction to sentence the accused to a term of five years' imprisonment, though such term extended beyond the term of military service for which he had enlisted. *In re Stubbs*, (1905) 133 Fed. 1012.

ASSAULT.

Vol. I, p. 511, sec. 5346.

"Haven."—Waters inclosed in whole or in part by a breakwater or other artificial structure to afford a protected anchorage, as well as those so inclosed by natural land, constitute a "haven" within the meaning of this section. Thus the waters inclosed between the shore and the government break-

waters in Lake Erie at the port of Buffalo, without as well as within the line designated on the government chart as "Buffalo Harbor Line," constitute a "haven," and not "high seas," within the meaning of the section. *Ex p. O'Hare*, (1910) 179 Fed. 682, reversing (1909) 171 Fed. 290.

BAIL AND RECOGNIZANCES.

Vol. I, p. 523, sec. 1020.

Wilful default.—Where, on breach of an appearance bond, the court found that the party had made wilful default, and final judgment was rendered at the succeeding term, it was held that the court had no power to remit any portion of the judgment against one of the sureties on his apprehending the principal and delivering him into custody at the term at which final judgment was entered, no answer having been filed to the scire facias issued and served at the previous term. *U. S. v. Robinson*, (1908) 158 Fed. 410.

Where a defendant on bail in a criminal case in a federal court voluntarily went into another state with knowledge that prior in-

dictments were there pending against him, and he was arrested, tried, convicted, and imprisoned, it was held that his default of the bail bond was wilful and entitled him to no relief under this section. *U. S. v. Marrin*, (1909) 170 Fed. 476.

Time for application for remission.—An application to a federal court which has entered judgment on a forfeited recognizance in favor of the United States, for a remission of the penalty for which such judgment was rendered, is not a motion to vacate the judgment, and may be entertained after the term at which the judgment was entered. *U. S. v. Jenkins*, (1909) 176 Fed. 672. See also *U. S. v. Traynor*, (1909) 173 Fed. 114.

BANKRUPTCY.

Chapter I. Definitions, 464.

Sec. 1. Meaning of Words and Phrases, 464.

- (1) *Person Against Whom Petition Has Been Filed, 464.*
- (2) *Adjudication, 465.*
- (3) *Appellate Courts, 465.*
- (4) *Bankrupt, 465.*
- (5) *Clerk, 465.*
- (6) *Corporations, 465.*
- (7) *Court, 465.*
- (8) *Courts of Bankruptcy, 465.*
- (9) *Creditor, 465.*
- (10) *Date of Bankruptcy — Time of Bankruptcy — Commencement of Proceedings — Bankruptcy, 465.*
- (11) *Debt, 465.*
- (12) *Discharge, 465.*
- (13) *Document, 465.*
- (14) *Holiday, 465.*
- (15) *When Person Deemed Insolvent, 465.*
- (16) *Fudge, 467.*
- (17) *Oath, 467.*
- (18) *Officer, 467.*
- (19) *Persons, 468.*
- (20) *Petition, 468.*
- (21) *Referee, 468.*
- (22) *Conceal, 468.*
- (23) *Secured Creditor, 468.*
- (24) *States, 468.*
- (25) *Transfer, 468.*
- (26) *Trustee, 468.*
- (27) *Wage-earner, 468.*
- (28) *Words Importing Masculine Gender, 468.*
- (29) *Words Importing Plural Number, 468.*
- (30) *Words Importing Singular Number, 468.*

II. Creation of Courts of Bankruptcy and Their Jurisdiction,

469.

Sec. 2. Federal and Territorial Courts, 469.

- (1) *To Adjudge Bankrupt, 470.*
- (2) *Allow and Disallow Claims, 472.*
- (3) *Appoint Receivers, etc., 472.*
- (4) *Try and Punish Bankrupts, etc., 475.*
- (5) *Permit Temporary Transaction of Business, 475.*
- (6) *Substitute Additional Parties, 475.*
- (7) *Collect and Distribute Assets, 476.*
- (8) *Close Estates, 476.*
- (9) *Confirm or Reject Compositions, 477.*
- (10) *Modify, etc., Referee's Findings, 478.*
- (11) *Determine Exemptions, 478.*
- (12) *Discharge Bankrupts, etc., 479.*
- (13) *Enforce Orders, 479.*
- (14) *Extradite Bankrupts, 479.*
- (15) *Make Orders, 479.*
- (16) *Punish for Contempt, 480.*
- (17) *Appoint and Remove Trustees, 480.*
- (18) *Tax Costs, 480.*

BANKRUPTCY.

- (19) *Transfer Cases*, 480.
- (20) *Ancillary Jurisdiction*, 480.
- Unspecified Powers*, 481.

Ch. III. Bankrupts, 481.

- Sec. 3. a. *Acts of Bankruptcy*, 481.
 - (1) *Conveyances to Defraud, etc.*, 481.
 - (2) *Preferences through Transfers*, 483.
 - (3) *Preferences through Legal Proceedings*, 486.
 - (4) *General Assignment — Appointment of Receiver or Trustee*, 488.
 - (5) *Admitting Inability to Pay*, 491.
- b. *Petition to Be Filed within Four Months*, 492.
 - (1) *Date of Recording Transfer*, 492.
- c. *Defense of Solvency*, 493.
- d. *Person Denying Insolvency*, 493.
- e. *Petitioner to Give Bond*, 494.
 - Allowance of Costs, Damages, etc.*, 494.
- 4. *Who May Become Bankrupts*, 495.
 - a. *Voluntary Bankrupts*, 495.
 - b. *Involuntary Bankrupts*, 495.
 - Liability of Officers and Stockholders of Corporations*, 501.
- 5. *Partners*, 501.
 - a. *Partnership*, 501.
 - b. *Administration of Estate*, 504.
 - c. *Jurisdiction over One Partner Sufficient*, 504.
 - d. *Trustee's Duty — Partnership Accounts*, 505.
 - e. *Distribution of Expenses*, 505.
 - f. *Payment of Debts — Surplus*, 506.
 - g. *Claims Against Various Estates — Marshaling Assets*, 507.
 - h. *Administration Where All Partners Not Bankrupt*, 508.
- 6. *Exemptions of Bankrupts*, 508.
 - a. *Exemptions under State Laws*, 508.
- 7. *Duties of Bankrupts*, 519.
 - (1) *Attend Meetings and Hearings*, 519.
 - (2) *Comply with Orders*, 519.
 - (3) *Examine Proofs of Claims*, 520.
 - (4) *Execute and Deliver Papers*, 520.
 - (5) *Execute Transfers*, 520.
 - (6) *Inform Trustee of Evasions of Law*, 520.
 - (7) *Disclose False Claims*, 520.
 - (8) *File Schedules*, 520.
 - (9) *Submit to Examination*, 524.
- 8. *Death or Insanity of Bankrupts*, 527.
 - a. *Not to Abate Proceedings*, 527.
 - Dower and Allowances for Widow and Children*, 528.
- 9. *Protection and Detention of Bankrupts*, 529.
 - a. *Exemption from Arrest*, 529.
 - (1) *Process Issued from Court of Bankruptcy*, 530.
 - (2) *Process Issued from State Court*, 530.
 - b. *Detention for Examination*, 530.
- 10. *Extradition of Bankrupts*, 531.
- 11. *Suits by and against Bankrupts*, 531.
 - a. *Stay of Suits*, 531.
 - b. *Appearance of Trustee*, 538.
 - c. *Prosecution of Suit by Trustee*, 539.
 - d. *Time for Bringing Suit against Trustee*, 540.
- 12. *Compositions, When Confirmed*, 540.
 - a. *When Offer May Be Made*, 540.
 - b. *Application for Confirming*, 541.
 - c. *Date and Place of Hearing*, 542.
 - d. *When Judge Shall Confirm*, 543.

BANKRUPTCY.

- (1) *Best Interests of Creditors*, 543.
- (2) *Acts Which Would Bar Discharge*, 544.
- (3) *Good Faith*, 544.
- e. *Distribution of Consideration—Administration When No Confirmation*, 545.
- Sec. 13. *Compositions, When Set Aside*, 546.
 - a. *When Fraud Practiced*, 546.
- 14. *Discharges, When Granted*, 547.
 - a. *Application for Discharge*, 547.
 - b. *Hearing Application and Granting Discharge*, 549.
 - (1) *Commission of Offense*, 557.
 - (2) *Concealment of Financial Condition*, 558.
 - (3) *Obtained Money or Property upon False Statement*, 560.
 - (4) *Concealment, etc., of Assets*, 562.
 - (5) *Discharge in Voluntary Proceedings*, 567.
 - (6) *Refusal to Obey Lawful Orders*, 567.
 - c. *When Trustee May Interpose Objections*, 568.
 - d. *Confirmation of Composition*, 568.
- 15. *Discharges, When Revoked*, 568.
- 16. *Conditions of Bankrupts*, 569.
- 17. *Debts Not Affected by a Discharge*, 570.
 - (1) *Taxes*, 573.
 - (2) *Liabilities for Tort, Fraud, etc.*, 573.
 - (3) *Debts Not Scheduled*, 577.
 - (4) *Fraud, etc., in Fiduciary Capacity*, 578.
- Ch. IV. *Courts and Procedure Therein*, 579.
- Sec. 18. *Process, Pleadings, and Adjudications*, 579.
 - a. *Service of Petition—Return—Publication*, 579.
 - b. *Time to Plead to Petition*, 581.
 - c. *Verification of Pleadings*, 582.
 - d. *Determining Issues of Fact—Fury Trial*, 583.
 - e. *Where No Pleadings Filed*, 585.
 - f. *Judge Absent—Reference to Referee*, 586.
 - g. *Hearing on Voluntary Petition—Absence of Judge*, 586.
- 19. *Fury Trials*, 586.
 - a. *When Demandable—Waiver*, 586.
 - b. *Attendance of Fury—Certifying Case to Other Court*, 588.
 - c. *Laws as to Fury Trials Applicable*, 588.
- 20. *Oaths, Affirmations*, 588.
 - a. *Who May Administer*, 588.
 - (1) *Referees*, 588.
 - (2) *Authorized Officers*, 588.
 - (3) *Diplomatic or Consular Officers*, 589.
 - b. *Affirmations*, 589.
- 21. *Evidence*, 589.
 - a. *Compulsory Attendance of Witnesses*, 589.
 - b. *Examination of Bankrupt's Wife*, 592.
 - c. *Depositions—Right to Take*, 592.
 - d. *Notice of Taking Depositions*, 592.
 - e. *Certified Copies as Evidence*, 593.
 - f. *Certified Copy of Order Approving Trustee's Bond*, 593.
 - g. *Certified Copy of Orders*, 593.
 - h. *Evidence of Revesting Title in Bankrupt*, 593.
- 22. *Reference of Cases after Adjudication*, 593.
 - a. *Judge May Refer Case*, 593.
 - (1) *General or Special Reference*, 593.
 - (2) *To Any Referee within Territorial Jurisdiction*, 593.
 - b. *Transfer of Case to Different Referee*, 594.

BANKRUPTCY.

- Sec. 23. Jurisdiction of United States and State Courts, 594.*
 - a. Circuit Courts, 594.*
 - b. Suits by Trustee — Where Brought, 595.*
 - c. Concurrent Jurisdiction, 603.*
 - 24. Jurisdiction of Appellate Courts, 603.*
 - a. Supreme Court — Circuit Courts of Appeals — Territorial Courts, 603.*
 - b. Circuit Courts of Appeals, 611.*
 - 25. Appeals and Writs of Error, 623.*
 - a. Appeals, 623.*
 - (1) From Judgment Granting or Denying Adjudication, 632.*
 - (2) From Grant or Denial of Discharge, 633.*
 - (3) From Allowance or Rejection of Claim, 634.*
 - Time for Taking Appeal — Hearing, 635.*
 - b. Appeal to Supreme Court, 638.*
 - 1. Jurisdictional Amount — Question Involved, 640.*
 - 2. Certification of Question by Supreme Court Justice, 641.*
 - c. Bond on Appeal by Trustees, 641.*
 - d. Certification to Supreme Court by Other Courts, 641.*
 - 26. Arbitration of Controversies, 645.*
 - a. Trustees May Submit, 645.*
 - b. Selection of Arbitrators, 645.*
 - c. Findings, 645.*
 - 27. Compromises, 645.*
 - a. When Allowed, 645.*
 - 28. Designation of Newspapers, 646.*
 - a. To Publish Notices, 646.*
 - 29. Offenses, 646.*
 - a. Misappropriating Property — Secreting or Destroying Documents, 646.*
 - b. Punishment, 646.*
 - (1) Concealing Property, 646.*
 - (2) False Oaths or Accounts, 650.*
 - (3) False Claims, 651.*
 - (4) Receiving Property from Bankrupt, 651.*
 - (5) Extorting Money or Property, 651.*
 - c. Punishment, 652.*
 - (1) Acting as Referee When Interested, 652.*
 - (2) Purchasing Property, 652.*
 - (3) Refusal to Permit Inspection of Accounts and Papers, 652.*
 - d. Limitation, 652.*
 - 30. Rules, Forms, and Orders, 652.*
 - a. Made by Supreme Court, 652.*
 - 31. Computation of Time, 653.*
 - 32. Transfer of Cases, 653.*
- Ch. V. Officers, Their Duties and Compensation, 654.**
- Sec. 33. Creation of Two Offices, 654.*
 - a. Referee and Trustee, 654.*
 - 34. Appointment, Removal, and Districts of Referees, 654.*
 - (1) Appointment and Removal of Referees, 654.*
 - (2) Districts of Referees, 654.*
 - 35. Qualifications of Referees, 654.*
 - (1) Competent, 655.*
 - (2) Not Officeholders, 655.*
 - (3) Not Related to Judges, 655.*
 - (4) Residents of Districts, 655.*
 - 36. Oaths of Office of Referees, 655.*
 - 37. Number of Referees, 655.*

BANKRUPTCY.

- Sec. 38. Jurisdiction of Referees, 655.*
- (1) *Consider Petitions, 658.*
 - (2) *Administer Oaths, Examine Witnesses, Require Production of Documents, 658.*
 - (3) *Taking Possession of and Releasing Property, 659.*
 - (4) *Perform Certain Duties of Courts, 659.*
 - (5) *Authorize Employment of Stenographers, 663.*
- 39. Duties of Referees, 663.*
- a. What Referees Shall Do, 663.*
 - (1) *Declare Dividends, 663.*
 - (2) *Examine Schedules and Lists, 664.*
 - (3) *Furnish Information, 664.*
 - (4) *Give Notices, 664.*
 - (5) *Make Up Records, 664.*
 - (6) *Prepare Schedules and Lists, 664.*
 - (7) *Preserve and Transmit Records, 665.*
 - (8) *Transmit Papers to Clerks, 665.*
 - (9) *Preserve Evidence, 665.*
 - (10) *Obtain Papers, 666.*
 - b. What Referees May Not Do, 666.*
 - (1) *Act if Interested, 666.*
 - (2) *Practice as Attorneys, 666.*
 - (3) *Purchase from Estate, 666.*
- 40. Compensation of Referees, 666.*
- a. Fee and Commissions, 666.*
 - b. Division between Two Referees, 668.*
 - c. Where Reference Revoked, 668.*
- 41a. Contempts before Referees, 668.*
- (1) *Disobedience, 668.*
 - (2) *Misbehavior, 673.*
 - (3) *Withholding Documents, 673.*
 - (4) *Refusal to Appear, Take Oath, or Be Examined, 673.*
When Tender of Mileage Necessary, 674.
- b. Contempt Proceedings — Penalty, 674.*
- 42. Records of Referees, 676.*
- a. Manner of Keeping, 676.*
 - b. Books and Papers, 676.*
 - c. Become Part of Court Records, 677.*
- 43. Referee's Absence or Disability, 677.*
- a. Filling Vacancy, 677.*
- 44. Appointment of Trustees, 677.*
- 45. Qualifications of Trustees, 680.*
- (1) *Individuals, 680.*
 - (2) *Corporations, 681.*
- 46. Death or Removal of Trustees, 681.*
- 47a. Duties of Trustees, 682.*
- (1) *Account and Pay Over, 682.*
 - (2) *Reduce Property to Money — Close Up Estate, 682.*
 - (3) *Deposit Money, 685.*
 - (4) *Disburse Money, 685.*
 - (5) *Furnish Information, 685.*
 - (6) *Keep Accounts, 685.*
 - (7) *Make Detailed Statement, 686.*
 - (8) *Make Final Reports, 686.*
 - (9) *Pay Dividends, 686.*
 - (10) *Report Condition of Estate, 686.*
 - (11) *Set Apart Exemptions, 686.*
- b. Concurrence of Two out of Three, 689.*
- c. File Certified Copy of Decree of Adjudication, 689.*
- 48. Compensation of Trustees, Receivers, and Marshals, 689.*
- a. Fee and Commissions of Trustee, 689.*
 - b. Where More than One Trustee, 690.*

BANKRUPTCY.

- c. Withholding Compensation, 690.*
- d. Compensation of Receivers and Marshals Appointed under Section 2 (3), 690.*
 - On Confirmation of Composition, 692.*
 - When Acting as Mere Custodian, 692.*
 - Notice to Creditors, 690.*
- e. Compensation for Conducting Business, 692.*
 - On Confirmation of Composition, 692.*
 - Notice to Creditors, 692.*
- Sec. 49. Accounts and Papers of Trustees, 693.*
- 50. Bonds of Referees and Trustees, 693.*
 - a. Referees' Bonds, 693.*
 - b. Trustees' Bonds, 693.*
 - c. Creditors Fixing Amount of Trustee's Bond, 693.*
 - d. Sureties' Qualification, 693.*
 - e. Two Sureties, 693.*
 - f. Value of Property of Sureties, 693.*
 - g. Corporations as Sureties, 693.*
 - h. Filing of and Suit upon Bonds, 693.*
 - i. Trustees' Personal Liability, 694.*
 - j. Joint Trustees, 694.*
 - k. Vacancy by Failure to Give Bond, 694.*
 - l. Limitation of Suits on Referees' Bonds, 694.*
 - m. Limitation of Suits on Trustees' Bonds, 694.*
- 51. Duties of Clerks, 694.*
 - (1) Account for Fees, 694.*
 - (2) Collect Fees, 695.*
 - (3) Delivery and Return of Papers, 695.*
 - (4) Pay Referee's and Trustee's Fee, 695.*
- 52. Compensation of Clerks and Marshals, 696.*
 - a. Clerk's Filing Fee, 696.*
 - b. Marshal's Fees, 696.*
- 53. Duties of Attorney-General, 696.*
- 54. Statistics of Bankruptcy Proceedings, 696.*
- Ch. VI. Creditors, 696.**
- Sec. 55. Meetings of Creditors, 696.*
 - a. Place and Time, 696.*
 - b. Presiding Officer — Duties, 697.*
 - c. Creditors' Duty, 697.*
 - d. Subsequent Meetings of Creditors, 697.*
 - e. Meeting at Call of Court, 697.*
 - f. Final Meeting, 698.*
- 56. Voters at Meetings of Creditors, 698.*
 - a. Method of Voting, 698.*
 - b. Voting by Secured Creditors, 699.*
- 57. Proof and Allowance of Claims, 700.*
 - a. Of What to Consist, 700.*
 - b. When Claim Founded upon Writing, 702.*
 - c. Filing Claims, 703.*
 - d. When Claims Allowed, 703.*
 - e. Claims of Secured Creditors, 704.*
 - f. Objections to Claims, 706.*
 - g. Preferred Creditors, 706.*
 - h. Securities Held by Secured Creditors, 709.*
 - i. Claims Secured by Individual Undertaking, 710.*
 - j. Debts Owed to United States, State, County, etc., 710.*
 - k. Reconsideration of Claims, 711.*
 - l. Recovery of Dividend by Trustee, 712.*
 - m. Claims by One Estate against Another, 712.*
 - n. Time for Proving Claims, 712.*
 - Infants and Insane Persons, 715.*

BANKRUPTCY.

Sec. 58. Notices to Creditors, 715.

a. Ten Days' Notice, 715.

- (1) *Examinations, 715.*
- (2) *Application for Confirmation of Composition, 715.*
- (3) *Meetings, 716.*
- (4) *Sales, 716.*
- (5) *Dividends, 716.*
- (6) *Final Accounts, 716.*
- (7) *Compromises, 716.*
- (8) *Dismissal of Proceedings, 716.*
- (9) *Applications for Discharge, 717.*

b. First Meeting — Publication of Notice, 717.

c. Notices Given by Referee, 717.

59. Who May File and Dismiss Petitions, 717.

a. Voluntary Bankrupt, 717.

b. Involuntary Bankrupt, 718.

c. Petitions in Duplicate, 726.

d. Notice to Other Creditors — Hearing — Dismissal, 726.

e. Computing Number of Creditors—Employees and Relatives, 727.

f. Appearance of Creditors, 727.

g. Notice of Dismissal, 729.

60. Preferred Creditors, 729.

a. What Constitutes Preference, 729.

b. Preferences Voidable, 739.

c. Set-off of New Credit after Preference, 746.

d. Payments to Attorneys — Examination, 747.

Ch. VII. Estates, 748.

Sec. 61. Depositories for Money, 748.

62. Expenses of Administering Estates, 749.

63a. Debts Which May Be Proved, 753.

- (1) *Fixed Liability, 753.*
- (2) *Costs of Suit, 760.*
- (3) *Claim for Taxable Costs, 760.*
- (4) *Open Account or Contract, 760.*
- (5) *Judgment after Filing of Petition, 764.*

b. Unliquidated Claims, 765.

64. Debts Which Have Priority, 766.

a. Taxes, 766.

b. Order of Payment, 770.

- (1) *Cost of Preserving Estate, 770.*
- (2) *Filing Fees — Expense of Recovering Concealed Assets, 771.*
- (3) *Costs of Administration — Attorneys' Fees, 772.*
- (4) *Employees' Wages, 774.*
- (5) *Debts Owing to Person Entitled to Priority, 777.*

c. After Composition Set Aside or Discharge Revoked, 780.

65. Declaration and Payment of Dividends, 781.

a. On Allowed Claims, 781.

b. First and Subsequent Dividends, 781.

Amount of First Dividend, 782.

Declaration of Final Dividend, 782.

c. Claims Subsequent to Payment of Dividends, 782.

d. Where Persons Adjudged Bankrupt without United States, 783.

e. Limit to Amount Collectible by Claimant, 783.

66. Unclaimed Dividends, 783.

a. Payment into Court, 783.

b. Distribution after One Year, 783.

67. Liens, 783.

a. Claims Not Valid Liens, 783.

b. Trustee Subrogated to Rights of Creditor, 784.

- c. *Certain Liens Dissolved*, 785.
 - (1) *Defendant Insolvent*, 785.
 - (2) *Knowledge of Insolvency*, 786.
 - (3) *Fraud—Trustee Subrogated*, 786.
- d. *Liens Given in Good Faith*, 786.
- e. *Conveyances, etc., within Four Months of Petition*, 792.
- Jurisdiction*, 797.
- f. *Liens, etc., Created through Legal Proceedings*, 797.
- Court May Order Conveyance*, 804.
- Bona Fide Purchasers*, 805.
- Sec. 68. *Set-offs and Counterclaims*, 805.
 - a. *Mutual Debts and Credits*, 805.
 - b. *When Not Allowed*, 808.
 - (1) *Debts Not Provable*, 808.
 - (2) *Purchase or Transfer for Purpose of Set-off*, 808.
- 69. *Possession of Property*, 808.
- 70. *Title to Property*, 811.
 - a. *Vested in Trustee*, 811.
 - (1) *Documents*, 820.
 - (2) *Patents, Copyrights, and Trademarks*, 821.
 - (3) *Powers*, 821.
 - (4) *Property Transferred in Fraud*, 821.
 - (5) *Property Which Might Have Been Transferred or Levied upon*, 823.
 - Policy of Insurance*, 835.
 - (6) *Rights of Action*, 838.
 - b. *Appraisal and Sale*, 839.
 - c. *Trustee to Convey Title*, 843.
 - d. *Composition Set Aside—Vesting Title in Trustee*, 843.
 - e. *Avoiding Certain Transfers—Recovery of Property*, 844.
 - Jurisdiction*, 846.
 - f. *Revestment of Title on Confirmation of Composition*, 847.
- 71. *Bankruptcy Records*, 847.
- 72. *Compensation of Officers Restricted*, 848.
- Time of Taking Effect**, 848.
 - a. *Force and Effect*, 848.
 - Amendment of 1903*, 849.
 - Amendment of 1910*, 849.
 - b. *Cases Pending under State Laws*, 849.

An Act To establish a uniform system of bankruptcy throughout the United States.

[Act of July 1, 1898, ch. 541, 30 Stat. L. 544, as amended by the Act of Feb. 5, 1903, ch. 487, 32 Stat. L. 797, the Act of June 15, 1906, ch. 3333, 34 Stat. L. 297, and the Act of June 25, 1910, ch. 412, 36 Stat. L. 838.]

CHAPTER I.

DEFINITIONS.

SECTION 1. MEANING OF WORDS AND PHRASES. — a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: [(1898) 30 Stat. L. 544.]

(1) [*Person against whom petition has been filed.*] “A person against whom a petition has been filed” shall include a person who has filed a voluntary petition; [(1898) 30 Stat. L. 544.]

(2) [*Adjudication.*] "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; [(1898) 30 Stat. L. 544.]

(3) [*Appellate courts.*] "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; [(1898) 30 Stat. L. 544.]

(4) [*Bankrupt.*] "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; [(1898) 30 Stat. L. 544.]

(5) [*Clerk.*] "clerk" shall mean the clerk of a court of bankruptcy; [(1898) 30 Stat. L. 544.]

(6) [*Corporations.*] "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; [(1898) 30 Stat. L. 544.]

(7) [*Court.*] "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; [(1898) 30 Stat. L. 544.]

(8) [*Courts of bankruptcy.*] "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; [(1898) 30 Stat. L. 544.]

(9) [*Creditor.*] "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; [(1898) 30 Stat. L. 544.]

(10) [*Date of bankruptcy — time of bankruptcy — commencement of proceedings — bankruptcy.*] "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; [(1898) 30 Stat. L. 544.]

(11) [*Debt.*] "debt" shall include any debt, demand, or claim provable in bankruptcy; [(1898) 30 Stat. L. 544.]

(12) [*Discharge.*] "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; [(1898) 30 Stat. L. 544.]

(13) [*Document.*] "document" shall include any book, deed, or instrument in writing; [(1898) 30 Stat. L. 544.]

(14) [*Holiday.*] "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; [(1898) 30 Stat. L. 544.]

(15) [*When person deemed insolvent.*] a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or

removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; [(1898) 30 Stat. L. 544.]

Determination of question as to solvency.—

The definition of insolvency provided by section 1a (15) must be strictly adhered to in determining whether or not an alleged bankrupt is solvent or otherwise. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766; *Duncan v. Landis*, (3d Cir. 1901) 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Pettingill*, (D. C. Mass. 1905) 135 Fed. 218; *In re Marine Iron Works*, (E. D. N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 123 Ia. 432, 99 N. W. 121; *Hackney v. Raymond Bros. Clarke Co.*, (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *National Bank, etc., Co. v. Spencer*, (1900) 53 App. Div. 547, 65 N. Y. S. 1001; *Livor v. Seiter*, (1901) 34 Misc. 382, 69 N. Y. S. 987, reversed on other grounds (1902) 69 App. Div. 33, 74 N. Y. S. 499; *Martin v. Bigelow*, (1901) 36 Misc. 298, 73 N. Y. S. 443; *Wilkinson v. Anderson-Taylor Co.*, (1904) 28 Utah 346, 79 Pac. 46.

The term "insolvency," as understood in the administration of bankrupt and insolvent laws, is the inability of a person to pay his debts as they mature in the regular course of business; as understood in dealing with contracts challenged on the ground of fraud, actual or constructive, it has reference to the insufficiency of the assets of the debtor to cover his liabilities. *Marvin v. Anderson*, (1901) 6 Am. Bankr. Rep. 520, 111 Wis. 387, 87 N. W. 226.

The issue as to solvency or insolvency is to be determined at the date of the commission of the alleged act of bankruptcy. *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766.

As to partnership insolvency, see the annotation under section 5a, *infra*, p. 501.

Fair valuation.—The property should be taken at a fair valuation in determining the question of solvency, not at the amount it afterwards brings when sold at auction by a trustee in bankruptcy. *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446.

"Fair valuation" means a value that can be made promptly effective by the owner of property to pay his debts. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale; and, on the other hand, the retail price that could be realized in the slow process of trade. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

"Fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

The test of a "fair valuation" of property is its market value at the time legal proceedings were taken, where that can be fairly established, and not its value as it may have been affected by such proceedings. *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295.

The fair "market value" of a corporation's assets, for the purpose of determining its solvency when it commits an alleged act of bankruptcy, is the value which the corporation might have realized on them for itself. *In re Marine Iron Works*, (E. D. N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390.

In Empire State Trust Co. v. William F. Fisher Co., (1904) 67 N. J. Eq. 88, 57 Atl. 502, the following rule is given: "The authorities seem to hold the reasonable rule that the assets of the debtor must . . . be valued as those of a going concern, if that be the actual condition, and that subsequent actual insolvency is not the true and only test."

Preferences considered.—Where the alleged act of bankruptcy consists in granting or permitting a preference to a creditor, the property thus transferred is to be considered in determining the question of solvency at that time. *In re Doscher*, (E. D. N. Y. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 77, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

Exempt property included.—In determining the issue as to the solvency or insolvency of an alleged bankrupt, all of the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state. *In re Baumann*, (W. D. Tenn. 1899) 96 Fed. 946, 3 Am. Bankr. Rep. 196; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502.

Fraudulent transfers excluded.—Property transferred in fraud of creditors is not to be considered in determining the solvency of an alleged bankrupt. *In re Shoemith*, (7th Cir. 1905) 135 Fed. 664, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502.

Other matters considered in determining solvency.—*Outstanding bonds*, though issued irregularly, should not be excluded from consideration in determining the question of a corporation's insolvency in bankruptcy proceedings against it. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

Interest of mortgagor in mortgaged property.—The interest of an alleged bankrupt in premises that he has mortgaged should be considered in determining whether he is solvent or insolvent within the meaning of the Bankruptcy Act. *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 43 C. C. A. 253, 11 Am. Bankr. Rep. 558; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

Debt guaranteed by bankrupt.—In a suit by a bankrupt's trustee to avoid a preference, it was held that a debt of a third person who was insolvent, and which the bankrupt had guaranteed, was properly considered as a debt of the bankrupt in determining his solvency at the time the alleged preference was given; and this though the guaranty was oral and within the statute of frauds, as that statute relates merely to the evidence required to prove the undertaking, and not to its validity. *Huttig Mfg. Co. v. Edwards*, (8th Cir. 1908) 160 Fed. 619, 87 C. C. A. 621, 20 Am. Bankr. Rep. 349.

Suspension of business.—Upon the question of the insolvency of a corporation at the time of the commission of an alleged act of bankruptcy, evidence of its suspension of business, and its inability to pay its debts, at a time within a few weeks or months thereafter is competent, and, in the absence of other evidence, is sufficient to warrant a finding of such insolvency. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 464.

The verified schedules of a bankrupt are competent evidence on the question of his insolvency, not only when the petition was filed, but also when a conveyance claimed to have been preferential was made, if within a reasonable time prior thereto. *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774, affirmed (2d Cir. 1905) 135 Fed. 1021, 68 C. C. A. 546.

Contingent assets.—*Assets must have a present value*, and be salable, in order to be considered in determining the question of the solvency of an alleged bankrupt; contingent assets are not within the meaning of the Bankruptcy Act. *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Marine Iron Works*, (E. D.

N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390.

Prospective profits upon goods ordered, but not paid for and not delivered, which might arise from orders to be filled in the future if not canceled, and if paid for, are not property, and cannot be considered as a part of the alleged bankrupt's assets. *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300.

The liability of stockholders of a corporation for stock claimed to have been issued without payment, which claim is disputed, cannot be taken into account as an asset in determining the question of the corporation's solvency in bankruptcy proceedings against it. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

Accounts receivable.—In determining the solvency or insolvency of a person, his accounts receivable are to be taken at their actual value and not at their nominal value. While it might be that something could be realized out of them in the future, that does not satisfy the law. It is their value at the time of the bankruptcy that is to be taken into consideration. *In re Coddington*, (M. D. Pa. 1902) 118 Fed. 281, 9 Am. Bankr. Rep. 243.

Inference of insolvency.—No inference arises from an adjudication in bankruptcy that the bankrupt was insolvent within the meaning of the act four months before he was adjudicated such. *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

The fact that a man is pressed and cannot meet his debts as they fall due is no evidence that he is insolvent within the meaning of the Bankruptcy Act. *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

Proof that a man was insolvent on a certain day does not justify an inference that he was insolvent on a day some time prior thereto. Many contingencies, such as unwise investments, losing contracts, misfortune, or accident, might happen to reduce a person from a state of solvency to one of insolvency within a short space of time. *Kimball v. Dresser*, (1904) 98 Me. 519, 57 Atl. 787; *Halbert v. Pranke*, (1904) 11 Am. Bankr. Rep. 620, 91 Minn. 204, 97 N. W. 976.

In *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231, it was held, where the bankrupt sent a letter to his creditors stating his inability to pay his debts and calling a meeting for the purpose of inducing them to take in settlement a small percentage in unsecured notes, that he was insolvent.

(16) [Judge.] "judge" shall mean a judge of a court of bankruptcy, not including the referee; [(1898) 30 Stat. L. 544.]

(17) [Oath.] "oath" shall include affirmation; [(1898) 30 Stat. L. 544.]

(18) [Officer.] "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any

officer shall include his successor and any person authorized by law to perform the duties of such officer; [(1898) 30 Stat. L. 544.]

(19) [*Persons.*] "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; [(1898) 30 Stat. L. 545.]

(20) [*Petition.*] "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; [(1898) 30 Stat. L. 545.]

(21) [*Referee.*] "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; [(1898) 30 Stat. L. 545.]

(22) [*Conceal.*] "conceal" shall include secrete, falsify, and mutilate; [(1898) 30 Stat. L. 545.]

(23) [*Secured creditor.*] "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; [(1898) 30 Stat. L. 545.]

(24) [*States.*] "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; [(1898) 30 Stat. L. 545.]

(25) [*Transfer.*] "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; [(1898) 30 Stat. L. 545.]

(26) [*Trustee.*] "trustee" shall include all of the trustees of an estate; [(1898) 30 Stat. L. 545.]

(27) [*Wage-earner.*] "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; [(1898) 30 Stat. L. 545.]

(28) [*Words importing masculine gender.*] words importing the masculine gender may be applied to and include corporations, partnerships, and women; [(1898) 30 Stat. L. 545.]

(29) [*Words importing plural number.*] words importing the plural number may be applied to and mean only a single person or thing; [(1898) 30 Stat. L. 545.]

(30) [*Words importing singular number.*] words importing the singular number may be applied to and mean several persons or things. [(1898) 30 Stat. L. 545.]

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

SEC. 2. [FEDERAL AND TERRITORIAL COURTS.] That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to [(1898) 30 Stat. L. 545.]

Right to exercise original jurisdiction.—The Bankruptcy Act confers on the District Courts, as courts of bankruptcy, such jurisdiction, at law and in equity, as enables them to exercise original jurisdiction in bankruptcy proceedings. *Brumby v. Jones*, (5th Cir. 1905) 141 Fed. 318, 72 C. C. A. 466, 15 Am. Bankr. Rep. 578; *Horner-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257.

Not courts of limited jurisdiction.—Courts of bankruptcy, being vested exclusively with jurisdiction of all proceedings throughout the country, are not courts of limited jurisdiction. *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

The jurisdiction of the court which makes an adjudication extends to all property of the bankrupt situated anywhere in the United States, and it may make such orders with respect thereto as are necessary for the preservation, collection, and administration of such property. *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751; *Staunton v. Wooden*, (9th Cir. 1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

Territorial jurisdiction.—The fact that the court of bankruptcy, in which a petition has been filed, has jurisdiction, coextensive with that of the United States, to order and control the disposition of the bankrupt's estate, does not mean that such court may issue its process to run into another district. Such court may not extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised. *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715; *In re Alphin, etc., Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Steele*, (N. D. Ala. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446; *Staunton v. Wooden*, (9th Cir. 1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

Equitable jurisdiction.—A court of bankruptcy is, in a strict sense, a court of equity, and is guided and controlled by equitable doctrines and principles. *In re Siegel-Hillman Dry Goods Co.*, (E. D. Mo. 1901) 111 Fed. 983, 7 Am. Bankr. Rep. 351; *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009,

8 Am. Bankr. Rep. 715; *In re Rochford*, (8th Cir. 1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; *Lockman v. Lang*, (8th Cir. 1904) 132 Fed. 1, 65 C. C. A. 621, 11 Am. Bankr. Rep. 597; *In re Waugh*, (9th Cir. 1904) 133 Fed. 281, 66 C. C. A. 659, 13 Am. Bankr. Rep. 187; *Dodge v. Norlin*, (8th Cir. 1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 86; *Mason v. Wolkowich*, (1st Cir. 1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. N. S. 765, 17 Am. Bankr. Rep. 709; *Ex p. Steele*, (N. D. Ala. 1908) 162 Fed. 604, 20 Am. Bankr. Rep. 446; *Westall v. Avery*, (4th Cir. 1909) 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673; *Clay v. Waters*, (8th Cir. 1910) 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463, 24 Am. Bankr. Rep. 474; *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

The equitable jurisdiction conferred on the bankruptcy courts by section 2 is that adopted by the Constitution from the *English* High Court of Chancery, as administered generally by the federal courts. *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715.

Bankruptcy court always open.—For the purposes of bankruptcy jurisdiction a District Court is always open. It has no separate terms. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; *In re Henschel*, (S. D. N. Y. 1902) 114 Fed. 968, 8 Am. Bankr. Rep. 201.

The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate, and at all times open for re-examination. *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692.

Right to enjoin interference with jurisdiction.—The bankruptcy law gives to courts of bankruptcy full power to enjoin all persons within their jurisdiction from doing any act that will interfere with or prevent its due administration, whether such persons are par-

ties to the proceedings or not; and where they are litigants in a state court, no rule of comity requires the court of bankruptcy to compel persons whose rights under the bankruptcy law are jeopardized by such liti-

gation to resort to the state court for protection. *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 286, 10 Am. Bankr. Rep. 308. And see generally sections 11a and 23b, and the annotation thereunder, *infra*, pp. 531, 506.

(1) [*To adjudge bankrupt.*] adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; [(1898) 30 Stat. L. 545.]

Jurisdiction as dependent on residence within the district.—A court of bankruptcy has jurisdiction to adjudge persons bankrupt who have resided, or have had their domicile, within its territorial jurisdiction for the six months preceding the filing of the petition in bankruptcy, or the greater portion thereof. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Waxelbaum*, (S. D. N. Y. 1899) 97 Fed. 562, 3 Am. Bankr. Rep. 267; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332; *In re Dinglehoeft*, (E. D. N. C. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736; *In re Garneau*, (7th Cir. 1904) 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679; *In re Isaacson*, (S. D. N. Y. 1908) 161 Fed. 777, 20 Am. Bankr. Rep. 430; *In re Oldstein*, (D. C. Ore. 1910) 182 Fed. 409; *In re Stokes*, (D. C. Wash. 1899) 1 Am. Bankr. Rep. 35; *In re Ray*, (D. C. Wash. 1899) 2 Am. Bankr. Rep. 153; *In re Clisdell*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424; *In re Berner*, (N. D. Ohio 1899) 3 Am. Bankr. Rep. 325; *Matter of Harris*, (D. C. N. J. 1904) 11 Am. Bankr. Rep. 649.

The phrase "the greater portion thereof," as used in section 2 (1), means the greater portion of the six months preceding the filing of the petition in bankruptcy. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

A domicile once acquired is presumed to continue until it is shown to have been changed; and, where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. *In re Waxelbaum*, (S. D. N. Y. 1899) 97 Fed. 562, 3 Am. Bankr. Rep. 267; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332; *In re Oldstein*, (D. C. Ore. 1910) 182 Fed. 409.

Residence must be bona fide.—Residence within the district, to give a court jurisdiction of the proceedings in bankruptcy, must be *bona fide*; and the removal of a person

from one district to another for the express purpose of filing a petition in bankruptcy therein, and with the intention of leaving the district as soon as he obtains a discharge, does not make him a resident so as to confer jurisdiction on the court. *In re Garneau*, (7th Cir. 1904) 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679. See also *In re Stokes*, (D. C. Wash. 1899) 1 Am. Bankr. Rep. 35.

Removal prior to filing petition.—Proof that an alleged bankrupt, whose residence and domicile had for years been in another state, had her principal place of business in the district where the petition was filed, up to a time four months prior to the filing of such petition, after which she had no place of business, is not sufficient to give the court jurisdiction of the proceedings. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

Temporary residence abroad immaterial.—A court of bankruptcy has jurisdiction of a voluntary petition for adjudication in bankruptcy, filed by a debtor who has had his domicile within the district for the preceding six months, although, during the greater portion of that time, he has resided abroad, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district, before the filing of the petition, with the intention of making his permanent home there. *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677.

Where a traveler resided in a particular district for only two months prior to the filing of a petition to have him declared a bankrupt, it was held that the court of that district had no jurisdiction thereof. *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736.

A corporation organized under the laws of a state cannot be a "resident" of another state so as to confer jurisdiction on a court of bankruptcy in the latter state of proceedings against it. *In re Mathews Consol. Slate Co.*, (D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350.

Residence as dependent on place of business.—A court of bankruptcy has jurisdiction, for the purposes of adjudication, over persons who have had their principal place of business within the territorial jurisdiction of the

court for the six months preceding the filing of the petition in bankruptcy, or the greater portion thereof. *Guinn v. Iowa Cent. R. Co.*, (S. D. Ia. 1882) 14 Fed. 323; *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421; *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1901) 107 Fed. 255, 5 Am. Bankr. Rep. 744; *In re Magid-Hope Silk Mfg Co.*, (D. C. Mass. 1901) 110 Fed. 352, 6 Am. Bankr. Rep. 610; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Southwestern Bridge, etc., Co.*, (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304; *Tiffany v. La Plume Condensed Milk Co.*, (M. D. Pa. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407; *In re Munger Vehicle Tire Co.*, (2d Cir. 1906) 159 Fed. 991, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; *In re Alaska American Fish Co.*, (W. D. Wash. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712; *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

Residence in one district, business place in another.—Where a petitioner in voluntary bankruptcy resides in one district, and is there employed as clerk in a store, but is engaged in trade on his own account, as a general merchant in another district, the court of bankruptcy in the latter district has jurisdiction of the petition, the bankrupt's principal place of business being within its territorial limits. *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

Residence continued for winding up business sufficient.—Where a partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition, although during a part of that time the only business carried on was in the way of winding up the affairs of the firm by two of the partners, the other partners having retired. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588.

Corporation's principal place of business.—Where a corporation operating factories, mills, or mines in various states has a principal office, from which supreme direction and control are exercised over all its business and property and its selling and collecting are done, where its directors meet, its books of account are kept, and its correspondence conducted, such office will be held to be its principal place of business. *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407.

Where a New Jersey corporation, having been proclaimed against in that state for non-payment of taxes, maintained its principal of-

fice in New York City, it was held that bankruptcy proceedings were properly instituted against it in New York. *In re Munger Vehicle Tire Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 901, 19 Am. Bankr. Rep. 785.

Where the defendant corporation shut down its works and ceased all business at Warren, R. I., in June, 1906, but continued its business in New York, where all its executive and banking business had been done, until the petition was filed in November following, it was held that New York was its principal place of business during the preceding six months, and that the petition was properly filed in that district. *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421.

Neither charter, nor place of incorporation, is controlling.—The question where a corporation had its principal place of business for the purpose of determining the jurisdiction of proceedings in bankruptcy against it is one of fact; and neither its place of incorporation, nor its charter, is controlling. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1901) 107 Fed. 255, 5 Am. Bankr. Rep. 744; *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872.

Foreign corporation's noncompliance with local law immaterial.—In determining whether a corporation has had its principal place of business in another state, so as to give the court in that district jurisdiction to adjudicate it a bankrupt, it is immaterial whether or not it complied with the laws of that state, so as entitle it to do business therein as a foreign corporation. *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

Commingled business relations in different districts.—Where a manufacturing corporation was organized under the laws of Washington, having its home office and principal place of business at Tacoma, and subsequently a second corporation was organized in California, apparently for the purpose of succeeding and taking over the business of the first, its home office being in Oakland, but its business being transacted in Tacoma by a manager who was also the manager of the first corporation, the business of which was continued by such joint manager without change and in such manner that the transactions and liabilities of the two corporations could not be separated, it was held that the Washington District Court had jurisdiction to entertain a petition in bankruptcy against both corporations as joint parties; it not appearing that any prior proceedings had been elsewhere instituted. *In re Alaska American Fish Co.*, (W. D. Wash. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712.

Coneurrent jurisdiction.—Where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts have coneurrent jurisdiction of involuntary bankruptcy proceedings against it. *In re United Burton Co.*, (D. C. Del. 1904) 137 Fed. 666, 13 Am. Bankr. Rep. 454.

(2) [*Allow and disallow claims.*] allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; [(1898) 30 Stat. L. 545.]

Cross-references: As to

Allowance, proof, and reconsideration of claims, see the several subdivisions of section 57.
What are provable claims, see the several subdivisions of section 63.

(3) [*Appoint receivers, etc.*] appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; [(1898) 30 Stat. L. 545.]

Cross-reference: As to

Seizure and possession of property, see section 69.

Appointment of receivers, or marshals, for preservation of estate.—Under section 2 (3) the court of bankruptcy has authority to appoint receivers, or the marshals, to take charge of the property of bankrupts, after the filing of the petition, and until it is dismissed or the trustee is qualified, when that is absolutely necessary for the preservation of estate. *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623; *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338; *In re Moody*, (N. D. Ia. 1904) 131 Fed. 525, 12 Am. Bankr. Rep. 718; *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; *In re T. E. Hill Co.*, (7th Cir. 1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

Bond required.—A court of bankruptcy is authorized to appoint a receiver to take possession of the property of one against whom a petition in involuntary bankruptcy has been filed, and is pending, only upon the giving of a bond by the petitioners therefor, as required by section 3e. *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594. And see section 3e, and the annotation thereunder, *infra*, p. 494.

Appointment not subject to collateral attack.—Where claimants instituted proceedings, in the nature of a replevin suit, against a bankrupt's receiver to recover personal property, their only claim to relief depending on their ownership or right of possession of the property which the receiver had seized, it was held that they could not in such proceeding collaterally attack the official status of the receiver or the regularity of the proceedings leading to his appointment. *Ross v. Stroh*, (3d Cir. 1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644. See also *In re Isaacson*, (2d Cir. 1909) 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

Receiver entitled to possession of property.

—Bankruptcy proceedings properly instituted vest the court of bankruptcy with ex-

clusive jurisdiction to administer the estate of the bankrupt, and oust the jurisdiction of a state court which has appointed a receiver in insolvency proceedings; and the receiver appointed by the court of bankruptcy is entitled to possession of the property. *In re Lengert Wagon Co.*, (S. D. N. Y. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535.

But under the rule of comity between federal and state courts, a receiver appointed by a court of bankruptcy will be required to apply to a state court for an order requiring its receiver to turn over the property of the bankrupt. *In re Lengert Wagon Co.*, (S. D. N. Y. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535. And see generally the annotation under section 23b, *infra*, p. 638.

Effect of collusion in appointment of receiver.—Where receivers, the appointment of whom is prayed for in a petition in bankruptcy against a corporation, were in fact selected by the alleged bankrupt and named at its instance, they will not be appointed; or, if such facts are shown after their appointment, they will be removed; but the court is not required, because of such unsuccessful collusion, to dismiss the petition in favor of one filed by other creditors; and, where it is otherwise sufficient, the adjudication may be made thereon. *Birmingham Coal, etc., Co. v. Southern Steel Co.*, (N. D. Ala. 1908) 160 Fed. 212, 20 Am. Bankr. Rep. 151.

Attorney for receiver.—Where a debtor is declared a bankrupt at the instance of a creditor, and a receiver is appointed, the attorney for such petitioning creditor should not be employed as attorney for the receiver. *In re Strobel*, (2d Cir. 1908) 160 Fed. 916, 88 C. C. A. 98, 20 Am. Bankr. Rep. 22.

Appointment must be necessary for preservation of estate.—Receivers in bankruptcy are necessary, and should be appointed, only when the preservation of the estate demands their intervention. *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; *Dunlap Hardware Co. v. Huddleston*, (5th Cir. 1909) 167 Fed. 433, 93 C. C. A. 69, 21 Am. Bankr. Rep. 731; *In re Oakland Lumber Co.*, (2d

Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181; *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 991; *In re Standard Cordage Co.*, (S. D. N. Y. 1910) 184 Fed. 156; *In re Desrochers*, 25 Am. Bankr. Rep. 703.

The words "absolutely necessary," as used in section 2 (3), require clear, positive, and certain proof of necessity. *In re Oakland Lumber Co.*, (2d Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181.

Danger of waste, despoilment, or misappropriation necessary.—The property of a bankrupt should not be taken out of his control before adjudication unless it clearly appears either that the property is perishable, or that it is apt to become wasted, despoiled, or misappropriated. *In re Standard Cordage Co.*, (S. D. N. Y. 1910) 184 Fed. 156.

Thus it has been held that where a bankrupt's property was in the hands of an assignee for the benefit of creditors, and it was not claimed that it was being dissipated or improvidently cared for, or that the assignee was not careful, prudent, or responsible, an *ex parte* order appointing a receiver was erroneous. *In re Oakland Lumber Co.*, (2d Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181.

Consent of an alleged bankrupt to the appointment of a receiver does not authorize such appointment where it is not absolutely necessary for the preservation of the estate. *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

Notice.—The statute does not provide for the giving of notice of the appointment, or application for the appointment, of a receiver to take charge of the bankrupt's property, when necessary for its preservation; therefore it has been held that such appointment is valid whether notice be given or not. But, in accordance with the general tenor of the bankruptcy law, it has also been held that notice of the appointment, or of the application for the appointment, should be given in all cases if possible. *Ross-Meeham Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; *In re Francis*, (E. D. Pa. 1905) 136 Fed. 912, 14 Am. Bankr. Rep. 676; *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; *In re Abrahamson*, (D. C. N. Y. 1898) 1 Am. Bankr. Rep. 44.

The appointment of a receiver for the property of an alleged bankrupt, either with or without notice, is not in violation of the constitution, as depriving the defendant of his property without due process of law. *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43.

As a general rule, however, it is necessary that notice shall be given the alleged bankrupt, before the appointment of a receiver shall be made, except (1) where the defendants or parties in interest have absconded, or are beyond the jurisdiction of the court,

or cannot be found; (2) where there is imminent danger of loss or great damage, or irreparable injury, or the gravest emergency, or when by notice the very purpose of a receiver may be rendered wholly nugatory, as where the property may be removed without the jurisdiction of the court, or it is being collected, and the proceeds wrongfully appropriated. In such cases the court will lay its hand upon the property, through the appointment of a receiver, for the purpose of maintaining the *status quo* until the issues may be determined as to the right of ownership. *In re Francis*, (E. D. Pa. 1905) 136 Fed. 912, 14 Am. Bankr. Rep. 676.

Notice of appointment in another district.—A district court will not appoint a receiver for the property of an alleged bankrupt on a summary application therefor, by parties to a petition in bankruptcy filed in another district, without such notice to the persons in possession, and those otherwise interested, as will answer the requirement of due process of law of the Constitution of the United States; such a proceeding is not authorized by the Bankruptcy Act, and if it were, the provision would be of doubtful constitutionality. *Ross-Meeham Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624.

Receiver's powers and duties—Custodian of property.—A temporary receiver of a bankrupt is merely a custodian of the estate, with authority to inventory and receive and retain all of the bankrupt's assets; the purpose of his appointment being only to protect the property from dissipation and loss until it is ascertained that there is a bankrupt's estate to be administered. *Boonville Nat. Bank v. Blakey*, (7th Cir. 1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; *In re Kolin*, (7th Cir. 1905) 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

Power to adjust claims.—Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power to do so. They may not compromise claims or admit or reject them. They cannot properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not to defend suits. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

Sales by receivers are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. No bankrupt estate should be charged with the expense of such a proceeding except in case of plain necessity. *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 991.

Authority to act outside of district.—Section 2 (3) contains nothing which authorizes the court to confer upon a receiver, ap-

pointed thereunder, who is not vested with title to the bankrupt's property, the power to exercise his official functions in respect to such property in any other district; and, under the general rule governing courts of equity and their receivers appointed in creditors' suits, such receiver has no authority to act officially outside of the district of his appointment. *In re Benedict*, (E. D. Wis. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232. See also *In re Dunseath, etc., Co.*, (W. D. Pa. 1909) 168 Fed. 973, 22 Am. Bankr. Rep. 75, following *In re National Mercantile Agency*, (E. D. Pa. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 189.

But see *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751, wherein it was held that a receiver might maintain an action for the protection of assets in a district other than that of his appointment.

Right to examine books and papers.—Where it is alleged that the bankrupt's stock of goods has been sold by him to a certain corporation without any adequate consideration, the sale being induced by the fraud of the vendee, a receiver of the bankrupt's estate has the right, under process from the court of bankruptcy, to examine any books or documents of such corporation showing or tending to show its receipt or disposition of said stock, or in any other way relating thereto. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822. See also the annotation under sections 7a (9) and 21a, *infra*, pp. 524, 589.

Duty to furnish statements from bankrupt's accounts.—Where a corporation defendant, in a suit for infringement of a patent, was adjudged a bankrupt, and a receiver appointed for its property, after an interlocutory decree against it and a referee for an accounting as to damages and profits, it was held that the receiver could not be required to prepare a statement of profits for use before the master from the company's books, or to render any other active assistance to the complainant at the expense of the estate, unless he elected to become a party to the suit; but that he might be required by subpoena to produce the books before a master. *American Graphophone Co. v. Leeds, etc., Co.*, (S. D. N. Y. 1909) 174 Fed. 158, 23 Am. Bankr. Rep. 337.

Right to maintain suits.—It has been held that a receiver, appointed under section 2 (3) for the preservation of the bankrupt's property, has no authority to maintain a suit to set aside a preferential or fraudulent transfer. *Boonville Nat. Bank v. Blakey*, (7th Cir. 1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

But in *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822, it was held that the court has jurisdiction, in appointing such receiver, to authorize him to institute all necessary actions at law or in equity for the recovery of the bankrupt's property.

Suits outside of district.—It has been

held that a receiver in bankruptcy, under an order to collect and take possession of all the assets of an alleged bankrupt, is not authorized to bring suits in a district other than the one in which he was appointed. *In re Dunseath, etc., Co.*, (W. D. Pa. 1909) 168 Fed. 973, 22 Am. Bankr. Rep. 75, following *In re National Mercantile Agency*, (E. D. Pa. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 189.

But see *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751, wherein it was held that a receiver in bankruptcy, appointed under section 2 (3), is charged with the duty of preserving the property of the bankrupt, and to that end, where property is situated at a distance from the court of his appointment, and is in danger of being dissipated through sales by judgment creditors, which would cause irreparable damage to the estate before he can apply to that court, he may maintain any plenary suit or action necessary for its protection in the district where the property is situated. And see sec. 2 (20), *infra*, p. 480.

Liability of receiver.—A receiver who contracts beyond his powers makes himself individually liable. *In re Kalb, etc., Mfg. Co.*, (2d Cir. 1908) 165 Fed. 895, 97 C. C. A. 573, 21 Am. Bankr. Rep. 393.

A receiver in bankruptcy for a railroad contractor, who continues the work under a contract, by paying the employees of a subcontractor who has abandoned the work the wages due them, less the amounts they owe for supplies, which it was the custom of the subcontractor to withhold and pay to the petitioner, does not incur any liability to the petitioner for the amounts due him, where the receiver is not indebted to the subcontractor, but pays the men to avoid delay in the work, and the filing of liens. *In re Ferguson Contracting Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 940.

Necessity of leave to sue receiver.—The Act of March 3, 1887, c. 373, sec. 3, 24 Stat. L. 554, and Act of Aug. 13, 1888, c. 866, sec. 3, 25 Stat. L. 436, 4 Fed. Stat. Annot. 387, which authorize a receiver appointed by a federal court to be sued without previous leave of such court "in respect of any act or transaction of his in carrying on the business connected with" the property in his charge apply to receivers in bankruptcy, but do not authorize a suit without leave against such receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate. *In re Kalb, etc., Mfg. Co.*, (2d Cir. 1908) 165 Fed. 895, 97 C. C. A. 573, 21 Am. Bankr. Rep. 393.

Restraining suits against receivers.—Where a receiver in bankruptcy acts as an officer of the court in the administration of the estate, the bankruptcy court has jurisdiction to determine the validity of his acts, even to the extent of preventing an action at law by one who is raising no question and relying on no right which is not within the jurisdiction of the bankruptcy court in the bankruptcy proceeding, the parties being the

same; but such court has no jurisdiction to prevent maintenance of an action against the receiver to enforce a liability in *personam* against him for acts done beyond the scope of his authority. *In re Spechler*, (E. D. N. Y. 1911) 185 Fed. 311.

Compensation.—The compensation of receivers or marshals, appointed under section 2 (3), is regulated, since the enactment of the amendment of June 25, 1910, by section 48d.

Receiver entitled to protection as to expenses and services.—The receiver, upon appointment and acceptance, becomes the officer and hand of the court in the performance of his duties, neither subject to the wishes or directions of the parties, nor dependent upon

the result of the controversy for the payment of his expenses or services; and he is clearly entitled to protection by the court, in the exercise of such jurisdiction, for all expenses rightly incurred and services rendered under its orders, either in allowances out of the funds committed to his charge, or through provision otherwise made by the court to that end. *In re T. E. Hill Co.*, (7th Cir. 1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

A court of bankruptcy may enforce an order requiring petitioning creditors to pay the expenses of a receivership, procured by them, by proceedings in contempt. *In re Lacov*, (2d Cir. 1905) 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

(4) [*Try and punish bankrupts, etc.*] arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; [(1898) 30 Stat. L. 545.]

Cross-reference: As to

Offenses generally, see the several subdivisions of section 29, *infra*, p. 646.

(5) [*Permit temporary transaction of business.*] authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act; [(amended 1903 and 1910) 32 Stat. L. 797 and 36 Stat. L. 838.]

Order to continue business.—An order authorizing a receiver in bankruptcy to continue the business of the bankrupt for a limited time is largely discretionary, and cannot be collaterally attacked. *In re Isaacson*, (2d Cir. 1909) 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

A referee should obtain the sanction of the judge before authorizing the continuance of a bankrupt's business, where such business is of considerable magnitude. *Bray v. Johnson*, (4th Cir. 1908) 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

Power to borrow money to continue business.—A receiver who is authorized to conduct a business, for the successful conduct of which the extension of credit and borrowing of money is necessary and customary, has the implied power to purchase on credit, and even to borrow money. Such a power will be implied, however, only in the absence of an express power to borrow conferred by the court. *In re Burkhalter*, (N. D. Ala. 1910) 182 Fed. 353.

To continue the business of bankrupts by receivers, courts of bankruptcy have implied

power to authorize the issuance of receivers' certificates to provide the funds necessary for operating expenses. *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Renstein*, (E. D. Pa. 1908) 162 Fed. 986, 20 Am. Bankr. Rep. 832.

But the referee should not, in any case, issue trustees' certificates to raise money for the purpose of transacting the bankrupt's business. *Bray v. Johnson*, (4th Cir. 1908) 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

Compensation.—Since the enactment of the amendment of June 25, 1910, the compensation of trustees, marshals, or receivers, where the business of the bankrupt has been conducted by them, under section 2 (5), is regulated by section 48c.

Section 2 (5) does not vest the court with power to fix the compensation of a trustee in advance for services to be rendered in the future. *In re Willis W. Russell Card Co.*, (D. C. N. J. 1909) 174 Fed. 202, 23 Am. Bankr. Rep. 300.

(6) [*Substitute additional parties.*] bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; [(1898) 30 Stat. L. 546.]

Section 2 (6) does not confer plenary jurisdiction of civil actions, at law and in equity, to determine title to and reduce to possession alleged assets of a bankrupt, since section 23 of the act is intended to define the jurisdiction of such courts over suits of that character. *Bardes v. Hawarden First Nat. Bank*,

(1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175, 4 Am. Bankr. Rep. 163.

The test of jurisdiction to determine matters in controversy between third persons is the necessity of doing so in order to administer the estate. *In re Hobbs*, (N. D. W. Va. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544.

(7) [*Collect and distribute assets.*] cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; [(1898) 30 Stat. L. 546.]

Cross-references: As to

Collection and reduction of assets, see section 47a (2), *infra*, p. 682.

Determining validity of liens, see the several subdivisions of section 67.

Jurisdiction of referees, see the several subdivisions of section 38, *infra*, p. 655.

Jurisdiction over adverse claimants and determination of controversies, see sections 23 a and b, *infra*, p. 594.

Recovery of voidable preferences, see section 60b.

Recovery of fraudulent transfers within the four-months period, see section 67e.

Recovery of transfers in fraud of creditors generally, see section 70e.

Sale of property, see section 47a (2), *infra*, p. 682, and section 70b.

The jurisdiction conferred by section 2 (7) depends on, first, whether the controversy has reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt estate; second, whether it arises in the bankruptcy proceed-

ings, and the property becomes, therefore, subject to distribution to creditors; or, third, whether, by the nature of the controversy, power is conferred on the court to determine conflicting liens and apportion assets. *In re Kellogg*, (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623.

District courts of the United States, as courts of bankruptcy, have jurisdiction to entertain and determine all suits brought by trustees in bankruptcy which are necessary for collecting, reducing to money, and distributing the estates of bankrupts, and for determining controversies in relation thereto, except such as are otherwise provided for in the Bankruptcy Act. *In re Sievers*, (E. D. Mo. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; *In re McCallum*, (E. D. Pa. 1902) 113 Fed. 393, 7 Am. Bankr. Rep. 596.

The distribution of the bankrupt's estate is controlled by the provisions of the Act of Congress, and its interpretation is ultimately a matter for federal determination. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

(8) [*Close estates.*] close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; [(1898) 30 Stat. L. 546.]

The closing of the estate as expeditiously as is compatible with the best interests of the parties is one of the trustee's duties. See section 47a (2), *infra*, p. 682.

Reopening of estate.—Under section 2 (8) a court of bankruptcy may, upon a proper showing, reopen estates whenever it appears that they were closed before they were fully administered; thus estates may be reopened on the discovery of additional assets, or for the purpose of correcting schedules, or where the interest of justice requires it. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; *Clark v. Pldecock*, (3d Cir. 1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309; *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569; *In re Ryburn*, (D. C. Conn. 1906) 145 Fed. 662, 16 Am. Bankr. Rep. 514; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306; *In re Pierson*, (S. D. N. Y. 1909) 174 Fed. 160, 23 Am. Bankr. Rep. 58; *Mat-*

ter of Sonabend, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

Existence of unadministered assets necessary.—To authorize the court to reopen the estate of a bankrupt, it should appear by some satisfactory evidence that there are assets unadministered, although no formal or technical procedure is required. An unverified petition filed by a creditor, stating on information and belief that the wife of the bankrupt has "money or property" belonging to him, without stating its character or amount, and which is unsupported by affidavits or other evidence, is insufficient to warrant action by the court. *In re Newton*, (8th Cir. 1901) 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52.

Reopening to recover assets.—Where bankrupt partners were refused a discharge after the estate in bankruptcy had been closed, on the ground that they had in their possession several thousand dollars in money which they did not schedule, and there is evidence tending to show that they have since invested

such money in property in the names of other persons, creditors are entitled to have the estate reopened, to the end that proceedings may be instituted to recover such property for their benefit. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569.

Where it appears that certain property had been transferred by the bankrupt, prior to his adjudication; that it was omitted from his schedules and had no part in the settlement of his estate; and that since such settlement facts have been discovered which lead creditors to believe that the transfer was fraudulent, an order reopening the estate is warranted. *In re Ryburn*, (D. C. Conn. 1906) 145 Fed. 662, 16 Am. Bankr. Rep. 514.

Reopening to amend schedules. — Where the members of a partnership were adjudged bankrupts on a voluntary petition and obtained a discharge, having scheduled no assets; and at the time of the adjudication an action on promissory notes was pending against them in a state court, in which they had pleaded a counterclaim, but through inadvertence or mistake neither the notes nor the counterclaim were scheduled, it was held, that on their application, made before the expiration of the time for filing claims, the bankrupts were entitled to have the discharge set aside, and to amend their schedules by including both the creditors' claim and their counterclaim. *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306.

Effect of reopening with respect to discharge, and proof of claims. — Under section 2 (8) a court of bankruptcy has jurisdiction to entertain a supplemental petition filed by a voluntary bankrupt after the estate has been closed and the bankrupt discharged, setting out additional schedules of property, with the reasons for their former omission; and the court may reopen the proceedings for the purpose of administering the new assets for the benefit of creditors who proved their claims in accordance with the statute in the original proceedings. But such supplementary proceedings cannot affect the discharge of the bankrupt, where more than a year has elapsed since it was granted, nor has a creditor who failed to prove his claim in the original proceedings any standing in such supplementary proceedings, or the right to examine the bankrupt therein. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

(9) [Confirm or reject compositions.] confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; [(1898) 30 Stat. L. 546.]

Cross-references: As to Compositions generally, see sections 12 and 13, *infra*, pp. 540, 546.

Jurisdiction of compositions. — Section 13 defines exclusively the ground upon which a composition may be vacated, and operates as a limitation upon the general grant of authority in section 2 (9). *In re Rudnick*,

The pendency of a petition to set aside a composition does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application, to reopen an estate; and such reopening is not an interference with the administration of the estate. Matter of Sonnabend, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

Who may apply for reopening. — The application or petition to reopen estates in bankruptcy must be made by some party interested in the estate, and who would be benefited by such reopening. *In re Chandler*, (7th Cir. 1905) 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904.

Thus it has been held that where a bankrupt's estate has been closed and the bankrupt discharged, the office of trustee is thereby terminated, and the former trustee of the estate has no standing to apply to have the estate reopened for the reason that it was not fully administered. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

Where claims of creditors were not proved within the time required by section 57a, such creditors have no standing to apply to have the bankrupt's estate reopened on the ground that he had fraudulently concealed assets. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

Time of making application. — An application to reopen a bankruptcy proceeding, on the ground that it was closed before the estate was fully administered, must be made within a reasonable time. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

Doctrine of laches applicable. — The bankruptcy law provides no limitation of time within which closed estates may be reopened, and the doctrine of laches is applicable where an unreasonable delay has intervened. *Traub v. Field*, (5th Cir. 1910) 182 Fed. 622, 105 C. C. A. 488.

But the fact that more than a year has elapsed before a creditor's petition for the reopening of the estate is filed, showing that the bankrupt died leaving assets which he had fraudulently transferred, does not deprive the court of jurisdiction to open the proceedings, and to appoint a trustee under section 44. *Clark v. Pidcock*, (3d Cir. 1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309.

(D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

Section 2 (9) does not give the court power to confirm an irregular composition; such power being limited by section 12, specifying what compositions may be confirmed. *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199.

(10) [*Modify, etc., referee's findings.*] consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; [(1898) 30 Stat. L. 546.]

Cross-reference: As to

Review of proceedings before referees, see section 38a, *infra*, p. 655.

(11) [*Determine exemptions.*] determine all claims of bankrupts to their exemptions; [(1898) 30 Stat. L. 546.]

Cross-references: As to

Exemptions generally, see section 6, *infra*, p. 508.

Title to exempt property, see section 70a.

Trustee's duty with respect to exempt property, see section 47 (11), *infra*, p. 686.

Determination of claims to exemption. — A court of bankruptcy, under section 2 (11), has exclusive jurisdiction to determine all claims of bankrupts to their exemptions. *McGahan v. Anderson*, (4th Cir. 1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641, reversing (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Lucius*, (S. D. Ala. 1903) 124 Fed. 455, 10 Am. Bankr. Rep. 653; *In re McCrary*, (S. D. Ala. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Dobbs*, (N. D. Ga. 1909) 175 Fed. 319, 23 Am. Bankr. Rep. 569.

The bankrupt may petition the court in relation to his claim to exemption at any time while the property is still unadministered. *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613.

Right of mortgagee to exemption. — A court of bankruptcy is without jurisdiction to adjudge a bankrupt's exemption to a mortgagee, or to any one except the bankrupt. *In re Paramore*, (E. D. N. C. 1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422.

Protection of exemption rights. — The court of bankruptcy should see to it, pending a discharge, that remedies for the collection of debts, from which the discharge might absolve the debtor, shall not be perfected so as to condemn exempt property in satisfaction of debts from which the discharge is intended to free it. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

Extent of jurisdiction — Generally. — The only question to be determined on a bankrupt's application for his exemptions is whether he is entitled to such exemptions as against the general creditors; and when that question has been disposed of, and the property set apart to the bankrupt, the jurisdiction of the federal court thereover ceases. The court will not retain jurisdiction for the purpose of enforcing the rights of creditors holding claims wherein the exemption has been waived by the bankrupt, nor will it entertain proceedings to subject the exempt property to liens, or adjudicate the rights of claimants with respect thereto. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am.

Bankr. Rep. 107; *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Black*, (W. D. Pa. 1900) 104 Fed. 289, 4 Am. Bankr. Rep. 776; *Woodruff v. Cheeves*, (5th Cir. 1901) 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Swords*, (N. D. Ga. 1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; *In re Hartsell*, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422; *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; *In re Yeager*, (E. D. Pa. 1910) 182 Fed. 951.

The bankruptcy court does not lose its jurisdiction over exempt property until it has been set apart to the bankrupt; up to that time the court has full authority to consider and dispose of such questions as are involved in relation thereto. *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

Exempt property may be held by the trustee for a reasonable time to await the action of the creditors having claims which they desire to enforce against the exemption. *In re Maynard*, (N. D. Ga. 1910) 183 Fed. 823.

The court may direct the trustee to hold a fund out of which the bankrupt's exemptions are to be paid, until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction. *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

Where the exemption is claimed from the proceeds of a sale, the court may consider and determine any claim made by others to the fund while it remains in the hands of the trustee. *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. And see annotation under section 6, *infra*, p. 508.

Rights of lien claimant. — The court of bankruptcy has jurisdiction to determine a creditor's claim to an equitable lien on money of the bankrupt, collected by the trustee, and claimed by the bankrupt as exempt. *In re Lucius*, (S. D. Ala. 1903) 124 Fed. 455, 10 Am. Bankr. Rep. 653.

The fact that the purchase price of the goods claimed as exempt had not been paid gives the seller no right to enforce his vendor's lien in a court of bankruptcy. *In re Wells*, (W. D. Ark. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308.

Where exempt property is attached in a state court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the at-

tached property has passed to the trustee, freed from the claim of exemption. *In re Edwards*, (S. D. Ala. 1907) 153 Fed. 794, 19 Am. Bankr. Rep. 632.

(12) [*Discharge bankrupts, etc.*] discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; [(1898) 30 Stat. L. 546.]

Cross-references: As to

Debts not affected by discharge, see the several subdivisions of section 17, *infra*, p. 570.

Discharges generally, see the several subdivisions of section 14, *infra*, p. 547.

Effect of discharge as to liability of corporation officers, directors, and stockholders, see section 4b, *infra*, p. 495.

Effect of discharge on codebtors, see section 16, *infra*, p. 569.

Revocation of discharge, see section 15, *infra*, p. 568.

(13) [*Enforce orders.*] enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; [(1898) 30 Stat. L. 546.]

Cross-references: As to

Authority to punish for contempts committed before referees, see section 2 (16), *infra*, p. 480.

Contempts and proceedings thereon, see section 41, *infra*, p. 668.

Enforcement of lawful orders.—A court of bankruptcy has, under section 2 (13), complete authority to enforce obedience to all its lawful orders, by fine, imprisonment, or both. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re Shachter*, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *In re Lacov*, (2d Cir. 1905) 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

Order to turn over assets.—Section 2 (13)

is applicable to an order requiring the turning over to the trustee, of money or property traced to the possession or control of the bankrupt, and concealed and withheld from the trustee. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533. And see the annotation under section 38a (4), and section 41a (1), *infra*, pp. 659, 668.

Frauds which are made criminal by the Act are punishable only on conviction by the verdict of a jury, or on plea of guilty; and fraudulent transfers which have been consummated cannot be reached by summary proceeding. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

Assault on trustee as contempt.—The court has jurisdiction summarily to try and determine the merits of a proceeding to punish for an assault on a trustee in bankruptcy, in the performance of his duties as such, as a contempt of court. *Ex p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196.

(14) [*Extradite bankrupts.*] extradite bankrupts from their respective districts to other districts; [(1898) 30 Stat. L. 546.]

Cross-reference: As to

Extradition generally, see section 10, *infra*, p. 531.

(15) [*Make orders.*] make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; [(1898) 30 Stat. L. 546.]

General power of bankruptcy court.—Section 2 (15) may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the bankruptcy law; provided the court otherwise has jurisdiction of the parties and the subject-matter. *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549.

As a court of equity, a bankruptcy court is competent to grant final and auxiliary reliefs adapted to the circumstances of any case, however peculiar. *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

Power to adopt equitable procedure.—In view of the full equity powers conferred on courts of bankruptcy, so far as may be neces-

sary to enforce the act, such courts may employ the procedure, writs, and remedies known to equity jurisprudence. *In re Benedict*, (E. D. Wis. 1903) 140 Fed. 55, 15 Am. Bankr. Rep. 232. *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148. And see the annotation under the first paragraph of this section.

Authority to issue writ of ne exeat.—Under section 2 (15) the court has authority to issue an order in the nature of a writ of ne exeat, when the arrest of the bankrupt is shown to be necessary for the enforcement of the Bankruptcy Act as applied to his case. *In re Lipke*, (S. D. N. Y. 1900) 98 Fed. 970, 3 Am. Bankr. Rep. 569. And see the annotation under section 9b, *infra*, p. 530.

(16) [*Punish for contempt.*] punish persons for contempts committed before referees; [(1898) 30 Stat. L. 546.]

Cross-reference: As to Contempts before referees generally, see the several subdivisions of section 41, *infra*, p. 668.

Power of commitment.—The court alone is authorized by the act to exercise the power of commitment. *Smith v. Belford*, (8th Cir. 1901) 108 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291.

(17) [*Appoint and remove trustees.*] pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; [(1898) 30 Stat. L. 546.]

Cross-reference: As to Appointment and removal of trustees, see sections 44 and 46, *infra*, pp. 677, 681.

(18) [*Tax costs.*] tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; [(1898) 30 Stat. L. 546.]

Costs have been considered throughout the annotation in connection with the particular matter wherein the question of costs has arisen. As to the cost and expenses of ad-

ministration, see section 62; and as to costs which are entitled to priority, see section 64 (1); (2), and (3).

(19) [*Transfer cases.*] transfer cases to other courts of bankruptcy; and [(1898) 30 Stat. L. 546.]

Cross-references: As to Absence or disability of referee as warranting appointment of another referee to conduct the proceedings, see section 43, *infra*, p. 677.

Reference of cases before adjudication, see sections 18 f and g, *infra*, p. 586.

Reference of cases after adjudication, see section 22a, *infra*, p. 593.

Transfer of cases from one referee to another, see section 22b, *infra*, p. 594.

Transfer of cases where petitions are filed in different districts, see section 32, *infra*, p. 653.

(20) [*Ancillary jurisdiction.*] exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy. [(Inserted 1910) 36 Stat. L. 839.]

Ancillary jurisdiction.—Under section 2 (20), which was added by the amendment of June 25, 1910, the courts of bankruptcy are authorized to exercise ancillary jurisdiction over persons and property, within their respective territorial limits, in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy. Prior to this amendment, however, the decisions were conflicting as to the authority to exercise such jurisdiction. In the following cases it was decided that ancillary jurisdiction might be exercised for certain purposes: *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 17 Ann. Cas. 969, 30 S. Ct. 372, 23 Am. Bankr. Rep. 519; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377; *In re Schrom*, (N. D. Ia. 1899) 97 Fed. 760, 3 Am. Bankr. Rep. 352; *In re Feiser*, (E. D. Pa. 1902) 115 Fed. 199, 7 Am. Bankr. Rep. 690; *In re Sutter*, (S. D. N. Y. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Benedict*, (E. D. Wis. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232; *In re*

John L. Nelson, etc., Co., (S. D. N. Y. 1907) 149 Fed. 590, 18 Am. Bankr. Rep. 66; *In re Dunseath, etc., Co.*, (W. D. Pa. 1909) 168 Fed. 973, 22 Am. Bankr. Rep. 75; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724, 24 Am. Bankr. Rep. 617; *Matter of Westfall*, (D. C. Cal. 1902) 8 Am. Bankr. Rep. 431; *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 766.

The reason for the enactment of the amendment providing for the exercise of ancillary jurisdiction is found in the fact that some courts insisted that such jurisdiction did not exist. *In re Williams*, (E. D. Ark. 1903) 129 Fed. 38, 9 Am. Bankr. Rep. 741; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *Ross-Meeham Foundry Co., v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; *In re Tybo Min., etc., Co.*, (D. C. Nev. 1904) 132 Fed. 697, 13 Am. Bankr. Rep. 62; *In re Granite City Bank*, (8th Cir. 1905) 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep.

404; *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re Von Hartz*, (2d Cir. 1905) 142 Fed. 726, 74 C. C. A. 58, 15 Am. Bankr. Rep. 747; *Henrie v. Henderson*, (4th Cir. 1906) 145 Fed. 316,

76 C. C. A. 196, 16 Am. Bankr. Rep. 617; *Hull v. Burr*, (5th Cir. 1907) 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751.

[*Unspecified powers.*] Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. [(1898) 30 Stat. L. 546.]

CHAPTER III.

BANKRUPTS.

SEC. 3. ACTS OF BANKRUPTCY. — a Acts of bankruptcy by a person shall consist of his having [(1898) 30 Stat. L. 546.]

Condonation of act of bankruptcy. — An act of bankruptcy once committed cannot be condoned at the will of that creditor only who may be immediately concerned in it. Every

creditor, whether a party to the transaction or not, is a creditor entitled to ask for adjudication by reason of it. *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

(1) [*Conveyances to defraud.*] conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or [(1898) 30 Stat. L. 546.]

Cross-reference: As to

Fraudulent transfers, etc., generally, and annulment thereof, see section 67e.

Fraudulent transfer, concealment, or removal. — The conveyance, transfer, concealment, or removal of any part of a debtor's property, by either his act or his permission, with the intent to hinder, delay, or defraud any of his creditors, constitutes an act of bankruptcy under section 3a (1). *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *In re Riggs Restaurant Co.*, (2d Cir. 1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; *Martin v. Hulen*, (8th Cir. 1906) 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510; *Henkel v. Seider*, (D. C. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773; *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927; *In re Wisniefsky*, (D. C. N. Y. 1910) 181 Fed. 896; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830.

For a general discussion of fraudulent transfers within the four months preceding bankruptcy, see the annotation under section 67e.

The absconding of an insolvent debtor, taking with him money or property not exempt, constitutes a concealment and removal of the property with intent to defraud his creditors, and is an act of bankruptcy. *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332.

The removal of property to a vessel about to leave for a foreign country, while owing more than \$1,000, is, in the absence of a satisfactory explanation, a fraud on creditors. *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

The word "removed," as employed in section 3a (1), whether taken by itself or viewed in the light of the context, signifies an actual or physical change in the position or locality of the property constituting the subject of the removal. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

Unavoidable Removal. — One does not permit a removal of property, within the meaning of section 3a (1), who has neither power nor right to prevent its removal. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

A transfer of his individual property by a member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership. *Hartman v. Peters*, (M. D. Pa. 1906) 146 Fed. 82, 17 Am. Bankr. Rep. 61; *In re Stovall Grocery Co.*, (N. D. Ga. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537.

Necessity of intention to hinder, delay, or defraud. — The intention, on the part of the debtor, to hinder, delay, or defraud his creditors, or some of them, is essential in order to constitute the act of bankruptcy specified in section 3a (1). *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 242, 4 Am. Bankr. Rep. 763; *In re Sha-*

piro, (S. D. N. Y. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839; *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *In re Foster*, (E. D. Pa. 1903) 126 Fed. 1014, 11 Am. Bankr. Rep. 131; *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Merchants' Nat. Bank v. Cole*, (6th Cir. 1907) 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44; *In re Kehler*, (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513, reversing (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

The burden of establishing the intent to hinder, delay, or defraud creditors rests on the petitioners. *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 242, 4 Am. Bankr. Rep. 763; *In re Shapiro*, (S. D. N. Y. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *In re Kehler*, (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513, reversing (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596.

Wrongful purpose involved.—An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone the collection or enforcement of their claims. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

Thus a transfer of property by an insane person cannot be held to be an act of bankruptcy. *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669.

Common-law fraud.—It has been held that a conveyance or transfer of property with intent to hinder, delay, or defraud creditors, which is made an act of bankruptcy by section 3a (1), is the same as that made voidable by the common law; and its fraudulent character is to be determined by the same tests. *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453.

The intent of the creditor who received the preference is not material. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604.

Intent presumed.—Where the inevitable result of a transfer of property by the debtor,

or with his permission, is actually to hinder, delay, or defraud his creditors, the intent to do so will be presumed. *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co.*, (6th Cir. 1904) 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610; *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *In re Minard*, (D. C. Ore. 1907) 156 Fed. 377, 19 Am. Bankr. Rep. 485; *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830.

In determining the question whether a transfer was made in good faith, or with intent to hinder, delay, or defraud creditors, so as to constitute an act of bankruptcy, the court or the jury may properly take into consideration the natural and necessary result of the transfer, and may infer the intent therefrom. *Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co.*, (6th Cir. 1904) 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610.

Intent may be established by circumstances.—An intent may be inferred from the acts done and surrounding circumstances, notwithstanding the debtor's denial. *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711.

A conveyance without consideration can have no other purpose than that of hindrance and delay, and if it has that purpose, even though no fraudulent intention is proven or suspected, this is enough to render it obnoxious to the Bankruptcy Act. *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830.

A voluntary conveyance of all his property by an insolvent debtor to a trustee, to be converted into money and distributed to the creditors of the grantor, though it is made for the equal benefit of all the creditors, without preferences and without actual fraud, and although it would be good at common law, is nevertheless an act of bankruptcy, as being a transfer of property with intent to hinder, delay, and defraud creditors, since its necessary operation is to deprive the creditors of the rights, advantages, and safeguards provided for them by the bankruptcy law. *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704.

Absence of fraudulent intention.—Where the intention to hinder, delay, or defraud creditors is absent, and the transaction itself is not such as to inevitably result in the hindrance, delay, or defrauding of creditors, it will not be held to constitute an act of bankruptcy within the language of the statute. *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *In re Cutting*, (W. D.

N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; Richmond Standard Steel Spike, etc., Co. v. Allen, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; Acme Food Co. v. Meier, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719.

The test as to whether a conveyance by an alleged bankrupt was fraudulent within section 3a (1) is the *bona fides* of the transfer. *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558.

An intent to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one. While, therefore, a man may not connive with others to get his property out of the way by sale or otherwise, yet a fair and open disposition of it on a full consideration cannot be given a fraudulent character, although it may incidentally have the effect of leaving nothing which creditors can get hold of, and even though the debtor do this to meet some of his obligations rather than others. *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453.

Giving security for loan. — Where a debtor while solvent made an equitable assignment of insurance policies to be issued as security for certain loans then made to him, but failed to make an actual delivery and assignment of the policies to the creditor until after loss, when he was insolvent, it was held that the assignment thereof at that time did not constitute an act of bankruptcy. *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57. See also *Acme Food Co. v. Meier*, (C. C. A. 6th Cir. 1907) 153 Fed. 74, 18 Am. Bankr. Rep. 550; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719.

Intent to avoid bankruptcy. — The Bank-

ruptcy Act nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt. Nor does section 3a (1) provide that the commission or permission of any of the acts therein specified with intent not to become bankrupt shall constitute an act of bankruptcy. While such intent involves a purpose that the debtor's property shall not be distributed under the provisions of the act, and that his creditors shall not enjoy its benefits, it is not in all cases equivalent to an "intent to hinder, delay, or defraud his creditors, or any of them," within the meaning of the statute. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

Insolvency. — The solvency of the debtor constitutes a good defense to a petition asking for his adjudication as a bankrupt, under section 3a (1). *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550. And see section 3c, and the annotation thereunder, *infra*, p. 493.

As to what constitutes insolvency, see the annotation under section 1a (15), *supra*, p. 465.

Insolvency at time of transfer unnecessary. — But it is not necessary that the debtor should be insolvent at the time the conveyance or transfer of property is made, in order to constitute an act of bankruptcy under section 3a (1); and if a solvent person conveys, conceals, or removes, or permits the conveyance, concealment, or removal of any part of his property, with the intent to hinder, delay, or defraud his creditors, or any of them, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, and a petition in bankruptcy is thereupon filed against him, he may be adjudged a bankrupt. *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711.

(2) [*Preferences through transfers.*] transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or [(1898) 30 Stat. L. 546.]

Cross-references: As to

Preferences generally, see section 60a.

Voidable preferences, see section 60b.

Preferences. — A debtor who, while insolvent, transfers any portion of his property to one or more of his creditors, with the intent to prefer such creditor over his other creditors, commits an act of bankruptcy under section 3a (2). *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 90 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re McGee*, (N. D. N. Y. 1901) 105 Fed. 895, 5 Am. Bankr. Rep. 262; *Stern v. Louisville Trust Co.*, (6th Cir. 1901) 112 Fed. 501, 50 C. C. A. 367, 7 Am.

Bankr. Rep. 305; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 434; *Boyd v. Lemon, etc., Co.*, (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 943, 8 Am. Bankr. Rep. 81; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Swarts v. St. Louis Fourth Nat. Bank*, (8th Cir. 1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *In re Riggs Restaurant Co.*, (2d Cir. 1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238; *In re O'Donnell*, (D. C. Mass. 1904) 131 Fed. 150, 12 Am. Bankr. Rep. 621; *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; *In re Bogen*, (S. D. Ohio 1904) 134 Fed. 1019, 13 Am. Bankr. Rep. 529; *Naylor v. Christiansen Harness*

Mfg. Co., (6th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. N. S. 656, 20 Am. Bankr. Rep. 237; *United Surety Co. v. Iowa Mfg. Co.*, (8th Cir. 1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 242, 46 App. Div. 339, 61 N. Y. S. 604. And see generally section 60, subdivisions a and b, and the annotation thereunder, for a general discussion of preferential transfers.

Thus it has been held that a debtor who, knowing he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within section 3a (2). *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345.

So, also, a mortgage made by a insolvent, and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an act of bankruptcy. *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238.

A conditional transfer of property, such as a pledge, mortgage, or security, is within the meaning of section 3a (2). *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238.

Transfer by partner.—It has been held that an act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, or making a fraudulent transfer, should be imputed to all the members of the firm in this as in all other civil cases. *In re Forbes*, (D. C. Mass. 1904) 128 Fed. 137, 11 Am. Bankr. Rep. 787.

But it is not an act of bankruptcy, for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own or one of the firm's creditors. *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. N. S. 656, 20 Am. Bankr. Rep. 237.

Payment as preference.—The payment of an existing indebtedness by an insolvent debtor, with the intention of preferring the creditor so paid over the other creditors of such debtor, constitutes a preference; and is, therefore, an act of bankruptcy within the meaning of section 3a (2). *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr.

Rep. 726; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; *Naylon v. Christiansen Harness Mfg. Co.*, (6th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789.

Thus it has been held that a merchant, hopelessly insolvent, who within four months prior to the filing of an involuntary petition in bankruptcy against him, and with knowledge of such condition of insolvency, pays substantial sums of money to certain of his creditors in full satisfaction of their claims, while refusing payment to others whose claims are due and equally entitled to payment, commits an act of bankruptcy. *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726.

And it is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid; such transaction being a transfer of property with intent to prefer certain creditors, within the intent and meaning of section 3a (2). *Boyd v. Lemon, etc., Co.*, (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81.

So, also, it has been held that the payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor, and, as such, an act of bankruptcy. *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84.

But payments made in the usual course of business, where there is no intention to prefer one creditor over another, are not acts of bankruptcy. *In re Pearson*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 482; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *Macon Grocery Co. v. Beach*, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938.

Payment of rent, taxes, and incidental expenses under renting agreement.—Where a debtor, being the owner of a leasehold interest in real property having a term of years to run, but not assignable without the consent of the landlord, sells the same, and applies part of the proceeds in paying the arrears of rent due, taxes on the property, and the incidental expenses of the sale, such payment does not constitute a preference of the creditors paid, but merely a means of realizing the value of the leasehold, and therefore is not an act of bankruptcy. *In re Pearson*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 482.

Payment of salaries.—If the salary of the chief officer of a corporation has accumu-

lated and thus become an existing debt, and the corporation, being insolvent, and in contemplation of such insolvency, pays the debt with intent to prefer it over their other creditors, this constitutes an act of bankruptcy. But it is a very different case when a corporation carrying on the business of a manufacturer, at a time when it is unable to pay all of its debts, uses a part of its assets to pay current expenses; and the current salary of the president of a corporation, if confined within a reasonable amount, is a part of the necessary running expenses, and it has to be paid in order to keep the establishment in operation. *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583.

Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditors over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer. *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539.

Necessity of intent to prefer.—Under section 3a (2), an intent to prefer one creditor over another is necessary, in order to constitute an act of bankruptcy. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 555; *Sabin v. Camp*, (D. C. Ore. 1900) 98 Fed. 974, 3 Am. Bankr. Rep. 578; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore.) 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *Clark v. Henne*, (5th Cir. 1904) 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; *Brake v. Callison*, (5th Cir. 1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *Merchants' Nat. Bank v. Cole*, (6th Cir. 1907) 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44; *Martin v. Hulén*, (8th Cir. 1906) 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; *In re McLoon*, (D. C. Ma. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938.

Must be other creditors.—A conveyance of property by a debtor to creditors cannot be charged as an act of bankruptcy where he had at the time no other creditors. *Brake v. Callison*, (5th Cir. 1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797.

The giving of a chattel mortgage to secure an antecedent debt is not a preferential transfer which constitutes an act of bankruptcy, where it is given in good faith in renewal of a prior mortgage and covering the same property; and in such case the fact of the mortgagor's insolvency is immaterial, where the mortgagor receives a further present consid-

eration sufficient to warrant the additional security. *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 398, 16 Am. Bankr. Rep. 751.

Intent inferred.—A debtor will, however, be presumed to have intended the necessary and natural consequences of his acts; and where, during insolvency, he makes a transfer to a creditor, the necessary result of which is to prefer such creditor over other creditors, it will be presumed to have been so intended. *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re McGee*, (N. D. N. Y. 1901) 105 Fed. 805, 5 Am. Bankr. Rep. 262; *In re Grant*, (S. D. N. Y. 1901) 106 Fed. 496, 5 Am. Bankr. Rep. 837; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *Boyd v. Lemon, etc., Co.*, (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; *Macon Grocery Co. v. Beach*, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; *Naylor v. Christiansen Harness Mfg. Co.*, (8th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Thus where an insolvent after the return of a verdict against him in an action at law, but before the entry of judgment, sent for a creditor and executed a mortgage to him to secure the debt, it was held that the preference thus given to the mortgagee over the judgment creditor must be presumed to have been intentional and, therefore, an act of bankruptcy. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Amount of transfer considered.—The presumption of an intent to prefer creditors, arising from a transfer of property by an insolvent, is affected by the amount of such transfer; and it is not as strong where the transfer is of a comparatively small part of the debtor's property. *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101. See also *Macon Grocery Co. v. Beach*, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; *In re Stovall Grocery Co.*, (N. D. Ga. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537.

Insolvency.—A transfer, in order to come within the language of section 3a (2) as an act of bankruptcy, must have been made while the debtor was insolvent. *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 253; *Blue*

Mountain Iron, etc., Co. v. Portner, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719. See also *Wilson v. Nelson*, (1901) 183 U. S.

191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

As to what constitutes insolvency, see the annotation under section 1a (15), *supra*, p. 465.

(3) [*Preferences through legal proceedings.*] suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(1898) 30 Stat. L. 546.]

Cross-reference: As to

Liens obtained through legal proceedings generally, and the annulment thereof, see section 67f.

Preference obtained through legal proceedings.—A debtor who, while insolvent, suffers or permits any creditor to obtain a preference through legal proceedings, and fails to vacate or discharge such preference at least five days before a sale or final disposition of the property affected thereby, commits an act of bankruptcy within the meaning of section 3a (3). *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 577; *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Parmenter Mfg. Co. v. Stoefer*, (1st Cir. 1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; *In re Empire Metallic Bedstead Co.*, (2d Cir. 1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; *In re Thomas*, (W. D. Pa. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 571; *Vaccaro v. Security Bank*, (6th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *In re Storm*, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Duncan v. Landis*, (3d Cir. 1901) 106 Fed. 639, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Nushbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Holmes v. Baker*, (9th Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *In re Gallagher*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 255; *Matter of Rung Furniture Co.*, (W. D. N. Y. 1903) 10 Am. Bankr. Rep. 44; *Matter of Toledo*

Portland Cement Co., (E. D. Mich. 1906) 17 Am. Bankr. Rep. 375.

For a general discussion of preferences obtained through legal proceedings, and the annulment thereof, see the annotation under section 67f.

The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on the property of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the Bankruptcy Act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of the insolvent person, and thus excluding other creditors from any share in the estate. *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney, given years before, constitutes the suffering or permitting of the creditor to obtain a preference which amounts to an act of bankruptcy, though the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by filing his petition in bankruptcy. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577.

Where a partnership was insolvent at the date of its dissolution, and thereafter an execution was levied on the firm's property for a partnership debt, the duty devolved on the retiring partner to discharge such levy, as well as on any other members of the firm, and a failure so to do constituted an act of bankruptcy, justifying an adjudication against the firm, and also against its members, including such retiring partner. *Holmes v. Baker*, (9th Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252.

Burden of proof.—Upon a petition in involuntary bankruptcy under section 3a (3),

the petitioning creditors must assume the burden of proving that a preference was obtained by a creditor through legal proceedings; that the debtor suffered or permitted the preference, and did not vacate or discharge it at least five days before a sale or final disposition of the property affected; and that he was insolvent at the time the preference was obtained. Proof that he was insolvent at the time of filing the petition is insufficient. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference through legal proceedings which, if he is insolvent, and unless he discharges the preference at least five days before the time for sale under the levy, constitutes an act of bankruptcy. *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288.

Where a creditor of a bankrupt removed certain goods from the bankrupt's store during his absence, and retained possession thereof over the bankrupt's protest, it was held that the failure to take legal proceedings to recover possession of the goods, in the absence of evidence of collusion, did not constitute an act of bankruptcy. *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326.

Obtaining of preference essential. — It does not necessarily follow, because a lien has been obtained through legal proceedings, and the debtor has failed to vacate or discharge the same, that a preference has been acquired. In order to commit the act of bankruptcy specified in section 3a (3), it is essential that the proceeding actually result in a preference; that is, that it shall enable some one or more of the creditors of an insolvent debtor to obtain a greater percentage of his debt than other creditors. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

And see the annotation under section 60a.

The act of bankruptcy is complete, under section 3a (3), where the debtor fails to vacate a legal proceeding within five days before the sale or disposition of the property affected thereby, providing, of course, that it effects a preference. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484;

Scheuer v. Smith, etc., Book, etc., Co., (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Vetterman*, (D. C. N. H. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245; *In re National Hotel, etc., Co.*, (E. D. Pa. 1905) 138 Fed. 947, 15 Am. Bankr. Rep. 69; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (3d Cir. 1907) 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756; *Holmes v. Baker*, (9th Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *In re Windt*, (D. C. Conn. 1910) 177 Fed. 584, 24 Am. Bankr. Rep. 536; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

Failure to discharge. — While the failure to discharge a levy five days before sale is an act of bankruptcy, an independent act of bankruptcy is also committed by a failure to discharge the levy on each succeeding day including the day of the sale. *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

It is not the mere obtaining of a judgment and levying execution on the property of the debtor while insolvent that makes him liable as a bankrupt, but the failure on his part, within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged. *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

Resistance immaterial. — That an insolvent resists legal proceedings by a creditor to obtain a preference does not prevent such preference constituting an act of bankruptcy, if the bankrupt fails to discharge the preference within the time provided. *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329.

"Final disposition" is not a gift of the property to some third person, or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. There are different ways or modes of disposing of property, of enforcing execution, judgments, and liens, and the words "or final disposition" cover every other method of passing the control and dominion of the property from the debtor to another, either absolutely or as security. *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

Computation of time.—Where property of a bankrupt was advertised for sale under an execution on Aug. 22, 1906, the bankrupt has the entire day of the 17th in which to vacate or discharge the execution before he will be guilty of an act of bankruptcy. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (3d Cir. 1907) 154 Fed. 682, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756. And see section 31, and the annotation thereunder, *infra*, p. 653, as to computation of time generally.

But where a person, while insolvent, voluntarily confessed judgment in favor of certain creditors, and permitted them to levy executions on and to sell the property thereunder without having vacated such sale, it was held that such proceedings constituted a "transfer" within clauses 1 and 2 of section 3, independent of clause 3; and, therefore, that the limitations against the creditor's right to file a bankruptcy petition ran from the day of the sale, and not from a period five days prior thereto. *In re Nusbaum*, (N. D. N. Y. 1907) 153 Fed. 835, 18 Am. Bankr. Rep. 598.

Creditors are not required to wait until a sale has actually taken place, but may file a petition, and, on the proper showing, have the sale enjoined. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 434. And see to the same effect *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *In re National Hotel, etc., Co.*, (E. D. Pa. 1905) 138 Fed. 947, 15 Am. Bankr. Rep. 69.

Debtor's participation unnecessary.—The suffering or permitting a preference through legal proceedings, by the failure to vacate or discharge the same, does not imply anything more than the mere passive nonresistance of an insolvent debtor to regular judicial proceedings directed against him. It is not necessary that the debtor should procure, or actively participate in, the proceedings. *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 168, 1 Am. Bankr. Rep. 577; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Gallagher*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 255.

Intent to prefer immaterial.—It is not necessary, under section 3a (3), that there should be an intention to give a preference; the fact that a creditor has actually obtained a preference over other creditors through legal proceedings, and that the debtor has failed to vacate or discharge the same at least five days before the sale or final disposition of the property affected thereby, is sufficient to constitute an act of bankruptcy under this section. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Moyer*, (E. D. Pa. 1899) 97 Fed. 324, 1 Am. Bankr. Rep. 577; *Parmenter Mfg. Co. v. Stoever*, (1st Cir. 1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; *In re Thomas*, (W. D. Pa. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 571; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

The failure to discharge valid liens, acquired through legal proceedings more than four months prior to the filing of the petition in bankruptcy, does not constitute an act of bankruptcy under section 3a (3). *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *Owen v. Brown*, (8th Cir. 1903) 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

The statute does not mean that valid judgment liens on real property acquired before the passage of the act, or more than four months before the filing of the petition in bankruptcy, shall be vacated; or that the due enforcement of such liens by execution shall constitute an illegal preference or an act of bankruptcy. *Owen v. Brown*, (8th Cir. 1903) 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717. See also *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607.

(4) [General assignment—appointment of receiver or trustee.] made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or [(amended 1903) 32 Stat. L. 797.]

I. ASSIGNMENT FOR BENEFIT OF CREDITORS,
489.II. APPOINTMENT OF RECEIVER OR TRUSTEE,
490.

I. ASSIGNMENT FOR BENEFIT OF CREDITORS.

The making of a general assignment for the benefit of creditors constitutes an act of bankruptcy, on the part of the assignor, under section 3a (4). *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463, *affirming* (D. C. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re Sievers*, (E. D. Mo. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; *Davis v. Bohle*, (8th Cir. 1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; *In re Gutwillig*, (2d Cir. 1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; *In re Romanow*, (D. C. Mass. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1899) 95 Fed. 645, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; *In re Meyer*, (2d Cir. 1899) 98 Fed. 978, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *Clark v. American Mfg., etc., Co.*, (4th Cir. 1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351; *In re Green*, (E. D. Pa. 1901) 106 Fed. 313, 5 Am. Bankr. Rep. 848; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *Day v. Beck, etc., Hardware Co.*, (5th Cir. 1902) 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175; *Summers v. Abbott*, (8th Cir. 1903) 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; *In re Chase*, (1st Cir. 1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200; *In re Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 60 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *In re Thomlinson Co.*, (8th Cir. 1907) 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691, *explaining Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *In re Fish Bros. Wagon Co.*, (8th Cir. 1908) 164 Fed. 553, 90 C. C. A. 427, 26 L. R. A. N. S. 433, 21 Am. Bankr. Rep. 149; *Griffith v. Dutton*, (1st Cir. 1908) 165 Fed. 620, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; *Lennox v. Allen-Lahe Co.*, (1st Cir. 1908) 167 Fed. 114, 92 C. C. A. 506, 21 Am. Bankr. Rep. 648; *Canner v. Webster Tapper Co.*, (1st Cir. 1909) 168 Fed. 519, 93 C. C. A. 541, 21 Am. Bankr. Rep. 872; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 856; *Yungbluth v. Slipper*, (C. C. A. 9th Cir. 1911) 185 Fed. 773; *In re Federal Lumber Co.*, (D. C. Mass. 1910) 185

Fed. 926; *In re Courttenay Mercantile Co.*, (D. C. N. D. 1911) 186 Fed. 352.

The "general assignment," contemplated by section 3a (4), is to be taken in its generic sense, and embraces any conveyance, at common law or by statute, by which the parties intend to make an absolute and unconditional appropriation of the property conveyed, to raise funds to pay the debts of the vendor, share and share alike. *In re Thomlinson Co.*, (8th Cir. 1907) 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691.

A valid assignment for all purposes is not necessary, under section 3a (4), in order to constitute the act of bankruptcy therein specified; but it is sufficient that the debtor assigns all of his property for the benefit of his creditors, and that the assignment was so intended. *Canner v. Webster Tapper Co.*, (1st Cir. 1909) 168 Fed. 519, 93 C. C. A. 541, 21 Am. Bankr. Rep. 872; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 856; *In re Federal Lumber Co.*, (D. C. Mass. 1910) 185 Fed. 926; *In re Courttenay Mercantile Co.*, (D. C. N. D. 1911) 186 Fed. 352.

A direct transfer to creditors, without the intervention of a trustee, is not an assignment for the benefit of creditors. *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200.

Assignment by corporation.—Where the officers of a corporation, acting under the authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders, make a general assignment of all its property to trustees for distribution among its creditors, this constitutes an act of bankruptcy. *Clark v. American Mfg., etc., Co.*, (4th Cir. 1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351. See also *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 60 C. C. A. 37, 12 Am. Bankr. Rep. 240.

But it has been held that a corporation's adoption of resolutions authorizing the treasurer to convert the corporate assets into cash, to be deposited with a trust company for the creditors' benefit, does not constitute an act of bankruptcy as a general assignment for creditors where the plan is not executed. *In re Federal Lumber Co.*, (D. C. Mass. 1910) 185 Fed. 926.

Partnerships, and the individual members thereof, may be adjudicated bankrupt as a result of the making of a general assignment for the benefit of creditors. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *Yungbluth v. Slipper*, (C. C. A. 9th Cir. 1911) 185 Fed. 773.

Where a partnership and the individuals composing it make an assignment for the benefit of creditors, the act of bankruptcy is committed by all. *Green River Deposit Bank*

v. Craig, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

But a stipulation, made in good faith by one partner, for the appointment of a receiver for the firm, and the subsequent transfer of its assets by him to such receiver, is not a general assignment within the Bankruptcy Act, and is not an act of bankruptcy. *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101.

Preferential or fraudulent intention unnecessary.—A general assignment for the benefit of creditors is an act of bankruptcy, although made without preferences, and without actually intending to defraud creditors. *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559. See also *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

Insolvency unnecessary.—In order to constitute an act of bankruptcy, the making of a general assignment for the benefit of creditors need not be because of insolvency, nor is there any necessity that the assignor should be actually insolvent, as such an assignment will of itself, without the element of insolvency, warrant an adjudication of bankruptcy. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463, *affirming* (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304.

II. APPOINTMENT OF RECEIVER OR TRUSTEE.

Appointment of receiver or trustee.—Where an insolvent debtor applies for the appointment of a receiver or trustee for his property, or where because of insolvency a receiver or trustee has been put in charge of his property, under the laws of the state or territory, or of the United States, the debtor becomes amenable to adjudication as a bankrupt under section 3a (4). *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Blue Mountain Iron, etc., Co. v. Portner*, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 543 (see master's report); *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; *In re C. H. Bennett Shoe Co.*, (D. C. Conn. 1905) 140 Fed. 687, 15 Am. Bankr. Rep. 497; *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309; *Hooks v. Aldridge*, (5th Cir. 1906) 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658; *Beatty v. An-*

dersen Coal Min. Co., (1st Cir. 1906) 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738; *In re Belfast Mesh Underwear Co.*, (D. C. Conn. 1907) 153 Fed. 224, 18 Am. Bankr. Rep. 620; *In re Sterlingworth R. Supply Co.*, (E. D. Pa. 1908) 164 Fed. 591, 21 Am. Bankr. Rep. 342; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244; *In re Electric Supply Co.*, (S. D. Ga. 1909) 175 Fed. 612, 23 Am. Bankr. Rep. 647; *In re Kennedy Tailoring Co.*, (E. D. Tenn. 1909) 175 Fed. 871, 23 Am. Bankr. Rep. 656; *Matter of Edward G. Milbury Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 523; *Matter of International Mercantile Agency*, (D. C. N. J. 1905) 13 Am. Bankr. Rep. 725; *In re Picken's Mfg. Co.*, (N. D. Ga. 1908) 20 Am. Bankr. Rep. 202; *In re Hecox*, (8th Cir. 1908) 21 Am. Bankr. Rep. 314.

Receivers are "put in charge" of the property of a defendant when the decree appointing them is entered, although they do not qualify nor take actual possession of the property until later; and the four months period within which a petition in bankruptcy based on such appointment as an act of bankruptcy must be filed, runs from the date of such decree. *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

Appointment of temporary receiver.—The Bankruptcy Act draws no distinction between temporary and permanent receivers; but it makes the simple fact of a receiver having been placed in charge of the defendant's property, on the ground of insolvency, an act of bankruptcy. *Blue Mountain Iron, etc., Co. v. Portner*, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re Kennedy Tailoring Co.*, (E. D. Tenn. 1909) 175 Fed. 871, 23 Am. Bankr. Rep. 656.

It is only where a receiver has been appointed in another court because of insolvency, as that term is defined in the bankruptcy law, or where the debtor on his own initiative has applied for the appointment of a receiver or custodian of his property, that an act of bankruptcy under section 3a (4) has been committed. *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284.

Liquidating trustees.—Section 3a (4) does not mean exclusively that a trustee must have been put in charge by order of a court; but it embraces as well a case where liquidating trustees have been elected by an insolvent company or corporation, as provided by the statute under which it is organized. *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369. See also *In re C. H. Bennett Shoe Co.*, (D. C. Conn. 1905) 140 Fed. 687, 15 Am. Bankr. Rep. 497.

Sheriff substituted for receiver or trustee.—Where, under a state statute, the property of an insolvent is placed in the hands of the sheriff who was required to distribute the net proceeds thereof among the creditors according to the rules established in insolvency cases, it was said that the sheriff, in such case, was merely a substitute for the receiver or trustee specified in the bankruptcy law. *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

No "intent" is necessary under section 3a (4). *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

Insolvency essential.—The mere appointment of a receiver or trustee does not of itself constitute an act of bankruptcy. In order to come within the meaning of section 3a (4) it is necessary that the appointment of a receiver or trustee be made because of the debtor's insolvency, or that such receiver or trustee was applied for by the debtor while insolvent. *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 16 Am. Bankr. Rep. 67; *Moss Nat. Bank v. Arend*, (6th Cir. 1906) 146 Fed. 351, 76 C. C. A. 629, 16 Am. Bankr. Rep. 867; *In re Golden Malt Cream Co.*, (7th Cir. 1908) 164 Fed. 326, 90 C. C. A. 258, 21 Am. Bankr. Rep. 36; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244; *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284; *In re Hudson River Electric Power Co.*, (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915; *In re Boston, etc., Min. Co.*, (D. C. Mass. 1909) 181 Fed. 422, 24 Am. Bankr. Rep. 923.

As to what constitutes insolvency, see the annotation under section 1a (15), *infra*, p. 465.

(5) [Admitting inability to pay.] admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. [(1898) 30 Stat. L. 546.]

An admission in writing of the inability to pay debts, and the willingness to be adjudged a bankrupt on that ground, constitutes an act of bankruptcy, under section 3a (5), which will warrant an adjudication of bankruptcy on a petition filed in involuntary proceedings. *In re Bates Mach. Co.*, (D. C. Mass. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129; *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 179, 9 Am. Bankr. Rep. 579; *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 590; *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500; *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *Cresson, etc., Coal, etc., Co. v. Stauffer*, (3d Cir. 1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; *In re Lisk Mfg. Co.*, (W. D. N. Y. 1908) 167 Fed. 411, 21 Am.

Insolvency need not be sole reason for appointment of receiver.—If insolvency, either as a distinct ground of proceeding, or as coupled with others, was one of the substantial reasons for the appointment of a receiver, the case comes within the reasonable construction of the statute. *Beatty v. Andersen Coal Min. Co.*, (1st Cir. 1906) 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738.

Until the amendments of 1903 to the Bankruptcy Act the appointment of a receiver for the property of an insolvent, whether an individual or a corporation, was not of itself an act of bankruptcy; and this was so whether the appointment was made upon the application of the insolvent or upon the application of creditors. *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; *In re Empire Metallic Bedstead Co.*, (2d Cir. 1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; *In re Harper*, (S. D. N. Y. 1900) 100 Fed. 266, 3 Am. Bankr. Rep. 804; *In re Henry Zeltner Brewing Co.*, (S. D. N. Y. 1902) 117 Fed. 799, 9 Am. Bankr. Rep. 63; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 179, 9 Am. Bankr. Rep. 579, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *In re Burrell*, (2d Cir. 1903) 123 Fed. 414, 59 C. C. A. 508, 9 Am. Bankr. Rep. 625; *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (E. D. Va. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129.

Bankr. Rep. 674; *Matter of Riley*, (E. D. Mich. 1905) 15 Am. Bankr. Rep. 159.

Insolvency unnecessary.—Where a corporation by a vote of its directors declared its inability to pay its debts, and its willingness to be adjudged a bankrupt on request of certain creditors, it was held that the latter were entitled to have the corporation adjudged a bankrupt without regard to its solvency. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 590; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324.

Admission must be in writing.—An averment that "the debtor admitted his inability to pay his debts" has been held to be insufficient; it being necessary, under section 3a (5), that the admission of inability to pay should be in writing, together with a written acknowledgment of willingness to be adjudged bankrupt on that ground. *Conway v. German*, (4th Cir. 1908) 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577.

Qualified admission insufficient.—Where a corporation authorized one of its officers to appear on behalf of the company in the federal court, and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," it was held that this was not such an unequal-

fied admission as is required by the act, and therefore not an act of bankruptcy on the part of the corporation. *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605.

Authority to make admission.—In order to warrant an adjudication, under section 3a (5), it must appear that the necessary admission was made by one having ample authority for that purpose; thus where the admission has been made by a partner, or by an officer of a corporation, in excess of his powers, an adjudication cannot be based thereon. *In re Bates Mach. Co.*, (D. C. Mass. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 8 Am. Bankr. Rep. 516; *In re Quartz Gold Min. Co.*, (D. C. Ore. 1907) 157 Fed. 243, 19 Am. Bankr. Rep. 667; *In re Burbank Co.*, (D. C. N. H. 1909) 168 Fed. 719, 21 Am. Bankr. Rep. 838; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

Admission authorized at regular meeting.—*De facto* officers have the power, at a legally convened meeting, to admit in writ-

ing the inability of their corporation to pay its debts and its willingness to be adjudged bankrupt. *In re Lisk Mfg. Co.*, (W. D. N. Y. 1908) 167 Fed. 411, 21 Am. Bankr. Rep. 674; *Matter of Riley*, (E. D. Mich. 1905) 15 Am. Bankr. Rep. 159.

An officer of a corporation cannot commit an act of bankruptcy in its name and behalf by admitting its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, without express authority. *In re Burbank Co.*, (D. C. N. H. 1909) 168 Fed. 719, 21 Am. Bankr. Rep. 838; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

A resolution adopted by the board of directors of a corporation authorizing an attorney to represent the corporation generally in any bankruptcy proceedings pending or that may be brought, and in his discretion to agree to the appointment of receivers, does not constitute an act of bankruptcy on the part of the corporation, nor does it authorize the attorney to commit such act in its behalf. *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

b [Petition to be filed within four months.] A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after [(1898) 30 Stat. L. 546.]

Cross-references: As to

Computation of time generally, see section 31, *infra*, p. 653.

Preparation and filing of the petition in bankruptcy generally, and practice thereon, see the several subdivisions of section 18, *infra*, p. 579, and section 59.

Section 3b has no relation to the proving of debts against the bankrupt's estate, or to the surrender of preferences, but only fixes a limitation for the filing of an involuntary petition. *Little v. Holley-Brooks Hardware Co.*, (5th Cir. 1904) 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422.

Computation of time.—In computing the time within which an involuntary petition in bankruptcy must be filed, it has been quite generally held that, in accordance with section 31, the time is to be so computed as to exclude the day on which the act of bank-

ruptcy was committed, and to include the day on which the petition was filed. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note; *In re Mingo Valley Creamery Assoc.*, (E. D. Pa. 1900) 100 Fed. 232, 4 Am. Bankr. Rep. 67; *Citizens' Bank v. W. C. De Pauw Co.*, (7th Cir. 1901) 105 Fed. 926, 5 Am. Bankr. Rep. 845; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38.

Thus where a general assignment was made on Oct. 1, at 10.08 A. M., and the petition in bankruptcy was filed at 4.45 P. M. on Feb. 1 following, it was held that the filing was within the four months period. *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38.

(1) [Date of recording transfer.] the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment. [(1898) 30 Stat. L. 546.]

The provisions of sections 3 and 6a are to be read together. When so read there can be no permissible question but that the date of

the preference referred to in section 6a, subdivisions a and b, is the same as that referred to in section 3b. *Long v. Farmers' State*

Bank, (8th Cir. 1906) 147 Fed. 860, 77 C. C. A. 538, 9 L. R. A. N. S. 585, 17 Am. Bankr. Rep. 103; *In re Bird*, (D. C. Minn. 1910) 180 Fed. 229.

The words "takes notorious, exclusive, or continuous possession" must be construed to mean such possession as the property is susceptible of, and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership. Any construction which would place intangible forms

of personal property on a plane with tangible property would lead to mischievous and serious interference with business and commercial transactions, which it cannot be assumed was contemplated by Congress. *In re Bogen*, (S. D. Ohio 1904) 134 Fed. 1019, 13 Am. Bankr. Rep. 529.

Whether recording or registering is required depends on the law of the state. See the cases cited to this effect under section 60a.

c [Defense of solvency.] It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. [(1898) 30 Stat. L. 547.]

Cross-references: As to

Setting up defense to petition, see section 18 b, c, and d, *infra*, p. 581 *et seq.*

What constitutes insolvency, see section 1a (15), *supra*, p. 465.

Solvency as a defense. — Under section 3c, the solvency of the debtor constitutes a complete defense to a proceeding in bankruptcy instituted under section 3a (1). *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Doseher*, (E. D. N. Y. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *McGowan v. Knittel*, (3d Cir. 1905) 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1, *reversing* (E. D. Pa. 1905) 134 Fed. 498, 14 Am. Bankr. Rep. 209; *In re Hartwell Oil Mills*, (N. D. Ga. 1908) 165 Fed. 555, 21 Am. Bankr. Rep. 586; *In re C. W. Aachenbach Co.*, (2d Cir. 1909) 174 Fed. 396, 98 C. C. A. 290, 23 Am. Bankr. Rep. 95; *In re Pickens Mfg. Co.*, (D. C. Ga. 1908) 20 Am. Bankr. Rep. 202.

Prima facie evidence of intent to prefer may be rebutted by proof that the debtor was ignorant of his insolvency. *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101.

Admission of insolvency in answer. — Where a bankrupt admitted his insolvency in his answer to an involuntary bankruptcy petition, it was held that his willingness to

be adjudged a bankrupt on that ground might be inferred. *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500.

The words "under the first subdivision of this section" do not refer to paragraph a of the section, defining acts of bankruptcy, as a whole, but to subdivision 1 of such paragraph, which makes the conveyance, transfer, concealment, or removal of property with intent to hinder, delay, or defraud creditors, an act of bankruptcy. *George M. West Co. v. Lea*, (1899) 14 U. S. 590, 19 S. Ct. 826, 46 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

What constitutes insolvency has been considered under section 1a (15), *supra*, p. 465.

Value of property fraudulently and preferentially transferred. — Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under both subdivisions 1 and 2 of section 3, as made with intent to defraud, and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision; but if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2. *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

d [Person denying insolvency.] Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. [(1898) 30 Stat. L. 547.]

Cross-references: As to

Duty of bankrupt to submit to examination when required, see section 7a (9), *infra*, p. 524.

Examination of persons other than the bankrupt, see section 21a, *infra*, p. 589.

Production of books, papers, and accounts.

— Under section 3d an alleged bankrupt is required to produce such books, invoices, etc., as should properly be kept in his business, and which are necessary to show the amount of his assets and liabilities, and his failure to do so, without satisfactory explanation,

casts upon him the burden of proving his solvency. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *Cummins Grocer Co. v. Talley*, (C. C. A. 6th Cir. 1911) 187 Fed. 507.

The bankrupt may be called as if under cross-examination under section 3d, and the evidence given by the bankrupt on such examination may of itself form a sufficient foundation for a finding of his insolvency. *In re Coddington*, (M. D. Pa. 1902) 116 Fed. 281, 9 Am. Bankr. Rep. 243.

e [*Petitioner to give bond.*] Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, [of] all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. [(1898) 30 Stat. L. 547.]

Cross-reference: As to

Obtaining possession of assets on giving of bond generally, see section 69.

Section 3e and section 69 are cognate, and they clearly mean that the bankrupt shall be protected from expense and injury in consequence of a seizure of his property, which may subsequently be made to appear to have been unwarranted. *In re Hafl*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362. See also section 69, and the annotation thereunder.

Bond required.— A court of bankruptcy is authorized to appoint a receiver to take possession of the property of one against whom a petition in involuntary bankruptcy has been filed, and is pending, only upon the giving of a bond by the petitioners therefor, as required by section 3e. *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In*

re McKane, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594.

The purpose of requiring a bond, either under section 3e or under section 69, is to indemnify the alleged bankrupt before his property may be taken from his possession by petitioning creditors prior to an adjudication of bankruptcy. *In re Hafl*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362.

Time of giving bond.— The bond required by section 3e should be given at the time of the making of an order appointing a receiver, or the issuing of a warrant to the marshal for the taking possession of the bankrupt's property. *In re Hafl*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362.

The bond is a prerequisite to the making of an order for taking charge of the bankrupt's property. *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538.

[*Allowance of costs, damages, etc.*] If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. [(1898) 30 Stat. L. 547.]

Cross-references: As to

Costs and expenses of administration generally, see section 62.

Costs and expenses entitled to priority, see section 64b (1), (2), (3).

A right to recover on the bond, given under section 3e, accrues to a respondent whose

property has been wrongfully taken out of his possession. *In re Nixon*, (D. C. Mont. 1901) 110 Fed. 633, 6 Am. Bankr. Rep. 693.

Amount of recovery.— On the dismissal of the bankruptcy proceedings, the alleged bankrupts can only recover on the bond such costs, expenses, and damages as are incident to the taking and withholding of the property, as

distinguished from costs, expenses, and damages incident to the institution of the bankruptcy proceedings. *Selkregg v. Hamilton*, (W. D. Pa. 1906) 144 Fed. 557, 16 Am. Bankr. Rep. 474.

Bond only runs in favor of respondents.—The only liability for costs is upon the bond, which runs only in favor of the respondent or respondents who were such when it was given. *In re Spalding*, (2d Cir. 1906) 150 Fed. 120, 80 C. C. A. 74, 17 Am. Bankr. Rep. 667.

Persons subsequently becoming respondents, if they desire to be protected, are required to move for an additional bond. *In re Spalding*, (2d Cir. 1906) 150 Fed. 120, 80 C. C. A. 74, 17 Am. Bankr. Rep. 667.

Counsel fees stand exactly the same as costs and are to be similarly disposed of; and respondents are entitled to recover whatever was incurred by them on that account,

because of the seizure and detention of the property, but not outside of that. They can claim nothing, for instance, for the assistance of counsel in defending and successfully resisting bankruptcy. *Selkregg v. Hamilton*, (W. D. Pa. 1906) 144 Fed. 557, 16 Am. Bankr. Rep. 474.

Neither costs nor counsel fees are allowable, under section 3e, where property has not been seized or taken out of the possession of the bankrupt in accordance with the provisions thereof; costs and expenses generally are not within the meaning of this section. *In re Ghiglione*, (S. D. N. Y. 1899) 93 Fed. 186, 1 Am. Bankr. Rep. 580; *In re Morris*, (E. D. Pa. 1902) 115 Fed. 591, 7 Am. Bankr. Rep. 709; *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538.

SEC. 4. WHO MAY BECOME BANKRUPTS. — a [Voluntary bankrupts.]

Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt. [(Amended 1910) 36 Stat. L. 839.]

Constitutionality.—Prior to the enactment of the amendment of June 25, 1910, it was held that the Bankruptcy Act was not lacking in the "uniformity" required by the Constitution, although it discriminated, in respect to the right to file a voluntary petition, between natural and artificial persons. *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385.

The Bankruptcy Act is not unconstitutional because it provides that others than traders may be adjudged bankrupts, and that this may be done on a voluntary petition. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

A debtor having but one debt, and no assets to which the trustee can take title, may become a voluntary bankrupt, section 1, subd. 29, providing that words importing the plural number may be applied to and mean only a single person or thing. *In re Schwaninger*, (E. D. Wis. 1906) 144 Fed. 555, 16 Am. Bankr. Rep. 427. See also *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69.

The word "debts," as used in section 4, must be construed in accordance with the definition given in section 1, subd. 11, as limited to a "debt, demand, or claim, provable in bankruptcy." *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69.

Partnerships may be adjudicated bankrupts in either voluntary or involuntary proceedings. See the several subdivisions of section 5, *infra*, p. 501.

Filing of petition not act of bankruptcy.—The filing of a petition in bankruptcy by one partner against his copartners is not an act of bankruptcy on the part of the firm. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Corporations.—Prior to the amendment of 1910, corporations were not entitled to take advantage of section 4a as voluntary bankrupts; but under that amendment, any corporation may become a voluntary bankrupt, excepting municipal, railroad, insurance, and banking corporations. See *In re Jefferson Casket Co.*, (N. D. N. Y. 1910) 182 Fed. 689.

Going into bankruptcy is a "special act" requiring "special" action, and is not a "general" duty of the president or "the business" of a corporation. It is a cessation and an abandonment of business, and a surrender of its property to a trustee to be appointed by its creditors and approved by the court for the payment of such creditors according to law. This is a power which resides in the directors. The president of a corporation has no such general or implied power. *In re Jefferson Casket Co.*, (N. D. N. Y. 1910) 182 Fed. 689.

The amendment of June 25, 1910, is not retroactive. *In re New Amsterdam Motor Co.*, (S. D. N. Y. 1910) 180 Fed. 943, 24 Am. Bankr. Rep. 757.

Persons under disability.—The objection to persons under general disability, such as infants, insane persons, aliens, married women, and Indians, becoming voluntary bankrupts, is equally available as to their becoming involuntary bankrupts, and has been considered under the following subdivision of this section.

b [Involuntary bankrupts.] Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a

municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. [(Amended 1910) 36 Stat. L. 839.]

Cross-reference: As to
Amenability of partnerships to bankruptcy proceedings, see section 5a, *infra*, p. 501.

- I. GENERALLY, 496.
- II. STATUTORY EXCEPTIONS, 496.
- III. NATURAL PERSONS, 498.
- IV. CORPORATIONS AND UNINCORPORATED COMPANIES, 498.

I. GENERALLY.

Constitutionality.—The Bankruptcy Act is not unconstitutional because it provides that others than traders may be adjudged bankrupts. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

The Act is not unconstitutional in respect to amenability to involuntary proceedings between different classes of corporations; nor is the classification adopted by Congress unreasonable, or beyond the limits of its discretion. *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1890) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385.

Under Const. U. S., art. 1, section 8, providing that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States," the uniformity required is geographical, and not personal; and no limitation is imposed upon Congress as to the classification of persons who are to be affected by such laws, provided only that the laws shall have uniform operation throughout the United States. *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1890) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385.

Effect of prior bankruptcy proceedings.—The fact that one has been discharged from his debts within six years cannot possibly be an objection to the institution of involuntary proceedings by creditors. *In re Little*, (7th Cir. 1905) 137 Fed. 521, 70 C. C. A. 105, 13 Am. Bankr. Rep. 640. And see the annotation under section 14b (5), *infra*, p. 547, as to the effect of a previous discharge within six years.

But creditors who have proved their claims in bankruptcy are not entitled, while the estate is still in process of administration, but after the bankrupt has been refused a discharge, to maintain proceedings to have him adjudged a bankrupt a second time on account of the same debts, on the ground that he acquired property after the first adjudication, which he is alleged to have conveyed in fraud of his creditors. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569.

And see the annotation under section 70a as to the ownership of property acquired after adjudication; and as to the effect of a former discharge as *res judicata*, see section 14b, *infra*, p. 548.

II. STATUTORY EXCEPTIONS.

Wage earners are expressly excepted from the operation of section 4b, and cannot be adjudged bankrupt in involuntary proceedings. *In re Pilger*, (E. D. Wis. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244; *In re Yoder*, (E. D. Pa. 1904) 127 Fed. 894, 11 Am. Bankr. Rep. 445.

When status of wage earner must keep existed.—The status of wage earner, in order to be available as a defense to an involuntary petition in bankruptcy, must have existed at the time of the contracting of the indebtedness for which an adjudication is sought. It is well settled that one cannot render himself immune from bankruptcy proceedings by changing his status subsequent to the creation of his indebtedness and the acquisition of property. *Rlickinger v. Vandalia First Nat. Bank*, (6th Cir. 1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Narema Chocolate Co.*, (D. C. R. I. 1910) 178 Fed. 393, 24 Am. Bankr. Rep. 154; *In re Wakefield*, (N. D. Cal. 1910) 182 Fed. 247.

A music teacher giving lessons at so much an hour is not a wage earner. *Wilkes-Barre First Nat. Bank v. Barnum*, (M. D. Pa. 1906) 160 Fed. 245, 20 Am. Bankr. Rep. 439.

The test in determining whether a person is a wage earner or not is: Does the person claiming to be a wage earner depend upon the return from his personal services for his maintenance and support? *Matter of Remaley*, (E. D. Pa. 1908) 23 Am. Bankr. Rep. 29.

In Carpenter v. Cudd, (4th Cir. 1909) 174 Fed. 603, 20 Ann. Cas. 977, 98 C. C. A. 442, 23 Am. Bankr. Rep. 463, it appeared that an alleged involuntary bankrupt nominally drew \$200 a year as salary, but owned two-thirds of the stock of the corporation, and drew more than \$2,000 a year preceding the institution of bankruptcy proceedings against him, and was also in the business of buying and selling real estate, his holdings outside the corporation being worth nearly \$30,000, and it was held that he was not a wage earner.

Persons engaged chiefly in farming, or the tillage of the soil, are not amenable to involuntary bankruptcy proceedings. *In re Thompson*, (N. D. Ia. 1900) 102 Fed. 287, 4 Am. Bankr. Rep. 340; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137; *Wulbern v. Drake*, (4th Cir. 1903) 120 Fed. 493, 56 C. C. A. 643, 9 Am. Bankr. Rep. 695; *Canta v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126; *In re Hoy*, (N. D. Ia. 1905) 137 Fed. 175, 14 Am. Bankr. Rep. 648; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 227; *Gregg v. Mitchell*, (6th Cir. 1906) 166 Fed. 122, 16

Ann. Cas. 510, 92 C. C. A. 415, 20 L. R. A. N. S. 148, 21 Am. Bankr. Rep. 659; *Oliver v. Armour*, (5th Cir. 1909) 167 Fed. 517, 93 C. C. A. 153, 21 L. R. A. N. S. 109, 21 Am. Bankr. Rep. 901; *Robertson v. Dwyer*, (C. C. A. 7th Cir. 1911) 184 Fed. 880; *E. E. Sutherland Medicine Co. v. Rich*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 85.

When status must exist.—It has been held that the question whether a person is exempt from involuntary bankruptcy proceedings by reason of being a person engaged chiefly in farming is to be determined by the status of the person at the time of the commission of the alleged acts of bankruptcy by him. *In re Luckhardt*, (D. C. Kan. 1900) 101 Fed. 807, 4 Am. Bankr. Rep. 307; *Flickinger v. Vandalla First Nat. Bank*, (6th Cir. 1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 820.

A partnership formed for the purpose of tilling the soil and engaging in agricultural pursuits, upon which occupation the copartners depend for a livelihood, is farming. *E. E. Sutherland Medicine Co. v. Rich*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 85.

A private banker, it has been held, is not subject to involuntary bankruptcy where his principal occupation is farming. *Couts v. Townsend*, (W. D. Ky. 1903) 120 Fed. 249, 11 Am. Bankr. Rep. 126.

But corporations are not within the exception of persons "engaged chiefly in farming or the tillage of the soil." *In re Lake Jackson Sugar Co.*, (S. D. Tex. 1904) 126 Fed. 640, 11 Am. Bankr. Rep. 458.

What is farming or tillage of soil.—It is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming; and each case must be decided on its own circumstances. *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577.

In *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137, the court said: "Within the purview of this statute it [farming] is understood to mean the business of cultivating land or employing it for the purpose of husbandry; and a farm is a tract devoted to cultivation, under a single control, whether it be large or small, isolated, or made up of many parcels."

Conducting a "stock farm," as well as conducting a "grain farm," is farming. *In re Dwyer*, (C. C. A. 7th Cir. 1911) 184 Fed. 880. See also *In re Thompson*, (N. D. Ia. 1900) 102 Fed. 287, 4 Am. Bankr. Rep. 340.

In *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137, it appeared that the alleged bankrupt, who owned 1,100 acres of land, cultivated one-third of the land with hired labor, and rented another third on shares, and the remaining third at a stipulated rental, but that he maintained supervision of all of the land; he also kept a store where he sold goods to his laborers and tenants, and some goods to outsiders, but his chief income was from his lands; and it was held that he was within the exception.

In *Rise v. Bordner*, (M. D. Pa. 1905) 110

Fed. 566, 15 Am. Bankr. Rep. 297, the defendant kept a small store, and owned a farm of 240 acres which he cultivated with the aid of his son and one laborer. His income from his business outside of farming amounted to sixty or seventy dollars a year, and the farm furnished most of his livelihood. The court held that the defendant was within the exception, as being chiefly engaged in farming, etc.

A farmer does not cease to be "engaged chiefly in farming," because he establishes a dairy, as one of the branches of his industry, to utilize the products of his farm and convert them to profitable uses, nor because he may sell the products of his dairy at retail. *Gregg v. Mitchell*, (6th Cir. 1904) 166 Fed. 725, 16 Ann. Cas. 510, 92 C. C. A. 415, 20 L. R. A. N. S. 148, 21 Am. Bankr. Rep. 659.

What is not farming or tillage of soil.—In *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577, the court held that a person keeping a stall at a public market, where during a year he sold products raised by him of the value of \$850, and other products worth over \$5,000, was not a person engaged chiefly in farming.

A person who buys and sells cattle, using his farm merely as a feeding place for the cattle, and purchasing most of the feed for them, is not engaged chiefly in farming if his income is mostly derived from such buying and selling of cattle. *Dearborn Bank v. Matney*, (W. D. Mo. 1904) 132 Fed. 75, 12 Am. Bankr. Rep. 482; *In re Brown*, (S. D. Ia. 1904) 132 Fed. 706, 13 Am. Bankr. Rep. 140.

Where a husband deeds a farm upon which he resides with his family to his wife to defraud his creditors, but continues to operate the farm as before, the wife merely attending to the ordinary duties of a farmer's wife, the wife does not thereby become a person engaged chiefly in farming, and is not exempt from involuntary proceedings in bankruptcy. *In re Johnson*, (N. D. N. Y. 1907) 149 Fed. 864, 18 Am. Bankr. Rep. 74.

The owner of a farm upon which he resides, but who has leased the same for a year for a money rental, is not engaged in farming, and may be adjudged an involuntary bankrupt. *In re Matson*, (M. D. Pa. 1903) 123 Fed. 743, 10 Am. Bankr. Rep. 479.

Determination of status of statutory exceptions.—Whether an alleged bankrupt is within the exceptions specified in section 4b, and therefore not amenable to involuntary bankruptcy, is to be determined as of the date of the commission of the alleged act of bankruptcy. If the debtor belonged to a non-exempt class when the act of bankruptcy was committed he may be adjudged bankrupt, notwithstanding the fact that he came to belong to a class which the statute exempts from adjudication before the petition in bankruptcy was filed. *In re New York, etc., Water Co.*, (S. D. N. Y. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 361, 6 Am. Bankr. Rep. 577; *In re Tontine Surety Co.*, (D. C. N. J. 1902) 116 Fed. 401, 8 Am. Bankr.

Rep. 421; *Tiffany v. La Plume Condensed Milk Co.*, (M. D. Pa. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; *Flickinger v. Vandalia First Nat. Bank*, (8th Cir. 1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Burgin*, (N. D. Ala. 1909) 173 Fed. 726, 22 Am. Bankr. Rep. 574; *Bollinger v. Central Nat. Bank*, (9th Cir. 1910) 177 Fed. 609, 101 C. C. A. 235, 24 Am. Bankr. Rep. 44; *In re Naroma Chocolate Co.*, (D. C. R. I. 1910) 178 Fed. 383, 24 Am. Bankr. Rep. 154; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927; *In re Wakefield*, (N. D. Cal. 1910) 182 Fed. 247; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830.

III. NATURAL PERSONS.

A natural person may be adjudged an involuntary bankrupt. *Cleage v. Laidley*, (8th Cir. 1906) 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598.

Private bankers are amenable to involuntary bankruptcy. *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222. See also *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763.

But a private banker who was chiefly engaged in farming was held to be exempt from involuntary bankruptcy proceedings because of such chief occupation. *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126. And see the preceding subdivision of this annotation, II. *Statutory Exceptions*.

Married women.—The statute authorizes the adjudication of a married woman as an involuntary bankrupt, where she is engaged in business on her own account, and owes business obligations of the amount required by the statute, for which her separate property is liable. *MacDonald v. Tefft-Weller Co.*, (5th Cir. 1904) 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800; *In re Johnson*, (N. D. N. Y. 1907) 149 Fed. 864, 18 Am. Bankr. Rep. 74; *Matter of Remaley*, (E. D. Pa. 1909) 23 Am. Bankr. Rep. 29.

An alien, domiciled within the United States, may be adjudged bankrupt. *In re Clisdell*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424.

Indians.—In the following cases it appears that Indians were adjudged bankrupts: *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re Rennie*, (S. D. Ind. Ter.) 2 Am. Bankr. Rep. 182.

Infants.—It has been held that the creditors of an infant, whose debts he is entitled to repudiate at majority, cannot have him adjudged an involuntary bankrupt, since they are not creditors in the sense of the Bankruptcy Act. *In re Eidemiller*, (N. D. Ill. 1900) 105 Fed. 595, 53 L. R. A. 118, 5 Am. Bankr. Rep. 570. See also *In re Pensansky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

And in *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794, it was said that an infant cannot be adjudged

bankrupt in either voluntary or involuntary proceedings.

An infant partner, though he may not be adjudicated himself, does not prevent an adjudication of the firm of which he is a member as a bankrupt. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

But the infant partner cannot join in a voluntary petition by the firm, nor be included in an adjudication made thereon. *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

The test as to whether an infant may be adjudicated an involuntary bankrupt seems to be whether the debts from which he seeks to be discharged are based upon contracts or obligations which he can disaffirm upon coming of age, or upon such as render him absolutely liable. *In re Penzansky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

Thus it has been held that if a minor engages in business as a merchant, and parties consequently assume that he is of full age, and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and may be adjudged bankrupt on his own petition, though still an infant. *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

Insane persons cannot be adjudged bankrupt. See *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *In re Burka*, (W. D. Tenn. 1901) 107 Fed. 674, 5 Am. Bankr. Rep. 843; *In re Eisenberg*, (S. D. N. Y. 1902) 117 Fed. 786, 8 Am. Bankr. Rep. 551; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669, reversing (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513; *In re Ward*, (D. C. N. J. 1908) 20 Am. Bankr. Rep. 482.

But the insanity of a partner does not prevent the adjudication of the copartnership of which he was a member. *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536.

Subsequent insanity.—Insanity occurring after an adjudication of bankruptcy does not abate the proceeding. See the annotation under section 8, *infra*, p. 527.

IV. CORPORATIONS AND UNINCORPORATED COMPANIES.

Corporations.—All moneyed, business, or commercial corporations, excepting municipal, railroad, insurance, or banking corporations, are, since the enactment of the amendment of June 25, 1910, amenable to involuntary bankruptcy proceedings. The amendment is not retroactive. *In re New Amsterdam Motor Co.*, (S. D. N. Y. 1910) 180 Fed. 943, 24 Am. Bankr. Rep. 757; *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

What is a moneyed corporation.—Section 37 of the Act of 1867 provided that it should apply to all moneyed, business, or com-

mercantile corporations, and in discussing this provision it was said that such language was intended to include all corporations of a private nature organized for pecuniary profit. See *Winter v. Iowa, etc., R. Co.*, (1873) 2 Dill. 487, 30 Fed. Cas. No. 17,890. See also *Rankin v. Florida, etc., R. Co.*, (1868) 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *In re Lady Bryan Min. Co.*, (1870) 4 Nat. Bankr. Reg. 394, 1 Sawy. 349, 14 Fed. Cas. No. 7,978; *In re Jefferson Ins. Co.*, (1877) 11 Nat. Bankr. Reg. 287, 2 Hughes 255, 13 Fed. Cas. No. 7,253; *Davis v. Alabama, etc., R. Co.*, (1873) 13 Nat. Bankr. Reg. 258, 1 Woods 661, 7 Fed. Cas. No. 3,648; *In re Detroit Car Works*, (1876) 14 Nat. Bankr. Reg. 243, 7 Fed. Cas. No. 3,833; *Freeman's Nat. Bank v. Smith*, (1875) 13 Blatchf. 220, 9 Fed. Cas. No. 5,080; *In re Collateral Loan, etc., Bank*, (1878) 5 Sawy. 331, 6 Fed. Cas. No. 2,997; *Jones v. Watkins*, (1827) 1 Stew. (Ala.) 81.

In discussing what constituted a moneyed corporation under the Kansas Crimes Act, it was held that a company incorporated for the purpose of pecuniary profit, although having no power to engage in banking, or in loaning money, or in writing insurance, is a moneyed corporation. *State v. Chance*, (1910) 82 Kan. 392, 20 Ann. Cas. 134 (see also note at p. 136), 108 Pac. 791.

In *State v. Fidelity, etc., Co.*, (1904) 35 Tex. Civ. App. 214, 80 S. W. 544, a statute providing for the taxation of "moneyed corporations," was held to mean all classes of corporations organized and created for business purposes, as distinguished from public, or charitable, or other corporations which were exempted by law from taxation.

Corporate name not conclusive as to business.—There is no judicial presumption that the corporate name denotes the business in which the corporation is engaged. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236.

Corporations engaged in farming.—A corporation is not exempt from the operation of the bankruptcy law, under the provision relating to the exemption of persons engaged chiefly in farming or the tillage of the soil, although its chief business may be farming. *In re Lake Jackson Sugar Co.*, (S. D. Tex. 1904) 129 Fed. 640, 11 Am. Bankr. Rep. 458.

Banking corporations.—Prior to the amendment of 1910 the provision of section 4b, relative to bankers, read: "Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Under that provision it was held that banks organized under the laws of the state were not subject to involuntary bankruptcy. *In re Surety Guarantee, etc., Co.*, (7th Cir. 1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129; *In re Oregon Trust, etc., Bank*, (D. C. Ore. 1907) 156 Fed. 319, 19 Am. Bankr. Rep. 484.

Private bankers, however, were held to be subject to involuntary proceedings. *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222. See also *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763.

But in *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126, it was held that a private banker was exempted from involuntary bankruptcy because his chief occupation was that of farming.

Municipal, railroad, insurance, and banking corporations are expressly excepted from the operation of section 4b, and therefore are not subject to adjudication as involuntary bankrupts. To be entitled to such immunity, however, it would seem that, as under the law prior to the amendment of 1910, it is essential that the alleged bankrupt shall have been within the statutory exceptions at the time of the commission of the alleged act of bankruptcy. See the cases cited to this effect in subdivision II. of this annotation, paragraph *Determination of Status of Statutory Exceptions*, p. 497, *supra*.

Winding-up or dissolution proceedings.—A corporation does not cease to exist from the fact that proceedings for winding up its affairs, or for its dissolution, have been instituted in a state court; and, notwithstanding such proceedings, a corporation still remains amenable to involuntary bankruptcy under section 4b. *Lea v. George M. West Co.*, (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *In re Empire Metallic Bedstead Co.*, (N. D. N. Y. 1899) 95 Fed. 957, 1 Am. Bankr. Rep. 136; *In re Storm*, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *White Mountain Paper Co. v. Morse*, (1st Cir. 1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309, *affirmed* (3d Cir. 1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; *In re Adams, etc., Co.*, (N. D. Ga. 1908) 164 Fed. 489, 21 Am. Bankr. Rep. 161; *Matter of Edward G. Milbury Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 523.

The fact that the property of a corporation is in the possession of receivers appointed by a state court does not affect the jurisdiction of a court of bankruptcy to adjudicate such corporation a bankrupt. *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re Sterlingworth R. Supply Co.*, (E. D. Pa. 1908) 164 Fed. 591, 21 Am. Bankr. Rep. 341.

Unincorporated companies or associations may, under the express provision of the statute, be adjudged bankrupt. *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re Seaboard Fire Underwriters*, (S. D. N. Y. 1905) 137 Fed. 987, 13 Am. Bankr. Rep. 722.

Prior to the enactment of the amendment of June 25, 1910, section 4b, with respect to the amenability of corporations thereto, read that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits," might be adjudged bankrupt. As to what constituted any one of the various classes of corporations mentioned there was not, and probably could not have been, any fixed rule; so that, under the old law, there existed a wide difference

of opinion. These decisions, however, are now only of value with respect to cases commenced prior to the time of the passage of the amendment, and are appended without comment.

Manufacturing corporations.—*Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, 26 L. R. A. N. S. 475; *In re San Gabriel Sanatorium Co.*, (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re Rollins Gold, etc., Min. Co.*, (S. D. N. Y. 1900) 102 Fed. 983, 4 Am. Bankr. Rep. 327; *In re Morton Boarding Stables*, (S. D. N. Y. 1901) 108 Fed. 791, 5 Am. Bankr. Rep. 763; *In re Tecopa Min., etc., Co.*, (S. D. Cal. 1901) 110 Fed. 120, 6 Am. Bankr. Rep. 250; *In re White Star Laundry Co.*, (E. D. Wis. 1902) 117 Fed. 570, 9 Am. Bankr. Rep. 30; *Columbia Ironworks v. National Lead Co.*, (6th Cir. 1904) 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; *In re White Mountain Paper Co.*, (D. C. N. H. 1903) 127 Fed. 180, 11 Am. Bankr. Rep. 491; *White Mountain Paper Co. v. Morse*, (1st Cir. 1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Marine Constr., etc., Co.*, (2d Cir. 1904) 130 Fed. 446, 64 C. C. A. 648, 11 Am. Bankr. Rep. 640; *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240, *affirming* (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 656; *In re Troy Steam Laundering Co.*, (N. D. N. Y. 1904) 132 Fed. 266, 13 Am. Bankr. Rep. 97; *Butt v. C. F. MacNielhol Constr. Co.*, (4th Cir. 1905) 140 Fed. 840, 72 C. C. A. 252, 15 Am. Bankr. Rep. 515, *affirming* (E. D. Va. 1905) 134 Fed. 979, 14 Am. Bankr. Rep. 189; *In re Mathews Consol. Slate Co.*, (D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 497; *In re T. E. Hill Co.*, (7th Cir. 1906) 148 Fed. 832, 78 C. C. A. 592, 17 Am. Bankr. Rep. 517; *In re Belle Fourche First Nat. Bank*, (8th Cir. 1907) 152 Fed. 64, 91 C. C. A. 260, 18 Am. Bankr. Rep. 265, 11 Am. Cas. 355; *In re Toledo Portland Cement Co.*, (E. D. Mich. 1907) 156 Fed. 83, 19 Am. Bankr. Rep. 117, *reversing* 17 Am. Bankr. Rep. 375; *In re Rutland Realty Co.*, (S. D. N. Y. 1907) 157 Fed. 296, 19 Am. Bankr. Rep. 546; *In re Church Constr. Co.*, (S. D. N. Y. 1907) 157 Fed. 296, 19 Am. Bankr. Rep. 549; *Hall, etc., Co. v. Friday*, (3d Cir. 1907) 158 Fed. 593, 87 C. C. A. 23, 19 Am. Bankr. Rep. 841; *In re Kingston Realty Co.*, (2d Cir. 1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845, *reversing* (E. D. N. Y. 1907) 157 Fed. 290, 19 Am. Bankr. Rep. 465; *United Surety Co. v. Iowa Mfg. Co.*, (8th Cir. 1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; *In re Charles Town Light, etc., Co.*, (N. D. W. Va. 1910) 183 Fed. 160; *In re Hudson River Power Transmission Co.*, (2d Cir. 1910) 183 Fed. 701, 106 C. C. A. 139, 25 Am. Bankr. Rep. 504; *In re Eagle Steam Laundry Co.*, (E. D. N. Y. 1911) 184 Fed. 949; *In re Akaka American Fish Co.*, (W. D. Wash. 1908) 20 Am. Bankr. Rep. 712.

Trading and mercantile corporations.—*In re San Gabriel Sanatorium Co.*, (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re Cameron Town Mut. F., etc., Ins. Co.*, (W. D. Mo. 1899) 96 Fed. 766, 2 Am. Bankr. Rep. 372; *In re New York, etc., Water Co.*, (S. D. N. Y. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508, *affirmed* (2d Cir. 1900) 102 Fed. 1004, 43 C. C. A. 91; *In re Chicago-Joplin Lead, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 67, 4 Am. Bankr. Rep. 712; *In re Oriental Soc.*, (E. D. Pa. 1900) 104 Fed. 975, 5 Am. Bankr. Rep. 219; *In re Morton Boarding Stables*, (S. D. N. Y. 1901) 108 Fed. 791, 5 Am. Bankr. Rep. 763; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Chesapeake Oyster, etc., Co.*, (D. C. Colo. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 173; *In re Fulton Club*, (N. D. Ga. 1902) 113 Fed. 997, 7 Am. Bankr. Rep. 670; *In re Philadelphia, etc., Transp. Co.*, (E. D. Pa. 1902) 114 Fed. 403, 7 Am. Bankr. Rep. 707; *In re Tontine Surety Co.*, (D. C. N. J. 1902) 116 Fed. 401, 8 Am. Bankr. Rep. 421; *In re Parmelee Library*, (7th Cir. 1903) 120 Fed. 235, 56 C. C. A. 583, 9 Am. Bankr. Rep. 568; *In re Surety, etc., Co.*, (7th Cir. 1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129; *In re H. J. Quimby Freight Forwarding Co.*, (D. C. Mass. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424; *In re Pacific Coast Warehouse Co.*, (N. D. Cal. 1903) 123 Fed. 749, 10 Am. Bankr. Rep. 474; *Philpot v. O'Brien*, (1st Cir. 1903) 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205, *appeal dismissed* (1905) 196 U. S. 643, 25 S. Ct. 785, 49 U. S. (L. ed.) 631; *In re New York Bldg.-Loan Banking Co.*, (S. D. N. Y. 1904) 127 Fed. 471, 11 Am. Bankr. Rep. 51; *In re Snyder, etc., Co.*, (N. D. Ill. 1904) 133 Fed. 806, 13 Am. Bankr. Rep. 325; *In re U. S. Hotel Co.*, (6th Cir. 1904) 134 Fed. 225, 67 C. C. A. 153, 66 L. R. A. 598, 13 Am. Bankr. Rep. 403; *In re Bay City Irrigation Co.*, (S. D. Tex. 1905) 136 Fed. 850, 14 Am. Bankr. Rep. 370; *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; *In re New York, etc., Ice Lines*, (3d Cir. 1906) 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832, *affirming* (S. D. N. Y. 1905) 14 Am. Bankr. Rep. 61; *In re Leighton*, (S. D. W. Va. 1906) 147 Fed. 311, 17 Am. Bankr. Rep. 275; *In re Kingston Realty Co.*, (E. D. N. Y. 1907) 157 Fed. 299, 19 Am. Bankr. Rep. 845; *Gallagher v. Delaney Stables Co.*, (E. D. Pa. 1908) 158 Fed. 361, 19 Am. Bankr. Rep. 861; *In re Westworth Lunch Co.*, (2d Cir. 1908) 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29; *In re Willis Cab, etc., Co.*, (S. D. N. Y. 1910) 179 Fed. 113; *In re Eagle Steam Laundry Co.*, (E. D. N. Y. 1910) 178 Fed. 308. And see to the same effect under former bankruptcy laws, *In re Ryan*, (D. C. Ore. 1873) 2 Sawy. 411, 21 Fed. Cas. No. 12,183; *In re Kingston Realty Co.*, (2d Cir. 1906) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845; *Altonwood Park Co. v. Gwynne*, (2d Cir. 1908) 160 Fed. 448, 87 C. C. A. 409, 20 Am.

Bankr. Rep. 31; *In re* New England Breeders' Club, (D. C. N. H. 1908) 165 Fed. 517, 21 Am. Bankr. Rep. 349; *Laker v. George H. Stapely Co.*, (S. D. Ohio 1908) 21 Am. Bankr. Rep. 303.

Mining corporations. — *In re* San Gabriel Sanatorium Co., (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re* Elk Park Min., etc., Co., (D. C. Colo. 1899) 101 Fed. 422, 4 Am. Bankr. Rep. 131; *In re* Rollins Gold, etc., Min. Co., (S. D. N. Y. 1900) 102 Fed. 982, 4 Am. Bankr. Rep. 327; *In re* Chicago-Joplin Lead, etc., Co., (W. D. Mo. 1900) 104 Fed. 67, 4 Am. Bankr. Rep. 712; *In re* Woodside Coal Co., (E. D. Pa. 1900) 105 Fed. 56, 5 Am. Bankr. Rep. 186; *In re* Keystone Coal Co., (W. D. Pa. 1901) 109 Fed. 872, 6

Am. Bankr. Rep. 377; *In re* Tecopa Min., etc., Co., (S. D. Cal. 1901) 110 Fed. 120, 6 Am. Bankr. Rep. 250; *In re* Mathews Consol. Slate Co., (D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407; *In re* Quincy Granite Quarries Co., (D. C. Mass. 1904) 147 Fed. 279, 16 Am. Bankr. Rep. 823.

Printing and publishing corporations. — *In re* Mutual Mercantile Agency, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re* Parmelee Library, (7th Cir. 1903) 120 Fed. 235, 56 C. C. A. 533, 9 Am. Bankr. Rep. 568; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67.

[*Liability of officers and stockholders of corporations.*] The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. [(*Inserted 1908*) 32 Stat. L. 797.]

Liability of officers, directors, and stockholders. — The express provision of the Bankrupt Act forbids that the secondary liability of the officers, stockholders, or directors of a corporation, under a state statute, should be affected by a corporation's discharge in bankruptcy. *In re* Marshall Paper Co., (1st Cir. 1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468, (D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653; *Klipstein*

v. Allen-Miles Co., (5th Cir. 1905) 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; *Firestone Tire, etc., Co. v. Agnew*, (N. Y. 1909) 21 Am. Bankr. Rep. 292; *In re* Flood-Pratt Dairy Co., (N. D. Ohio 1909) 23 Am. Bankr. Rep. 148.

As to the effect of a discharge on codebtors generally, see section 16 and the annotation thereunder, *infra*, p. 569.

SEC. 5. PARTNERS. — *a* [*Partnership.*] A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. [(*1898*) 30 Stat. L. 547.]

Cross-reference: As to

Petitions in bankruptcy against other than partnership debtors, and procedure thereon, see the several subdivisions of sections 18 (*infra*, p. 579) and 59.

Adjudication of partnerships as bankrupts.

— Under the authority conferred by section 56, a partnership, as such, may be adjudged bankrupt where it is chargeable with the commission of any of the acts of bankruptcy enumerated in the several subdivisions of section 30. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 566; *In re* Dunnigan, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re* Levy, (N. D. N. Y. 1899) 95 Fed. 812, 2 Am. Bankr. Rep. 21; *In re* Hirsch, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re* Meyer, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re* Duguid, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re* Barden, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31; *Vaccaro v. Security Bank*, (6th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *Davis v. Stevens*, (D.

C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re* Miller, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225; *In re* Stokes, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re* Hale, (E. D. N. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35; *In re* Harris, (N. D. Ohio 1899) 108 Fed. 517, 4 Am. Bankr. Rep. 132; *In re* Sanderlin, (E. D. N. C. 1901) 109 Fed. 837, 6 Am. Bankr. Rep. 354; *In re* Kersten, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re* Carleton, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 274; *In re* Farley, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 267; *In re* Mercur, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505, *affirming* (E. D. Pa. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; *In re* McLaren, (N. D. N. Y. 1903) 125 Fed. 635, 11 Am. Bankr. Rep. 144; *In re* Stein, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536; *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222; *In re* Perley, (E. D. Mo. 1905) 138 Fed. 927, 15 Am. Bankr. Rep. 54; *In re* Bo-relli, (D. C. Conn. 1906) 142 Fed. 296, 16 Am. Bankr. Rep. 115; *In re* Hudson Clothing Co., (D. C. Me. 1906) 148 Fed. 305, 17 Am. Bankr.

Rep. 826; *Manson v. Williams*, (1st Cir. 1907) 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674; *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 17 L. R. A. N. S. 886, 10 Am. Bankr. Rep. 577; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Culver*, (D. C. Minn. 1909) 176 Fed. 450, 23 Am. Bankr. Rep. 779; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804; *In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 285; *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357; *In re McMurtrey*, (W. D. Tex. 1905) 15 Am. Bankr. Rep. 430; *In re Pincus*, (S. D. N. Y. 1906) 17 Am. Bankr. Rep. 331.

The insanity of a partner and the appointment of a conservator of his estate will not prevent adjudication of bankruptcy against the partnership on petition of its creditors. *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. See also the annotation under sec. 8, *infra*, p. 527.

Adjudication not dependent on possession of assets.—It is no defense to a bankruptcy proceeding against a partnership, on petition of one of its members, that the firm is without assets. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Infant partner.—Where proceedings in involuntary bankruptcy are instituted against a firm, and it appears that one of the partners is a minor, an adjudication should be made against the firm as such, but as to the infant partner the petition should be dismissed. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

The commission of an act of bankruptcy by the individuals composing the firm is not a necessary prerequisite to the adjudication of the partnership entity as a bankrupt. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 17 L. R. A. N. S. 886, 19 Am. Bankr. Rep. 577; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. N. S. 656, 20 Am. Bankr. Rep. 237; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757.

Existence of partnership necessary.—As required by the statute, a partnership, as such, may be adjudged bankrupt only "during the continuation of the partnership business, or after its dissolution and before the final settlement thereof;" and, in accordance with this language, it has been held that in order to warrant the adjudication as a bankrupt of the partnership entity, it is necessary to show the actual existence of such partnership at the time of the filing of the petition in bankruptcy against it. *Royston v. Weis*,

(5th Cir. 1902) 112 Fed. 962, 50 C. C. A. 638, 1 Am. Bankr. Rep. 584; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re McLaren*, (N. D. N. Y. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 141; *Jones v. Burnham*, (3d Cir. 1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

The burden of proof in an issue to determine whether or not the respondent is a partnership, rests upon the petitioners. *Jones v. Burnham*, (3d Cir. 1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85.

There is no final settlement of the affairs of a partnership until its debts are paid, or in some other way extinguished; and in the absence of a showing to that effect, the other elements being present, a partnership may be adjudged bankrupt. *In re Levy*, (N. D. N. Y. 1899) 95 Fed. 812, 2 Am. Bankr. Rep. 21; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

If a partnership has been dissolved by the partners, inter se, before the filing of the petition, it is not thereafter an existing partnership, and proceedings in bankruptcy cannot be maintained against it. *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

Adjudication after dissolution by death.—A partnership, after its dissolution by the death of one partner, may be adjudged a bankrupt; and in such case the proceedings are not invalidated by the fact that the petition does not refer to the deceased partner, nor disclose that the partners named were surviving partners, where the business was being continued as provided for in the partnership articles. *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618. See also *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489.

But where, on an application for an adjudication of bankruptcy against a firm, it appeared that both of the original partners had died, leaving their interests to certain others, some of whom were minors, and it did not appear by whom or under what arrangement the firm was subsequently conducted, except that two persons conducted the business and committed the acts of bankruptcy alleged, and the continuance of the partnership was denied by the alleged infant members, an adjudication was denied until the parties, by a proper proceeding or pleading, removed the uncertainties of the situation. *In re McLaren*, (N. D. N. Y. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 141.

Necessity of showing insolvency of individuals composing firm.—It has been held that where the act of bankruptcy charged against a partnership entity is one involving insolvency, it is necessary, in order to warrant an adjudication, to allege and prove that the assets of the partnership, plus the assets of its members in excess of their individual debts, are insufficient to pay the partnership

debts. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 79, 3 Am. Bankr. Rep. 588; *Vaccaro v. Security Bank*, (6th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re Forbes*, (D. C. Mass. 1904) 128 Fed. 137, 11 Am. Bankr. Rep. 787; *In re Perley*, (E. D. Mo. 1905) 138 Fed. 927, 15 Am. Bankr. Rep. 54; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 886, 84 C. C. A. 61, 17 L. R. A. N. S. 886, 19 Am. Bankr. Rep. 577; *Tumlin v. Bryan*, (5th Cir. 1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. N. S. 960, 21 Am. Bankr. Rep. 319; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757.

But it has also been held that a partnership is insolvent and subject to adjudication as a bankrupt when the partnership property is insufficient to pay its debts, regardless of the individual property of the partners. *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427.

Sufficient evidence of insolvency.—The inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically all of its property to creditors, either by way of payment or security, leaving other debts unpaid, are facts sufficient to establish its insolvency. *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140.

Petition—Form.—No official form having been prescribed for a petition in involuntary bankruptcy against a partnership, form No. 3 (the general form of a creditors' petition) is to be used for that purpose, with such changes as are necessary to meet the exigencies of the particular case. *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504.

A partnership is a distinct entity, which requires a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication against the partnership itself, irrespective of and in addition to any that may be made against the individual members; and simultaneous proceedings against the individual members of a partnership do not necessarily bring the partnership into court, so as to authorize an amendment calling for an adjudication against it. *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505.

Only one petition need be filed upon the voluntary application of a partnership for the benefit of the Bankruptcy Act, and all that is done thereupon constitutes but one proceeding, although it includes granting a discharge to each of the partners. *In re Langslow*, (N. D. N. Y. 1899) 98 Fed. 869, 1 Am. Bankr. Rep. 258; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529.

Who may file petition.—A member of the partnership may file a petition seeking the adjudication of his firm as a bankrupt. *In*

re Murray, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

But a single partner cannot maintain a petition to have his partnership adjudged a voluntary or an involuntary bankrupt, in the sense in which these terms are generally used. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Necessity of notice to nonassenting partner.—Members of a partnership who do not join in, or assent to, the filing of a petition in bankruptcy against the partnership, and who have not been notified thereof, cannot be adjudicated bankrupt. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

Where some, but not all, of the members of a partnership file a petition in bankruptcy asking for the adjudication of the firm, the proceeding is a voluntary one as to the firm and the petitioners, but it is involuntary as to nonassenting partners. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

An objecting partner cannot be adjudicated against his will. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

But such nonconsenting partner does not hold a veto on the jurisdiction of the court over the partnership as an entity. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

Thus while the objecting partner may prevent his own adjudication, he cannot escape an accounting which is necessary to facilitate the jurisdiction of the court over the partnership case. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

The firm creditors may also file a petition in bankruptcy against the partnership entity, as well as against the individual members thereof. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Meyer*, (2d Cir. 1899) 98 Fed. 978, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8.

Individual petition seeking discharge from partnership debts.—Where a member of a partnership files a petition in bankruptcy, and seeks thereby to obtain a discharge from his liability for the payment of partnership

obligations, as well as his individual debts, the petition, schedules, and notices to creditors should contain the averments and information necessary to lay a foundation for discharge effectual as against firm creditors. *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re McFaun*, (N. D. Ia. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; *In re Hartman*, (N. D. Ia. 1899) 96 Fed. 593, 3 Am. Bankr. Rep. 65; *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529; *In re Hale*, (E. D.

N. C. 1901) 107 Fed. 432, 5 Am. Bankr. Rep. 35; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266; *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *In re Morrison*, (W. D. Tex. 1904) 127 Fed. 166, 11 Am. Bankr. Rep. 498; *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8; *New York Inst., etc., v. Crockett*, (1907) 17 Am. Bankr. Rep. 283, 117 App. Div. 269, 102 N. Y. S. 412.

Discharge.—As to the effect of a discharge with respect to partnership debts, see the annotation under the first subdivision of section 17a, *infra*, p. 570.

b [Administration of estate.] The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates. [(1898) 30 Stat. L. 547.]

Cross-reference: As to Appointment of trustees generally, see section 44a, *infra*, p. 677.

Trustee of partnership estate.—The statute contemplates that the trustee elected for a partnership shall also be the trustee of the individual partners; and there is no authority for the election of separate trustees for the partners. *In re Coe*, (S. D. N. Y. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715. And see generally the annotation under the following subdivision of this section.

But see *In re Bertenshaw*, (8th Cir. 1907) 167 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577, wherein it was said that where a partnership is adjudged bankrupt, and the members of the partnership are not, the trustee takes title to the partnership property and to that only, and his full duty is discharged and all the power which he has is exercised when he collects and converts the partnership property into money and distributes its proceeds among the creditors. The creditors of the partnership may subject the individual property of the unadjudicated partners to the payment of their debts before, during, or after the bankruptcy proceedings, just as they may the property of indorsers upon the commercial

paper of the firm or the property of sureties for its obligations. But the trustee of the estate of the partnership is neither the assignee or the trustee of the claims of its creditors, nor their attorney nor agent to collect their claims out of the individual property of the unadjudicated partners, and he has no more right or authority at law or in equity to seize their individual property and to apply it to the payment of the partnership creditors than he has to take the property of indorsers of the firm paper or the property of sureties for its obligations and apply such property to that purpose. He is merely the trustee of the property of the partnership; not of the individual property of the partners, nor of the property of any other debtors of the creditors of the partnership, and he is without power to take or to administer such property. Nor may he maintain any action or proceeding to enforce the liability of the individual partners to the partnership creditors, because he is not the assignee of the claims of the creditors of the partnership and he has no more right or authority than a stranger to enforce these claims against persons other than the bankrupt partnership, or against property other than the property of the partnership.

c [Jurisdiction over one partner sufficient.] The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. [(1898) 30 Stat. L. 547.]

Entity doctrine.—It has been held that a partnership is a "person" or entity which may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings, if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners as bankrupts. See *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re Stokes*, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; *Dickas v. Barnes*, (6th

Cir. 1905) 140 Fed. 849, 72 C. C. A. 261, 15 Am. Bankr. Rep. 566; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 899, 87 C. C. A. 77, 79, 16 L. R. A. N. S. 656, 20 Am. Bankr. Rep. 237; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *In re Lattimer*, (E. D. Pa. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938; *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481; *Menke v. Sunderman*, (C. C. A.

3d Cir. 1911) 186 Fed. 486; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757.

Where one of the partners is adjudged bankrupt and the court thus acquires jurisdiction of him, the partnership is dissolved; and if the partnership also is adjudged bankrupt, the bankruptcy court is given jurisdiction by clause c of the partnership and of all its members, because it then becomes necessary to marshal the properties and the liabilities of the partnership and its members, and to distribute the proceeds of the properties among the creditors in accordance with the equitable rule recited in clause f. *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

Jurisdiction as to estate of deceased partner.—Upon the filing of a petition in bankruptcy by one individually, and as surviving partner of a late copartnership, the bankruptcy court has complete jurisdiction over the partnership estate, although such estate, together with the personal estate of the deceased partner, was in course of administration in a state court before the petition in bankruptcy was filed, provided possession of the partnership assets can be obtained by the referee without forcibly interfering with the custody of the administrator. *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489.

On an adjudication of bankruptcy against a firm, the firm property vests in the trustee in bankruptcy, and the surviving partner thereafter has no power to consent to an allowance to the widow and children of the deceased partner out of the assets of the firm, prior to the payment of the firm's debts. *In re Dobert*, (W. D. Tex. 1908) 165 Fed. 749, 21 Am. Bankr. Rep. 634.

Necessity of partnership being adjudged bankrupt.—The uniform current of authority is that a partnership is a distinct entity separate from the individuals who compose it; that it owes its property and owes its debts, which are respectively separate and distinct from the individual property and the individual debts of its partners; and that an adjudication of the partnership as a bankrupt, apart from or in addition to the adjudication of its partners as bankrupts, is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property. *In re Meyers*, (S. D. N. Y. 1899) 96 Fed. 408; *In re McFann*, (N. D. Ia. 1899)

96 Fed. 592, 3 Am. Bankr. Rep. 66; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 82, 3 Am. Bankr. Rep. 91; *In re Meyers*, (S. D. N. Y. 1899) 97 Fed. 757; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 979, 39 C. C. A. 368, 371, 3 Am. Bankr. Rep. 559; *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553; *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432; *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 867, 859; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 361; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 388, 58 C. C. A. 472, 476, 10 Am. Bankr. Rep. 505; *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 530, 538; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; *Mills v. Fisher*, (6th Cir. 1906) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. N. S. 656, 20 Am. Bankr. Rep. 237.

Where all the members of a firm are adjudicated bankrupts, but there has been no adjudication against the firm, the trustee appointed in the individual cases has no authority to interfere with firm assets, though all the cases were instituted simultaneously by the same creditor, and the same trustee appointed for all the partners. *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505.

Necessity of partner being adjudged bankrupt.—The plain provisions of the Bankruptcy Act forbid the court of bankruptcy to draw to itself and administer the individual property of unadjudicated partners upon a mere adjudication of the bankruptcy of their partnership. *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

The provision of clause c simply gives to a court of bankruptcy, which has jurisdiction of one of the members of a partnership adjudged bankrupt, the same jurisdiction to administer the estate of the partnership and of its members which a court of equity would have in similar circumstances. A court of equity in such circumstances would not take the partnership property from the solvent partners, and clause h imposes upon the bankruptcy court this salutary rule of equity practice. *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

d [Trustee's duty — partnership accounts.] The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. [(1898) 30 Stat. L. 547.]

e [Distribution of expenses.] The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. [(1898) 30 Stat. L. 547.]

Filing fees.—It has been held that a deposit of the statutory filing fee of \$25 must be made not only for the partnership, but also for each member of the firm who seeks

an adjudication. *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266.

But it has also been held that only one deposit of the filing fee is necessary, and that it cannot be demanded of the partners, as a prerequisite to discharging them, that

they should each separately deposit a like fee. *In re Langslow*, (N. D. N. Y. 1899) 98 Fed. 869, 1 Am. Bankr. Rep. 258; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870.

f [Payment of debts — surplus.] The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. [(1898) 30 Stat. L. 548.]

Officers' fees. — So, also, it has been held that the clerk, referee, and trustee, respectively, are entitled to separate fees, as though there were separate and distinct cases as to each partner in addition to the partnership case, although no individual petitions were filed. *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266, following *In re Barden*, (E. D. N. C. 1900) 101 Fed. 555.

Distribution. — The net proceeds of the partnership property must be appropriated by the trustee first to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and any surplus in either fund may then be applied to the other. *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Janes*, (2d Cir. 1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341; *In re Henderson*, (N. D. W. Va. 1906) 142 Fed. 588, 16 Am. Bankr. Rep. 91, affirmed *Euclid Nat. Bank v. Union Trust, etc., Co.*, (4th Cir. 1906) 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 838; *Sargent v. Blake*, (8th Cir. 1908) 160 Fed. 57, 15 Ann. Cas. 58, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804; *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

Distribution equitable. — Subsection 5f is declaratory of an established equity rule. *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

The rule of distribution prescribed by section 5f is not to be varied by anything permissible under section 5g, where the partnership and the individual members are all adjudged bankrupts and the estates of all are before the court and are unaffected by preference or fraud. This is but applying the general rule, that where all the partners become bankrupt the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors. *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

Section 5f directs how the assets shall be

marshaled. The language is plain, explicit, and unambiguous; its phraseology conveys no intimation that any exception is contemplated. *In re Janes*, (2d Cir. 1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341.

Firm creditors are entitled to be first paid out of firm assets before the individual creditors have any right to share therein. If a surplus should remain, however, after the payment of partnership debts, creditors of the individual partners may share therein. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Jones*, (E. D. Mo. 1900) 100 Fed. 781, 4 Am. Bankr. Rep. 141; *Wallerstein v. Ervin*, (3d Cir. 1901) 112 Fed. 124, 50 C. C. A. 129, 7 Am. Bankr. Rep. 256; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Groetzinger*, (3d Cir. 1904) 127 Fed. 814, 62 C. C. A. 494, 11 Am. Bankr. Rep. 723; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 509, 21 Am. Bankr. Rep. 205; *In re Terens*, (E. D. Wis. 1910) 175 Fed. 495; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728; *Moses v. Pond*, (N. Y. 1900) 4 Am. Bankr. Rep. 655; *Matter of Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352.

A dissolution of, and transfer by one of two partners to the other of all of his interest in, an insolvent partnership, although without actual fraudulent intent, is fraudulent in law as against partnership creditors, and does not debar them from the right to be first paid from the partnership property, and for that purpose to have a marshaling of assets between the partnership and individual estates in bankruptcy. *In re Terens*, (E. D. Wis. 1910) 175 Fed. 495.

The creditors of the individual partners are entitled to be first paid out of the assets of the separate estates, and such assets cannot be distributed to firm creditors excepting where there is a surplus remaining after such payment has been made. *In re Wilcox*, (D. C. Mass. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117; *In re Mills*, (D. C. Ind. 1899) 95 Fed. 269, 2 Am. Bankr. Rep. 667; *In re Lehigh Lumber Co.*, (W. D. Pa. 1900) 101 Fed. 216, 4 Am. Bankr. Rep. 221; *Lamoille County Nat. Bank v. Stevens*, (D. C. Vt. 1901) 107 Fed. 245, 6 Am. Bankr. Rep. 164; *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6

Am. Bankr. Rep. 699; *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 208; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Janes*, (2d Cir. 1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341; *Euclid Nat. Bank v. Union Trust, etc., Co.*, (4th Cir. 1906) 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 834; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728; *In re Chandler*, (7th Cir. 1911) 184 Fed. 887, 107 C. C. A. 209; *In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 283.

It would confound all distinctions between partnership and individual estates to hold that a particular firm creditor, who was given a priority over other firm creditors, should also have a like priority over individual cred-

itors. *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699.

Pro rata distribution between firm and individual creditors. — Where there are no partnership assets and no solvent partner it has been held that partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt. *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553; *Conrader v. Cohen*, (3d Cir. 1903) 121 Fed. 801, 58 C. C. A. 249, 9 Am. Bankr. Rep. 619, *affirming* (W. D. Pa. 1902) 118 Fed. 676, 9 Am. Bankr. Rep. 85; *In re Janes*, (W. D. N. Y. 1904) 128 Fed. 527, 11 Am. Bankr. Rep. 792. See also *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63. *Contra, In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 283.

g [Claims against various estates — marshaling assets.] The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. [(1898) 30 Stat. L. 548.]

rather than in the matter of the matter in not good
Cross-references: As to Proof of claims generally, see the several subdivisions of section 57. What are provable claims, see the several subdivisions of section 63.

Construction. — Subsection 5g must be construed with reference to the rest of section 5, especially 5d, e, and f. *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

Proof of claims. — Section 5g allows the filing and proof of claims of the partnership estate against the individual estates and vice versa, and removes all technical obstacles in the way of bringing those claims before the court to be dealt with as justice and equity require. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Bates*, (D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56; *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9; *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; *Hibberd v. McGill*, (C. C. A. 3d Cir. 1904) 129 Fed. 590, 12 Am. Bankr. Rep. 101; *Buckingham v. Chicago First Nat. Bank*, (6th Cir. 1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524; *In re Stoddard Bros. Lumber Co.*, (D. C. Idaho 1909) 169 Fed. 190, 22 Am. Bankr. Rep. 435; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728.

Existence of assets immaterial. — A partnership debt, on which a bankrupt partner remains liable, is none the less provable against his estate because there may be no surplus of his individual assets over his separate debts. The provability of a debt depends on the nature of the liability, not on the existence or the prospect of assets for its satisfaction. *In re Bates*, (D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56.

The real nature of a transaction may be

shown to determine whether the debt is one provable against the firm or the individual partners. In re Stevens, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9; *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; *Hibberd v. McGill*, (3d Cir. 1904) 129 Fed. 590, 64 C. C. A. 158, 12 Am. Bankr. Rep. 101.

Notes. — Notes signed by a bankrupt firm, which include claims on which one of the partners is not primarily liable, are *prima facie* debts provable against the firm. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299. See also *Lamoille County Nat. Bank v. Stevens*, (D. C. Vt. 1901) 107 Fed. 245, 6 Am. Bankr. Rep. 164; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524.

But notes signed by the members of a partnership, which do not purport to be obligations of the firm, although given by the partners for money borrowed and put into the firm as capital, are not provable against the estate of the partnership in bankruptcy. *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225. See also *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9.

Firm notes indorsed by partners. — Holders of notes of a bankrupt partnership, also indorsed by the individual partners, may, at their election, prove the same as individual debts of one of the partners. *Buckingham v. Chicago First Nat. Bank*, (6th Cir. 1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465.

Where the members of a firm borrow money on their individual credit for the benefit of the firm, the lender, after having obtained a dividend from the firm's assets in bankruptcy, may have his claim allowed for the balance as a claim against the individual partners. *In re McCoy*, (7th Cir. 1906) 150 Fed. 108, 80 C. C. A. 60, 17 Am. Bankr. Rep. 760.

Proof of claims by partners. — The amount contributed by a partner to the capital of a

partnership cannot, on the bankruptcy of the firm, be proved as a debt entitled to share ratably with general creditors. *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728.

A solvent partner in a firm is not entitled to claim interest against the estate in bankruptcy of his partner on the balances in his favor shown by the partnership books, in the

absence of a mutual agreement that such interest should be charged. *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9.

Set-off of partnership debt. — A solvent partnership which is indebted to a bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 18 Am. Bankr. Rep. 84.

h [Administration where all partners not bankrupt.] In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. [(1898) 30 Stat. L. 548.]

When section 5*h* applies. — Section 5*h* contemplates a case where one or more but not all of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court. *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Am. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Junek*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298; *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481.

But in *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925, it was said that section 5*h* has reference to cases where one or more but not all of the members of a partnership are adjudged bankrupts either with or without the adjudication of the partnership; and that it is the administration of the partnership assets, rather than the adjudication, that is made to depend upon the consent of the solvent members of the partnership.

Section 5*h*, being exceptional and negative, cannot be construed into affirmative authority for the administration of the firm assets in individual proceedings against all the partners; but it rather recognizes the absence of

any inherent necessity for throwing a firm into bankruptcy merely because its members have been adjudicated. *In re Merour*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 473, 10 Am. Bankr. Rep. 505; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Section 5*h* does not apply to a case where the infancy of the partner not adjudged bankrupt was the only ground for dismissing the petition as to him. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

Right of unadjudicated partner to settle partnership business. — Where a partner and his partnership have not been adjudged bankrupts, but his copartners have, subdivision *h* reserves to him the right to close up the partnership business. *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481.

The inherent right of a solvent partner to close up the affairs of the firm must be recognized by the court of bankruptcy. This right was not conferred by the Bankruptcy Act, neither can it be abridged or taken away by it. *In re Junek*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

SEC. 6. EXEMPTIONS OF BANKRUPTS. — *a* [Exemptions under state laws.] This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. [(1898) 30 Stat. L. 548.]

Cross-references: As to

Jurisdiction with respect to exemptions, see section 2 (11), *supra*, p. 478.

Setting apart of exemptions, etc., by the trustee, see section 47*a* (11), *infra*, p. 686.

Title to exempt property, see section 70*e* and 70*a* (5).

I. CLAIMING EXEMPTION. 508.

II. MATTERS AFFECTING RIGHT TO EXEMPTION. 510.

III. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS. 513.

I. CLAIMING EXEMPTION.

Necessity of claiming. — The exemptions to which a bankrupt is entitled under the laws of the state, in accordance with the provisions of section 6 of the Bankruptcy Act, must be claimed in the schedule which an involuntary bankrupt is required to file, under section 7*a* (8), within ten days after his adjudication, unless further time has been granted therefor, and which a voluntary bankrupt must file with his petition in bankruptcy. *In re Friedrich*, (7th Cir. 1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4

Am. Bankr. Rep. 46; *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171; *McGahan v. Anderson*, (C. C. A. 4th Cir. 1902) 113 Fed. 115, 7 Am. Bankr. Rep. 641; *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422; *In re Highfield*, (M. D. Pa. 1908) 163 Fed. 924, 21 Am. Bankr. Rep. 92; *In re Jennings*, (N. D. Ga. 1909) 166 Fed. 639, 22 Am. Bankr. Rep. 160; *In re Donabey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796; *In re Baughman*, (D. C. Pa. 1910) 183 Fed. 668; *In re Nunn*, (S. D. Ga. 1899) 2 Am. Bankr. Rep. 664; *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606; *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491. And see the cases cited, *infra*, this page, under the heading, *Time and manner of claiming*.

The failure to claim the exemptions is, in the absence of a good reason therefor, considered to be a waiver of the right to make such claim. *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; *In re Wunder*, (E. D. Pa. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Von Kerm*, (E. D. Pa. 1905) 135 Fed. 447, 14 Am. Bankr. Rep. 403; *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230; *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693; *In re Mathews*, (E. D. Okla. 1908) 20 Am. Bankr. Rep. 369.

Thus it has been held that where a bankrupt neglected to file a claim for exemptions until after a sale of his assets, his claim thereto was not saved by his having appeared and objected to the order of sale on the ground that his exemptions had not been allowed. *In re Wunder*, (E. D. Pa. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701.

Time and manner of claiming.—While the exemptions which a bankrupt may claim, under section 6, are those provided for by the statutes of the several states, the time and manner of claiming such exemptions, and of awarding them, are regulated by the Bankruptcy Act; thus the exemptions must be claimed in accordance with section 7a (8), and set apart by the trustee in accordance with section 47a (11). *In re Friedrich*, (7th Cir. 1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 629, 12 Am. Bankr. Rep. 384; *Lipman v. Stein*, (3d Cir. 1905) 134 Fed. 235, 67 C. C. A. 17; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614; *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693; *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728. And see the cases cited under the heading, *Necessity of claiming*, *supra*, p. 508.

Courts of bankruptcy are not controlled by the state law as to the time or manner in which claims for exemption may be preferred in bankruptcy. *In re Kane*, (7th Cir. 1904)

127 Fed. 552, 62 C. C. A. 616; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

An extension of time for filing schedules also extends the time for claiming the exemption. *In re O'Hara*, (M. D. Pa. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714.

Where the exemption is personal to the debtor, it can only be demanded by him. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382.

Allowance of exemption claim after filing of schedules.—Although section 7a (8) is the guide as to the strictly regular time and manner of asserting in the bankruptcy court the claim for exemptions, nevertheless it has been held that such section is directory; and that, taken in connection with the express right to allow amendments, there is some discretion in the bankruptcy court to allow claims of exemption to be made after the original schedules have been filed. *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652. See also *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53. And see the cases cited, *infra*, p. 510, under the heading, *Amendment of schedules*.

Agreement that mortgagee shall select exempt property for debtor.—A bankrupt who mortgages his exempt property may, if permitted by the state law, agree that the mortgagee may select the property which shall be set aside as exempt; and such authority, given upon a valuable consideration and coupled with an interest, cannot be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof. *In re National Grocer Co.*, (6th Cir. 1910) 181 Fed. 33, 104 C. C. A. 47.

Necessity of claiming specific property.—It has been held that the bankrupt should claim the specific property which he desires to have set apart to him as exempt; and that his failure to do so, unless his schedules are subsequently amended in this respect, will preclude him from the recovery of such exemption thereafter. *In re Haskin*, (E. D. Pa. 1901) 109 Fed. 789, 6 Am. Bankr. Rep. 485; *In re Staunton*, (E. D. Pa. 1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457; *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

But in *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31, it was said that there is not a word in the statute to warrant the conjecture that Congress intended that the bankrupt himself should make an itemization and estimate which the trustee, in performing the function expressly assigned to him, might wholly disregard; and that while it is true that among the forms promulgated by the Supreme Court is "Schedule B (5)," in which is contained the words, "Property claimed to be exempted by the state laws, its valuation," etc., that is nothing more than a direction.

Claim in bulk.—A claim by a bankrupt of an exemption out of a stock of goods in bulk

is insufficient. *In re Wilson*, (W. D. Va. 1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287.

Amendment of schedules.—The bankrupt may, upon proper application, be permitted to amend his schedules so as to remedy defects therein with respect to the claiming of his exemptions. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556; *In re Berman*, (N. D. Ohio 1905) 140 Fed. 761, 15 Am. Bankr. Rep. 463; *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614; *In re Maxson*, (N. D. Ia. 1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424; *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (3d Cir. 1909) 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487.

Insertion of exemption claim by amendment.—The statute does not preclude the court, in its discretion, from allowing claims of exemption to be made by amendment after the original schedule has been filed. *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652. See also *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

Amendment on discovery of additional assets.—Where, after the trustees were discharged, the bankrupts, acting in good faith, assisted by their counsel, found additional assets of which they had hitherto been ignorant, it was held that the bankrupts, not having received the full amount of their exemptions under the state statute, were entitled within a reasonable time to leave to amend the schedule of exempt property, and to an allowance out of the fund so obtained of an amount necessary to complete the exemption. *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (3d Cir. 1909) 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487.

So also it has been held that the bankrupt may amend his schedules so as to include a sum of money subsequently surrendered to the trustee by a creditor, as the proceeds of property transferred to him by the bankrupt and constituting a preference, and may at the same time claim the remainder of his exemption therefrom. *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557.

Accident or mistake.—Where a bankrupt's schedules contained a waiver of exemptions, it was held, on an application to amend, that it was admissible to show that the waiver was the result of accident and mistake. *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556.

Mistake of counsel.—A bankrupt does not lose his right to claim the exemptions, by his failure, through the mistake of his attorney, to specifically claim them in his schedule; and, on application at any seasonable time while the property remains in the hands of the trustee unaffected by adverse rights, he should be permitted to amend his schedule in that respect. *Goodman v. Curtis*, (5th Cir.

1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

So also it has been held that where a debtor, shortly before filing his petition in bankruptcy, acting in good faith on the advice of his attorney, voluntarily conveyed his homestead to his wife, and afterwards, before his examination, receiving different advice, secured a reconveyance to himself, and on obtaining leave amended his schedule by including the homestead therein, such homestead should be set aside to the bankrupt in the bankruptcy proceedings, since the conveyance to his wife was not fraudulent in fact; and as his creditors had no interest in or claim on his homestead interest in the land, the conveyance of such interest could not injure, or be fraudulent, as to them. *In re Tolleit*, (6th Cir. 1901) 106 Fed. 866, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404.

Oversight.—The failure of a bankrupt through oversight to make a claim to a homestead exemption in his schedule does not deprive him of the exemption allowed to himself and his family by the laws of the state, where timely application is otherwise made to the court of bankruptcy therefor, and such application, although not such in form, may properly be treated as an amendment of the schedule. *In re Maxson*, (N. D. Ia. 1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424.

Matters of form.—Where a bankrupt undertook in good faith to claim his exemption, but failed to make the claim in the form required by the statute, in consequence of which it was all sold by the trustee, it was held that he might be permitted to amend his schedules thereafter, so as to claim the exemption from its proceeds. *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; *In re Berman*, (N. D. Ohio 1905) 140 Fed. 761, 15 Am. Bankr. Rep. 463; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

But a bankrupt cannot amend his schedules relating to exemptions so as to claim something which he could not have claimed at the time his petition was filed. *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

Nor will an amendment be allowed for the purpose of preferring certain creditors to whom the bankrupt has given notes, in which he waived his exemption privilege. *Moran v. King*, (4th Cir. 1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176, affirming (W. D. Va. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472. See also *In re Garner*, (W. D. Va. 1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263.

But see *In re Batten*, (E. D. Va. 1909) 170 Fed. 688, wherein it was held that the fact that a creditor had waived his exemption did not authorize the refusal of its allowance.

II. MATTERS AFFECTING RIGHT TO EXEMPTION.

Death.—On the death of a debtor, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator. *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57.

Residence.—The bankrupt must be a resident of the state the benefit of whose exemption laws are claimed by him. *In re Dinglahoeff*, (E. D. N. C. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re O'Hara*, (M. D. Pa. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714; *In re Donahey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796.

Land located outside the district.—A court of bankruptcy is without jurisdiction to allot to a bankrupt, domiciled within its district, a homestead in lands situated in another district. *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472.

Removal from state after right to exemption accrues.—The right of a bankrupt to his exemption is to be determined as of the date when it is claimed; and his removal from the state after the claim has been made is immaterial, although the right is only given to residents by the state law. *In re Donahey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796.

Sale of property.—Where the trustee erroneously sells exempt property, the bankrupt may claim the amount of his exemptions from the proceeds of the sale. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

Sale of exempt property for benefit of estate.—Where a bankrupt, by agreement with the trustee, allowed exempt property to be sold for the benefit of the estate, it was held that the trustee should allow the exemption out of the proceeds of the sale. *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. See also *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432.

Sale of perishable property.—The mere fact that exempt property has been sold by a receiver, under the direction of the court, as perishable, will not deprive the bankrupt of the right to his exemption out of the proceeds; notwithstanding that, under the state law, a debtor is not entitled to his exemption out of the proceeds of a sale, but must elect the goods he wishes to retain and have them set aside to him. *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; *In re Coddington*, (M. D. Pa. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 629, 12 Am. Bankr. Rep. 384, affirmed (3d Cir. 1905) 134 Fed. 235, 67 C. C. A. 17.

Sale without prejudice to claim exemption.—Where exempt property was sold by order of the court, but without prejudice to the rights of the bankrupt to apply for the proceeds of the sale, the court will surrender such proceeds in lieu of the exemption. *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

Sale to avoid loss of exemption.—Where a bankrupt's exemption, allowed by the state for the benefit of the family, would be defeated unless its allowance is made in cash

out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds. *In re Luby*, (S. D. Ohio 1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801 (sale of stock of liquors).

Thus it has been held that where all the land of a bankrupt is so encumbered by mortgages, under which the mortgagees have the right to sell the homestead, the court may sell the land and make the allotment of the homestead out of the proceeds. *In re Paramore*, (E. D. N. C. 1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130.

Creditors with notice, who make no objection to a sale of all of the property for the purpose of permitting the bankrupt to take his exemption from the proceeds, cannot afterward object to its allowance therefrom. *Dunlap Hardware Co. v. Huddleston*, (5th Cir. 1909) 167 Fed. 433, 93 C. C. A. 69.

Rights of creditors as to exemptions allowed out of proceeds of sale.—Where a bankrupt elects to take his exemption out of the proceeds of a sale of real estate, the amount thereof while in the hands of the trustee is subject to seizure under a judgment containing a waiver of exemption. *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817.

Money allowed a bankrupt "in lieu of his exemption," may be attached in the hands of the trustee in bankruptcy on a judgment rendered against a bankrupt, on a note wherein the bankrupt waived the benefits of the exemption law. *Zumpfe v. Schultz*, (1907) 20 Am. Bankr. Rep. 916, 35 Pa. Super. Ct. 106.

Where the exemption is claimed from the proceeds of a sale, the court may consider and determine any claim made by others to the fund while it remains in the hands of the trustee. *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. And see annotation under section 2 (11).

Preferential transfer.—The right of a bankrupt to claim his exemption from property which he has preferentially transferred in violation of the provisions of section 60b, where such property has been subsequently recovered by the trustee, presents a conflict of opinion; in the following cases it has been held that he is not entitled to his exemption in such cases. *In re Tollett*, (E. D. Tenn. 1900) 105 Fed. 425, 5 Am. Bankr. Rep. 305; *In re White*, (W. D. Mo. 1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re Long*, (E. D. Pa. 1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909; *In re Coddington*, (M. D. Pa. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122; *In re Wisniefsky*, (D. C. N. J. 1910) 181 Fed. 896; *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

On the other hand it has also been held that where property preferentially transferred has been recovered back by the trustee, it then forms a part of the estate in bankruptcy from which the bankrupt may claim his exemption. *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Bashinski v. Talbott*, (5th Cir. 1902) 119 Fed. 337, 56 C. C. A. 241, 9 Am. Bankr. Rep. 513; *In re Soper*,

(D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

Fraud.—In several jurisdictions it has been held that a bankrupt who has been guilty of fraud is not entitled to the exemption provided for by the laws of the state; and in such cases the bankrupt will also be denied the exemption in a court of bankruptcy. *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re White*, (W. D. Mo. 1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re Williamson*, (N. D. Ga. 1901) 114 Fed. 190, 8 Am. Bankr. Rep. 43; *In re Taylor*, (D. C. Colo. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410; *In re Boorstin*, (N. D. Ga. 1902) 114 Fed. 696, 8 Am. Bankr. Rep. 89; *In re Long*, (E. D. Pa. 1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Yost*, (M. D. Pa. 1902) 117 Fed. 792, 9 Am. Bankr. Rep. 153; *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; *In re Woolcott*, (E. D. N. C. 1905) 140 Fed. 460, 15 Am. Bankr. Rep. 386; *In re Alex*, (E. D. Pa. 1905) 141 Fed. 483, 15 Am. Bankr. Rep. 450; *In re Leverton*, (M. D. Pa. 1907) 155 Fed. 925, 19 Am. Bankr. Rep. 434; *In re Dobbs*, (N. D. Ga. 1909) 172 Fed. 682, 22 Am. Bankr. Rep. 801; *In re Wishniefsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Sussman*, (M. D. Pa. 1910) 183 Fed. 331.

Courts of bankruptcy proceed on equitable principles and will not sustain a positive fraud committed by the bankrupt, in an endeavor to extend his exemptions, any more than it would be sustained by a court of equity. *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693.

But the foregoing rule as to the effect of fraud is not general; thus it has been held that where a conveyance in fraud of creditors has been set aside, the property is administered as that of the debtor; and, as a matter of general law, he is not precluded by the void conveyance from asserting his right to a homestead exemption therein as against his creditors. *In re Thompson*, (E. D. Wash. 1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

So, also, in this connection, it has been said that a debtor may claim his exemptions out of fraudulently conveyed property, recovered back by a trustee, for the reason that he never in fact parted with the title. *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

And in *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432, it was held that a bankrupt cannot be denied his exemptions because he has not accounted for all his assets or has fraudulently transferred his property.

Fraudulent intention necessary.—Even in those states wherein the bankrupt's fraud constitutes a bar to the allowance of his exemptions, it is necessary, in order to warrant a refusal of the exemption, that there be a fraudulent intention on the part of the bankrupt; and where fraud has been made a statutory bar, the facts must be brought within the terms of the statute. *In re Thompson*, (S. D. Ga. 1902) 115 Fed. 924, 8 Am. Bankr. Rep. 283; *Fields v. Karter*, (5th Cir. 1902) 115 Fed. 950, 53 C. C. A.

432, 8 Am. Bankr. Rep. 351; *In re West*, (N. D. Ga. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Diamond*, (N. D. Ala. 1908) 158 Fed. 370, 19 Am. Bankr. Rep. 811; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 190; *In re Rothschild*, (S. D. Ga. 1901) 6 Am. Bankr. Rep. 43; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586.

Failure to pay for property claimed as exempt.—In some jurisdictions, under statutes prevailing therein, a debtor is not entitled to the exemption out of property for which he has not paid. *Cannon v. Dexter Broom, etc., Co.*, (4th Cir. 1903) 120 Fed. 657, 57 C. C. A. 327, 9 Am. Bankr. Rep. 724.

It has also been held that the exemption will not be allowed as against an execution issued for the purchase money of property claimed to be exempt. *In re Boyd*, (N. D. Ia. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337.

See also *In re Butler*, (N. D. Ga. 1902) 120 Fed. 100, 9 Am. Bankr. Rep. 539. In this case, however, it was held that the exemption could not be denied where the creditor's claim had not been reduced to judgment, and no steps had been taken to fix a lien on the property for the purchase money.

But the fact that the purchase price of the goods claimed as exempt has not been paid gives the seller no right to enforce his vendor's lien in a court of bankruptcy. *In re Wells*, (W. D. Ark. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308.

Annulment of liens.—Whatever benefit results from the annulment of attachment liens, under the provisions of section 67c and f, extends to exempt property as well as to that which is not exempt. It is the policy of the law to allow the bankrupt, as well as creditors, the benefit of the changed status. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

Thus it has been held that where a garnishee has knowledge that the property or credits in his hands are exempt, it is his duty to interpose such defense; otherwise a judgment rendered against him, or his payment of the money into court, will not discharge his liability to the defendant, where the defendant had no actual knowledge of the proceeding. *In re Beals*, (D. C. Ind. 1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639. And see also the annotation under section 67 e and f.

Abandonment.—It has been held that where, under the law of the state, a bankrupt's exemption is personal to him, it is nonassignable, and that in such case an assignment thereof operates as an abandonment. *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

Effect of abandonment.—Where a claim for exemption has been abandoned, the property goes to the bankrupt's creditors generally, even though some creditors claim under an execution wherein the right of exemption has been waived. *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668. See also *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230.

Waiver — Effect generally. — Where the bankrupt has waived his right of exemption, he will not be entitled, as against such debt, to have property set apart to him under section 6 of the Bankruptcy Act. *In re Garden*, (N. D. Ala. 1899) 93 Fed. 423, 1 Am. Bankr. Rep. 582.

A trustee in bankruptcy is not entitled to the bankrupt's exemption, as against a creditor who has attached the same by an attachment execution, issued and served within four months prior to the bankruptcy, on a judgment waiving exemption. *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251.

The waiver of a homestead exemption in a mortgage given by a bankrupt is in favor of the mortgage creditor alone, and does not inure to the benefit of others. If the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption; and the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance, given him by statute, in case of a sale. *In re Nye*, (C. C. A. 8th Cir. 1904) 133 Fed. 33, 13 Am. Bankr. Rep. 142.

But a waiver of exemptions in a promissory note, proved against the estate of the maker in bankruptcy, but which had not been reduced to judgment prior to the bankruptcy, is ineffective, and does not defeat the right of the bankrupt to claim his exemptions or give the court of bankruptcy jurisdiction to administer the exempt property. *In re Moore*, (M. D. Ala. 1901) 112 Fed. 289, 7 Am. Bankr. Rep. 285.

Waiver as warranting refusal of exemption. — The fact that a bankrupt has waived his right of homestead in favor of certain creditors, as authorized by the laws of the state, does not warrant the court of bankruptcy in refusing to allow and set aside the homestead. *In re Batten*, (E. D. Va. 1909) 170 Fed. 688.

But see *In re Garner*, (W. D. Va. 1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263, wherein it was held that the homestead exemption will not be allowed where the homestead waiver creditors, and not the bankrupt's family, will secure the benefit thereof.

Refusal to give trustee indemnity does not amount to waiver of exemption. — Where a voluntary bankrupt demanded the exemption allowed him by the law of the state, and the property was appraised, and the claim allowed by the referee, but the bankrupt refused to accede to the trustee's demand for a bond of indemnity, as the condition upon which he would deliver the property to him, and agreed that the property might be sold by the trustee, stating that he would claim the amount of the exemptions from the proceeds, it was held that there was no waiver or forfeiture by the bankrupt of his right to claim the exemption. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

Withdrawal of waiver. — A waiver of exemption, inserted by accident or mistake, may be withdrawn by amendment. *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556.

But a bankrupt who has filed a formal waiver of his exemption will not be permitted to withdraw it for the benefit of a single creditor to whom he has made an assignment of his claim. *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230. See also *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

III. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS.

Constitutionality. — The constitutional requirement that bankruptcy laws be uniform throughout the United States is not violated by the Bankruptcy Act because by the sixth section thereof bankrupts are allowed the exemptions prescribed by the state law in force at the time of the filing of the petition in bankruptcy. *Hanover Nat. Bank v. Moses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

Construction. — Courts of bankruptcy should enforce the provisions of the law relating to exemptions liberally, to effectuate their purpose, both in construing the state statutes, and in the manner of allowing the exemption. *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533.

Section 6 must be construed with section 70a, in so far as exempt property is concerned, so that both provisions may be given effect. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107. See also the annotation under section 70a (5) (second paragraph) with respect to exempt insurance policies.

Section 6 does not enlarge the exemptions available to the bankrupt under the state laws. *In re Manning*, (E. D. Pa. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571; *In re Boyd*, (N. D. Ia. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337.

Exemption provided for by insolvent law not allowable. — A bankrupt is not entitled to an allowance for the support of his family provided by the state insolvency law, pending a proceeding under such law; since such allowance is not an exemption, but relates to that part of the insolvency law which is suspended in its operation by the Bankruptcy Act. *In re Anderson*, (D. C. Mass. 1901) 110 Fed. 141.

Federal exemption laws recognized. — The Bankruptcy Act recognizes all exemptions, whether state or federal, as they existed at the time of the passage of the act. *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6 (exemption of Indian lands); *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761 (homestead exemption).

Pensions. — Money received from the United States as a pension, and remaining unchanged in the pensioner's hands at the time of filing his petition in bankruptcy, is exempt from liability for his debts under Rev. Stat., § 4747, 5 Fed. Stat. Annot. 667. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

Where pension money has been invested to provide for either the present or the future welfare of the pensioner and his family, it will be protected as exempt. *In re Ellithorpe*, (W. D. N. Y. 1901) 111 Fed. 163, 7 Am. Bankr. Rep. 18.

But pension money in the hands of a bankrupt at the time of the adjudication, which is neither invested nor mingled with other funds, is not exempt. *In re Jones*, (D. C. Me. 1909) 166 Fed. 337, 21 Am. Bankr. Rep. 536.

State law adopted.—Section 6 of the bankruptcy law is clearly an adoption of the exemption laws of the several states; and, therefore, the bankrupt can only be allowed such exemptions as are provided for by the state exemption laws; and in determining the rights of bankrupts to their exemptions, the courts of bankruptcy will follow the construction placed upon the local statutes by the highest courts of the state. Some of the cases wherein this proposition has been announced, or acted upon, are arranged under the following state classification.

Alabama.—*Sellers v. Bell*, (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re Moore*, (1901) 112 Fed. 289, 7 Am. Bankr. Rep. 285, overruling *In re Garden*, (1899) 93 Fed. 423, 1 Am. Bankr. Rep. 582; *In re Tune*, (1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Diamond*, (1908) 158 Fed. 370, 19 Am. Bankr. Rep. 811; *In re McCrary*, (1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161.

Arkansas.—*In re Park*, (1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re Durham*, (1900) 104 Fed. 231, 4 Am. Bankr. Rep. 760; *In re Wells*, (1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308; *In re Meriwether*, (1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; *In re Falconer*, (1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488; *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416.

California.—*In re Petersen*, (1899) 95 Fed. 417, 2 Am. Bankr. Rep. 630; *In re Diller*, (1900) 100 Fed. 931, 4 Am. Bankr. Rep. 45; *In re Hindman*, (1900) 104 Fed. 331, 43 C. C. A. 558, 5 Am. Bankr. Rep. 20; *In re Scheld*, (1900) 104 Fed. 870, 44 C. C. A. 233, 5 Am. Bankr. Rep. 102; *In re Fly*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 550.

A bankrupt who was engaged in farming until a short time before the adjudication is entitled to the exemptions given to a farmer by the laws of the state, although he is temporarily engaged in another pursuit, but without intention to abandon permanently his former occupation. *In re Fly*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 550.

Delaware.—*In re Evans*, (1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752.

Florida.—*In re Carpenter*, (1901) 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

Georgia.—*In re Camp*, (1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Hill*, (1899) 96 Fed. 185, 2 Am. Bankr. Rep. 798; *In re Woodruff*, (1899) 96 Fed. 317, 2 Am. Bankr. Rep. 678, reversed (1901) 105 Fed.

601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; *In re Waxelbaum*, (1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re Lynch*, (1900) 101 Fed. 579, 4 Am. Bankr. Rep. 262; *In re Swords*, (1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Williamson*, (1901) 114 Fed. 190, 8 Am. Bankr. Rep. 43; *In re Stephens*, (1902) 114 Fed. 192, 8 Am. Bankr. Rep. 53; *In re Boorstin*, (1902) 114 Fed. 696, 8 Am. Bankr. Rep. 89; *In re Thompson*, (1902) 115 Fed. 924, 8 Am. Bankr. Rep. 283; *In re Talbott*, (1902) 116 Fed. 417, 8 Am. Bankr. Rep. 427; *In re West*, (1902) 116 Fed. 707, 8 Am. Bankr. Rep. 564; *In re Castleberry*, (1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Arnold*, (1909) 169 Fed. 1000, 22 Am. Bankr. Rep. 392; *In re Dobbs*, (1909) 172 Fed. 682, 22 Am. Bankr. Rep. 801; *In re Glisson*, (1910) 182 Fed. 287; *In re Maynard*, (1910) 183 Fed. 823; *In re Cochran*, (1911) 185 Fed. 913.

Illinois.—*In re Kane*, (1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533.

Indiana.—*In re Beals*, (1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639.

Iowa.—*In re Lange*, (1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189; *In re Tilden*, (1899) 91 Fed. 500, 1 Am. Bankr. Rep. 306; *In re Steele*, (1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549, reversed (1900) 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; *In re Pope*, (1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; *In re Hatch*, (1900) 102 Fed. 290, 4 Am. Bankr. Rep. 349; *In re Little*, (1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Boyd*, (1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337; *In re Sullivan*, (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87; *In re Maxson*, (1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424.

Kentucky.—*In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551; *In re Downing*, (1905) 139 Fed. 590, 15 Am. Bankr. Rep. 423, (1906) 148 Fed. 120; *In re Sale*, (1906) 143 Fed. 310, 76 C. C. A. 448, 16 Am. Bankr. Rep. 235; *In re Leech*, (1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; *In re Baker*, (1910) 182 Fed. 392, 104 C. C. A. 602.

Maine.—*Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076; *In re Mullen*, (1905) 140 Fed. 296, 15 Am. Bankr. Rep. 275.

Maryland.—*In re Beauchamp*, (1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *Steiner v. Marshall*, (1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486; *Burdette v. Jackson*, (1910) 179 Fed. 229, 102 C. C. A. 481, 24 Am. Bankr. Rep. 127.

Massachusetts.—*In re Turnbull*, (1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Anderson*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 555; *In re Collier*, (1901) 111 Fed. 503, 7 Am. Bankr. Rep. 131.

Michigan.—*In re National Grocer Co.*, (1910) 181 Fed. 33, 104 C. C. A. 47.

Minnesota.—*In re Cale*, (1910) 182 Fed. 439.

Mississippi.—*In re Kaplan*, (1910) 186 Fed. 242.

Missouri.—*In re White*, (1901) 109 Fed.

635, 6 Am. Bankr. Rep. 451; *In re Stout*, (1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505.

Montana.—*In re Culwell*, (1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

Nebraska.—*In re Conley*, (1907) 162 Fed. 806, 19 Am. Bankr. Rep. 200; *In re Soper*, (1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

New Jersey.—*In re Demarest*, (1901) 110 Fed. 638, 6 Am. Bankr. Rep. 232.

New York.—*In re Lewensohn*, (1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594; *In re Osborn*, (1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Ellithorpe*, (1901) 111 Fed. 163, 7 Am. Bankr. Rep. 18.

North Carolina.—*In re Stevenson*, (1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; *In re Richard*, (1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Grimes*, (1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Woodard*, (1899) 95 Fed. 200, 2 Am. Bankr. Rep. 339; *In re Grimes*, (1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; *In re Duguid*, (1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Wilson*, (1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260; *In re Steed*, (1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Dinglehoef*, (1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Royal*, (1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Seabolt*, (1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; *In re Evans*, (1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Woolleott*, (1905) 140 Fed. 460, 15 Am. Bankr. Rep. 386.

North Dakota.—*In re Cohn*, (1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

Ohio.—*In re Rhodes*, (1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173; *In re Luby*, (1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801; *In re Groves*, (1901) 6 Am. Bankr. Rep. 728.

Oklahoma.—*Matter of Golden Rule Mercantile Co.*, (1908) 21 Am. Bankr. Rep. 397.

Oregon.—*In re Daubner*, (1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

Pennsylvania.—*In re Brown*, (1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Myers*, (1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536; *In re Black*, (1900) 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re Bolinger*, (1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171; *In re Haskin*, (1901) 109 Fed. 789, 6 Am. Bankr. Rep. 485; *In re Manning*, (1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571; *In re Hoover*, (1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330; *In re Jackson*, (1902) 116 Fed. 46, 8 Am. Bankr. Rep. 594; *In re Long*, (1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Staunton*, (1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; *In re Wunder*, (1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; *Lipman v. Stein*, (1905) 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; *Burke v. Guarantee Title, etc., Co.*, (1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31.

A liquor license, though transferable only with the approval of the Court of Quarter Sessions which granted it, and not subject to seizure on execution, is not only part of the bankrupt's assets, but may be claimed by him as part of his exemption. *In re Ole-*

wine, (1903) 125 Fed. 840, 11 Am. Bankr. Rep. 40.

Rhode Island.—*In re Caswell*, (1901) 6 Am. Bankr. Rep. 718.

South Carolina.—*In re McCutchen*, (1900) 100 Fed. 779, 4 Am. Bankr. Rep. 81; *McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; *Cannon v. Dexter Broom, etc., Co.*, (1903) 120 Fed. 657, 57 C. C. A. 119, 9 Am. Bankr. Rep. 724; *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469; *In re Bailes*, (1909) 176 Fed. 460, 23 Am. Bankr. Rep. 789.

South Dakota.—*In re Novak*, (1907) 150 Fed. 602, 18 Am. Bankr. Rep. 236.

Tennessee.—*In re Tollett*, (1900) 105 Fed. 425, 5 Am. Bankr. Rep. 305, *affirmed* (1901) 106 Fed. 866, 5 Am. Bankr. Rep. 404.

Texas.—*In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530; *In re Smith*, (1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Smith*, (1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Harrington*, (1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; *In re Presnall*, (1909) 167 Fed. 406, 21 Am. Bankr. Rep. 905.

Vermont.—*In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; *In re Bean*, (1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Oderkirk*, (1900) 103 Fed. 770, 4 Am. Bankr. Rep. 617; *In re White*, (1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613; *In re Libby*, (1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615; *In re Marquette*, (1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Hopkins*, (1900) 103 Fed. 781, 4 Am. Bankr. Rep. 619; *In re Mosier*, (1901) 112 Fed. 138, 7 Am. Bankr. Rep. 208; *In re Gordon*, (1902) 115 Fed. 445, 8 Am. Bankr. Rep. 256; *In re Everleth*, (1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Grady*, (1905) 138 Fed. 935, 14 Am. Bankr. Rep. 738; *In re Alfred*, (1899) 1 Am. Bankr. Rep. 243; *In re Trombly*, (1906) 16 Am. Bankr. Rep. 598.

Under a statute exempting to a debtor "two horses kept and used for team work," a bankrupt is not entitled to claim as exempt a horse kept and used as a racer, and not otherwise, although he has been casually used on a few occasions for work, and also in carrying members of the bankrupt's family to and from work or school. *In re Libby*, (1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615.

Virginia.—*In re Sisler*, (1899) 96 Fed. 402, 2 Am. Bankr. Rep. 760; *In re Tobias*, (1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555; *Richardson v. Woodward*, (1900) 104 Fed. 873, 5 Am. Bankr. Rep. 94; *In re Moran*, (1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472, *affirmed* (1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; *In re Wilson*, (1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287; *In re Garner*, (1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263; *In re Campbell*, (1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *In re Allen*, (1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518.

Washington.—*Smalley v. Laugenour*, (1905) 196 U. S. 93, 25 S. Ct. 216, 49 U. S. (L. ed.) 400, 13 Am. Bankr. Rep. 692; *In re*

Thomas, (1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99; *In re Buelow*, (1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Holden*, (1904) 127 Fed. 980, 12 Am. Bankr. Rep. 96; *In re Thompson*, (1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

Under Rem. & Bal. Code Wash., § 563, subd. 4, providing that a debtor shall have exempt certain domestic animals and the feed therefor for six months, and also provisions and fuel for his family, a debtor who has not the animals referred to cannot select other property in lieu thereof and hold the same exempt from his creditors. *In re Scheier*, (1911) 188 Fed. 744.

Wisconsin.—*In re Frederick*, (1899) 95 Fed. 282, modified (1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Hoag*, (1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290; *In re Jones*, (1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Schuller*, (1901) 108 Fed. 591, 6 Am. Bankr. Rep. 278; *In re Mayer*, (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; *In re Neimann*, (1903) 124 Fed. 738, 10 Am. Bankr. Rep. 739; *In re Kaufmann*, (1906) 142 Fed. 898, 16 Am. Bankr. Rep. 118; *In re Wood*, (1906) 147 Fed. 877, 17 Am. Bankr. Rep. 93.

Homestead exemptions.—The principle heretofore announced with respect to exemptions generally, to wit, that the allowance of exemptions under the bankruptcy law is governed entirely by the state statutes relating thereto, has also been applied to homestead exemptions.

Alabama.—*In re McCrary*, (1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161.

Arkansas.—*In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488; *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416; *In re Irvin*, (1903) 120 Fed. 733, 57 C. C. A. 147, 9 Am. Bankr. Rep. 689.

An unmarried man who owns a house in which he resides with his widowed mother and minor brother, who are not able to support themselves unaided, and to whose support he contributes from his wages, is the head of a family, and is entitled to the exemption of his homestead in bankruptcy. *In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488.

The fact that a bankrupt removed, with his family, into a building owned by him, after he became insolvent, and in contemplation of bankruptcy, does not defeat his right to claim his homestead exemption in the property. *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416.

California.—*In re Wilson*, (1903) 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522.

It has been held that the use of funds by an insolvent debtor to purchase a homestead or to discharge a lien thereon is not fraudulent, and does not invalidate his claim to the homestead exemption, or give his trustee in bankruptcy the right to subject the homestead to a lien for the amount so diverted from his creditors. *In re Wilson*, (1903) 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522

Colorado.—*In re Nye*, (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; *In re Youngstrom*, (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572.

Georgia.—*In re Swords*, (1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Reinhart*, (1902) 129 Fed. 510, 12 Am. Bankr. Rep. 78; *In re Hargraves*, (1907) 160 Fed. 758, 20 Am. Bankr. Rep. 186; *Dunlap Hardware Co. v. Huddleston*, (1909) 167 Fed. 433, 93 C. C. A. 60, 21 Am. Bankr. Rep. 731; *In re Dobbs*, (1909) 175 Fed. 319, 23 Am. Bankr. Rep. 569; *Matter of Jeffers*, (1906) 17 Am. Bankr. Rep. 368; *Matter of Jackson*, (1907) 18 Am. Bankr. Rep. 216; *Matter of Cotton*, (1909) 23 Am. Bankr. Rep. 586.

The head of the family has no power to waive his statutory homestead exemption in favor of a creditor; such power of waiver having relation solely to the exemption provided by the state constitution of 1877. *In re Reinhart*, (1902) 129 Fed. 510, 12 Am. Bankr. Rep. 78.

Iowa.—*In re Pope*, (1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; *In re Rafferty*, (1901) 112 Fed. 512, 7 Am. Bankr. Rep. 415; *In re Johnson*, (1902) 118 Fed. 312, 9 Am. Bankr. Rep. 257; *Ingram v. Wilson*, (1903) 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192; *In re Sullivan*, (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578, affirming (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87; *In re Eash*, (1907) 157 Fed. 996, 19 Am. Bankr. Rep. 738; *In re Maxson*, (1909) 170 Fed. 358, 22 Am. Bankr. Rep. 424.

Corn standing in the field on the homestead of a bankrupt, which had fully matured at the date of the bankruptcy, is not exempt under the homestead exemption statute of Iowa. *In re Sullivan*, (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578, affirming (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87.

Kansas.—*Huenergardt v. John S. Brittain Dry Goods Co.*, (1902) 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341.

The debtor may change his homestead during the four months preceding his adjudication, by abandoning one and removing to and claiming another more valuable, where it is done in good faith and without fraud. *Huenergardt v. John S. Brittain Dry Goods Co.*, (1902) 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341.

Kentucky.—*In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551; *In re Sale*, (1906) 143 Fed. 310, 74 C. C. A. 448, 16 Am. Bankr. Rep. 235.

The fact that the bankrupt may have entered into a contract to sell the homestead to his wife and sister-in-law, they not at the time being in any way indebted to him, does not in any way affect his right to the exemption. *In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551.

Michigan.—The mere intention to create a homestead right is not sufficient to warrant the allowance of the homestead exemption. *In re Hatch*, (1899) 2 Am. Bankr. Rep. 89.

Missouri.—*Matter of Hostin*, (1901) 7 Am. Bankr. Rep. 362.

Montana.—*In re Culwell*, (1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

North Carolina.—*In re McBryde*, (1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Owings*, (1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re Paramore*, (1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130.

North Dakota.—*In re Cohn*, (1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

Ohio.—*In re Giles*, (1908) 158 Fed. 596, 85 C. C. A. 418, 19 Am. Bankr. Rep. 306.

A divorced husband, living on a homestead with his minor child, for whose maintenance he is responsible, is entitled to hold the same as exempt on becoming a bankrupt. *In re Rhodes*, (1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173.

Where at adjudication a bankrupt is unmarried and not the head of a family, and therefore not entitled to any exemptions, his marriage prior to the qualification of the trustee does not entitle him to exemptions out of property owned by him at adjudication, but which was in the custody of the bankruptcy court, though in the actual possession of the bankrupt at the time of his marriage. *Matter of Fletcher*, (1906) 16 Am. Bankr. Rep. 491.

Oklahoma.—*In re Letson*, (1907) 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

Oregon.—*In re Daubner*, (1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

Crops growing upon the homestead of a voluntary bankrupt at the time of his adjudication are not exempt, but will pass to his trustee in bankruptcy for the benefit of the creditors. *In re Daubner*, (1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

South Carolina.—*McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; *In re Manning*, (1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498; *In re Finklea*, (1907) 153 Fed. 492, 18 Am. Bankr. Rep. 738; *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469; *In re Bailes*, (1909) 176 Fed. 460, 23 Am. Bankr. Rep. 789.

It is the intent of the homestead laws that a homestead in real estate in kind shall be set aside whenever practicable, and a bankrupt is entitled to retain the land assigned as his homestead, although valued in excess of the limit of the exemption, on payment of the excess. *In re Manning*, (1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498.

A single man, whose parents are living, is not the head of a family; nor is he entitled to the homestead exemption because he was, at the time of his bankruptcy, paying the board and expenses of his sister at a school. *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469.

A bankrupt claiming a homestead exemption has the burden of showing by clear and conclusive proof that he was solvent, and able to pay all claims against him, when he acquired the homestead. *McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

Tennessee.—*In re Tollett*, (1901) 106 Fed. 866, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404.

Texas.—*In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530; *In re Harrington*, (1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; *In re Flannagan*, (1902) 117 Fed. 695, 9 Am. Bankr. Rep. 140; *Burow v. Grand Lodge, etc.*, (1905) 133 Fed. 708, 66 C. C. A. 538, 13 Am. Bankr. Rep. 542; *Duncan v. Ferguson-McKinney Dry Goods Co.*, (1907) 150 Fed. 289, 80 C. C. A. 157, 18 Am. Bankr. Rep. 155; *McCarty v. Coffin*, (1907) 150 Fed. 307, 80 C. C. A. 195, 18 Am. Bankr. Rep. 148; *In re Presnall*, (1909) 167 Fed. 406, 21 Am. Bankr. Rep. 905; *In re Mussey*, (1910) 179 Fed. 1007.

Where a bankrupt engaged in mercantile business made an assignment of all his property, and left his place of business, and went to reside on the farm of his mother, and devoted his subsequent time and attention to his mother's farming interests, and testified that his only hope of being able to resume business was the remote contingency of his being able to compromise with his creditors, it was held that there was no fixed, definite intent to resume the business, sufficient to entitle him to have the place where he formerly carried on his business exempted to him as a business homestead. *In re Flannagan*, (1902) 117 Fed. 695, 9 Am. Bankr. Rep. 140.

A bankrupt cannot claim, as exempt property, a crop growing on his homestead at the time of the adjudication in bankruptcy. *In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530.

Vermont.—*In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; *In re Marquette*, (1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Oderkirk*, (1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; *In re Gibbs*, (1900) 103 Fed. 782, 4 Am. Bankr. Rep. 619.

It has been held that a single man or woman, without relatives even, might be a housekeeper, or the head of a family, as to a homestead; but the ability to be such is not enough; the condition must exist. *In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496.

Virginia.—*Moran v. King*, (1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; *In re Garner*, (1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263; *In re Allen*, (1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518; *In re Fisher*, (1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; *In re Batten*, (1909) 170 Fed. 688.

Washington.—*In re Thomas*, (1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99; *In re Buelow*, (1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Schulz*, (1905) 135 Fed. 228, 14 Am. Bankr. Rep. 317; *In re Thompson*, (1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

Wisconsin.—*In re Hoag*, (1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290; *In re Mayer*, (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; *In re Kaufmann*, (1906) 142 Fed. 898, 16 Am. Bankr. Rep. 118; *In re Wood*, (1906) 147 Fed. 877, 17 Am. Bankr. Rep. 93.

The bankrupt is not entitled to the crops

growing on the homestead at the time of the filing of his petition in bankruptcy. *In re Hoag*, (W. D. Wis. 1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290.

Partnership exemptions.—The right to claim exemptions from partnership property is, similarly to the allowance of all other exemptions, governed by the law of the state. In the following cases the right to such exemption has been recognized: *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Stevenson*, (E. D. N. C. 1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; *In re Grimes*, (W. D. N. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Friedrich*, (7th Cir. 1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re Wilson*, (E. D. N. C. 1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260; *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; *In re Fowler*, (E. D. N. C. 1906) 145 Fed. 270, 16 Am. Bankr. Rep. 580; *In re Novak*, (D. C. S. D. 1907) 150 Fed. 602, 18 Am. Bankr. Rep. 236.

But where the laws of the state do not recognize the right to exemptions out of the partnership property, such an allowance will not be made in the court of bankruptcy. *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re Demarest*, (D. C. N. J. 1901) 110 Fed. 638, 6 Am. Bankr. Rep. 232; *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680.

Individual partners cannot claim exemptions from the partnership property as against partnership debts in bankruptcy, though the other partner or partners may have consented thereto. *In re Scheier*, (E. D. Wash. 1911) 188 Fed. 744.

In the absence of any decision of the state courts allowing partners to claim exemptions out of the firm property, it has been held that in case of the bankruptcy of a partnership, where there is partnership property, but no individual assets, the members of the firm are not entitled to have any portion of the firm property set apart to them as their individual exemptions, unless there should remain a surplus of such property after the payment of all firm debts. *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151.

Nominal partner.—Where a minor, though having contributed to the capital of a firm, did not participate in the assignment which constituted the act of bankruptcy, nor take any part in any of the firm's transactions, and was not a partner as to creditors, it was held that he was not entitled to an exemption allowance out of the personal property of the estate. *In re Floyd*, (E. D. N. C. 1907) 154 Fed. 757, 18 Am. Bankr. Rep. 827.

Use of partnership name by individual.—Even though the state law does not permit the exemption to be claimed by partners from partnership property, still a bankrupt is entitled to the exemption out of the merchandise in a store conducted in the name of a

partnership, but which is shown to have been in fact owned by him exclusively for some years prior to his bankruptcy. *In re Meriwether*, (W. D. Ark. 1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; *In re Carpenter*, (5th Cir. 1901) 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

Wearing apparel.—The state exemption laws with respect to wearing apparel have been recognized in the following cases: *Sellers v. Bell*, (5th Cir. 1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re Smith*, (W. D. Tex. 1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Evans*, (D. C. Del. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752; *In re Leech*, (6th Cir. 1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; *In re Caswell*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 718.

Jewelry.—It has been held that the words "all the wearing apparel," being without restriction or qualification, included a gold watch, a watch chain, a set of cuff links, two watch fobs, a gold ring, a gold ring with diamond setting, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, and a set of shirt studs, of the aggregate value of \$444.50. *In re Evans*, (D. C. Del. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752. See also *In re Smith*, (W. D. Tex. 1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Caswell*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 718.

But it has also been held that a watch is not "necessary wearing apparel." *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

"Regalia."—It has been held that neither a watch and chain, nor a sword and belt, constituting a part of the Masonic regalia, are exempt to a bankrupt as wearing apparel under the Vermont statute. *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

But see *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259, wherein it was held that, under a state statute exempting from execution "all wearing apparel of the debtor," a bankrupt is entitled to claim as exempt a Masonic uniform, although he does not wear it as an ordinary and usual dress, but on special occasions only.

And a hat, although also a part of such regalia, has been held to be exempt. *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

Tools, implements of trade, etc.—The state exemption laws have been recognized in the following cases with respect to the allowance of exemptions in the case of tools, implements of trade, etc. *In re Petersen*, (N. D. Cal. 1899) 95 Fed. 417, 2 Am. Bankr. Rep. 630; *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Collier*, (D. C. Mass. 1901) 111 Fed. 503, 7 Am. Bankr.

Rep. 131; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275; *Steiner v. Marshall*, (4th Cir. 1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486; *In re Conley*, (D. C. Neb. 1907) 162 Fed. 806, 19 Am. Bankr. Rep. 200; *In re Trombly*, (D. C. Vt. 1906) 16 Am. Bankr. Rep. 598.

A watch has been held to be exempt as one of the tools, implements, and fixtures necessary for carrying on a trade or business. *In re Collier*, (D. C. Mass. 1901) 111 Fed. 503, 7 Am. Bankr. Rep. 131.

But see *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236, where in it was held that a watch and chain were not exempt as a timepiece, constituting a part of the tools of his trade used by a barber, where among such tools there was also a clock.

A "candy stove" and a "marble-top table" used by the bankrupt in his business

of making candy have been held to be exempt as suitable tools necessary for sustaining life. *In re Trombly*, (D. C. Vt. 1906) 16 Am. Bankr. Rep. 598.

Canoe used by guide.—A bankrupt who is a professional guide for hunters and fishermen, and as such registered under the laws of the state, is entitled to the exemption of a canoe as a tool of his trade or occupation. *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275.

But a rifle does not come within the exemption allowed to such a guide. *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275.

A bankrupt who is an undertaker is entitled to hold as exempt such tools, instruments, and appliances as are found by the court to be necessary to the practice of his profession, and used by him therein. *Steiner v. Marshall*, (4th Cir. 1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486.

SEC. 7. DUTIES OF BANKRUPTS. — a The bankrupt shall

(1) [*Attend meetings and hearings.*] attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; [(1898) 30 Stat. L. 548.]

Cross-references: As to

Creditors' meetings generally, see section 55.

Voters at creditors' meetings, see section 56.

Attendance at meetings.—The bankrupt must, when so directed by the judge, attend the first creditors' meeting, and the hearing on his application for a discharge. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733, *In re Alphin, etc.*, Cotton Co., (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109; *In re Parker*, (D. C. Kan. 1899) 1 Am. Bankr. Rep. 615.

Referee cannot dispense with bankrupt's attendance.—The bankrupt's attendance before the referee on the hearing of objections to his application for a discharge, demanded by the creditors, cannot be dispensed with by the referee. *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109.

Discretion as to ordering attendance.—The statute does not give to the bankrupt or his creditors the right, as a matter of law, to a writ of habeas corpus ad testificandum to secure the bankrupt's presence and testimony at a first meeting of creditors, the issuance of such writ being discretionary. *In re Thaw*, (3d Cir. 1908) 166 Fed. 71, 91 C. C. A. 657, 22 Am. Bankr. Rep. 687.

Ordering attendance of bankrupt confined in state institution.—In *In re Thaw*, (3d Cir. 1908) 166 Fed. 71, 91 C. C. A. 657, 22 Am. Bankr. Rep. 687, it appears that a bankrupt, while in the custody of the proper state authorities as an insane person, instituted voluntary proceedings in bankruptcy in a federal court in another state, and that, in such bankruptcy proceeding, a writ of habeas corpus ad testificandum was issued to obtain his presence and testimony at a first meeting of his creditors, and it was held that, no issue having been raised as to the bankrupt's sanity, an order quashing the writ of habeas corpus was a proper exercise of discretion.

(2) [*Comply with orders.*] comply with all lawful orders of the court; [(1898) 30 Stat. L. 548.]

Cross-references: As to

Failure to comply with lawful orders as contempt, see the several subdivisions of section 41a, *infra*, p. 688.

Jurisdiction to compel compliance with lawful orders, see section 2 (13) and (16), *supra*, pp. 479, 480.

Duty to give information, and render as-

sistance, to trustee.—Up to the time of his discharge, the bankrupt can be compelled, by summary order of court, to give the receiver any information he may possess, or render him any assistance he can in the transfer of possession of property belonging to the bankrupt estate. *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59.

(3) [*Examine proofs of claims.*] examine the correctness of all proofs of claims filed against his estate; [(1898) 30 Stat. L. 548.]

Cross-reference: As to

Proof of claims generally, see the several subdivisions of section 57.

(4) [*Execute and deliver papers.*] execute and deliver such papers as shall be ordered by the court; [(1898) 30 Stat. L. 548.]

Books and papers tending to incriminate. — It has been held that the books and papers taken from the possession of the bankrupt cannot be used as evidence against him. *People v. Swarts*, (Ill. 1902) 8 Am. Bankr. Rep. 487. See generally the annotation under subdivision (9) of this section, *infra*, p. 524, and also under section 21a, *infra*, p. 589.

Order regulating use of books proper. — In *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, it was held that an order requiring the bankrupt to deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt, who is to afford the receiver free opportunity to inspect them, the receiver to use and permit them to be used only for the purpose of the civil administration of the bankrupt estate, and not for any criminal proceeding, is a proper exercise of the authority of the bankruptcy court, and does not compel the bankrupt to be a witness against himself in a criminal case in the constitutional sense, although the knowledge gained from the books may be used to procure other evidence for use against him in a criminal prosecution.

Waiver of privilege. — Where a bankrupt, on the commencement of the bankruptcy proceedings, surrendered his books to the receiver without raising the question of privilege as to their use against him, it was held that so far as it was a proper use of the books by the trustee in bankruptcy to allow prosecuting authorities to use them, the bankrupt was chargeable with knowledge of that right, and his surrender of the books waived his privilege. *In re Tracy*, (S. D. N. Y. 1910) 177 Fed. 532, 23 Am. Bankr. Rep. 438.

A voluntary bankrupt cannot refuse to deliver the books of account kept by him in his business, and necessary to an investigation of his affairs, to his trustee, on the ground that matter contained therein might tend to incriminate him. If the constitutional privilege extends to civil proceedings, the filing of a voluntary petition in bankruptcy operates both as a waiver of such privilege, in relation to the bankrupt's books, and as a transfer of the right of custody of the same to the court and its officers. *In re Sapiro*, (E. D. Wis. 1899) 92 Fed. 340, 1 Am. Bankr. Rep. 296.

(5) [*Execute transfers.*] execute to his trustee transfers of all his property in foreign countries; [(1898) 30 Stat. L. 548.]

(6) [*Inform trustee of evasions of law.*] immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; [(1898) 30 Stat. L. 548.]

(7) [*Disclose false claims.*] in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; [(1898) 30 Stat. L. 548.]

Bankrupt should object to proof of false claims. — The fact that a trustee has not been appointed will not relieve the bankrupt from the duty, nor deprive him of the right, of objecting to the allowance of any false or unjust claim against his estate, or of moving

for its expunction. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72. And see generally as to proof of claims, the several subdivisions of section 57 and the annotation thereunder.

(8) [*File schedules.*] prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and [(1898) 30 Stat. L. 548.]

Cross-references: As to

Duty of referee to examine and cause the amendment of defective schedules, see section 39a (2), *infra*, p. 664.

Failure to schedule debts as affecting discharge therefrom, see section 17a (3), *infra*, p. 577.

- I. SCHEDULE OF ASSETS, 521.
- II. SCHEDULE OF CREDITORS AND LIABILITIES, 521.
- III. FORM, VERIFICATION, AND AMENDMENT, 523.

I. SCHEDULE OF ASSETS.

Duty to schedule assets.—It is the duty of the bankrupt, in involuntary proceedings, to prepare, make oath to, and file in court, within ten days after his adjudication, unless further time has been granted therefor, a schedule of his property, showing the amount and kind of property, the location thereof, and its money value in detail. In cases of voluntary bankruptcy such a schedule must be filed with the petition in bankruptcy. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Walther*, (S. D. N. Y. 1899) 95 Fed. 941, 2 Am. Bankr. Rep. 702; *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 3 Am. Bankr. Rep. 572; *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Gailey*, (7th Cir. 1904) 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539; *In re Breitling*, (7th Cir. 1904) 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; *Woods v. Little*, (3d Cir. 1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *Remmers v. Merchants' Laclede Nat. Bank*, (8th Cir. 1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; *In re Wishniefsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Harris*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 359; *Matter of Back Bay Automobile Co.*, (D. C. Mass. 1907) 19 Am. Bankr. Rep. 33; *Steinhardt v. National Park Bank*, (1907) 19 Am. Bankr. Rep. 72, 120 App. Div. 255, 105 N. Y. S. 23; *Matter of Schulman*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 707; *Matter of Brady*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 364.

Good faith required.—A bankrupt is required to show the utmost good faith, and to make the fullest disclosures of his assets. *In re Breitling*, (7th Cir. 1904) 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126.

Every known asset must be scheduled.—A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would be not only a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

An equitable interest in land must be scheduled. *In re Gailey*, (7th Cir. 1904) 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539.

A vested interest, which the bankrupt has in the estate of another, must be scheduled. *Woods v. Little*, (3d Cir. 1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

Commingled property.—Where the bankrupt, previous to the adjudication, had acted as administratrix of her husband's estate, and had mingled property of her own with the property of such estate, it is her duty, in the bankruptcy proceedings, to present a correct and intelligible statement of her affairs, showing clearly what property her husband left, what she added thereto, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. *In re Walther*, (S. D. N. Y. 1899) 95 Fed. 941, 2 Am. Bankr. Rep. 702.

Failure to schedule property cannot inure to bankrupt's benefit.—Where a bankrupt fails to schedule certain property, all knowledge of which he withholds from his trustee, he cannot assert title to such property after the estate has been closed, on the ground that the trustee has abandoned it. *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408, 13 Am. Bankr. Rep. 698.

Advice of counsel as justifying omissions.—To justify the omission, by a bankrupt, of property from his schedule on the ground that he acted on the advice of counsel, it must be shown that he fully and fairly stated the facts to his counsel, and acted on his opinion on a matter of law only. *Remmers v. Merchants' Laclede Nat. Bank*, (8th Cir. 1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78.

Use as evidence.—The schedule cannot be used as evidence against the bankrupt in a criminal prosecution in the federal courts. *Johnson v. U. S.*, (1st Cir. 1908) 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; *Cohen v. U. S.*, (4th Cir. 1909) 170 Fed. 715, 96 C. C. A. 35, 22 Am. Bankr. Rep. 333.

But it has been held that such schedules are admissible in evidence in a prosecution in a state court, under a state statute, against the bankrupt. *Com. v. Ensign*, (1909) 22 Am. Bankr. Rep. 797, 40 Pa. Super. Ct. 157.

II. SCHEDULE OF CREDITORS AND LIABILITIES.

Duty to schedule creditors and liabilities.—The bankrupt must, under section 7a (8), file a list of his creditors, showing their residences, if known; and if such residence should be unknown, that fact must be stated. Such schedule must also contain the amount due to each creditor, the consideration thereof, and the security held by them, if any. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *Sellers v. Bell*, (5th Cir. 1899) 94 Fed. 811, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804, 2 Am. Bankr. Rep. 602; *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318; *In re*

Dvorak, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66; Columbia Bank v. Birkett, (N. Y. 1903) 9 Am. Bankr. Rep. 481; Sutherland v. Lasher, (1903) 11 Am. Bankr. Rep. 780, 41 Misc. 249, 84 N. Y. S. 56, affirmed 87 App. Div. 633, 84 N. Y. S. 1148; Westheimer v. Howard, (1905) 14 Am. Bankr. Rep. 547, 47 Misc. 145, 93 N. Y. S. 518; Schiller v. Weinstein, (1905) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; Haack v. Theise, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905; Custard v. Wiggersen, (Wis. 1907) 17 Am. Bankr. Rep. 337; Weindenfeld v. Tillinghast, (N. Y. 1907) 18 Am. Bankr. Rep. 531; Murphy v. Blumenreich, (1908) 19 Am. Bankr. Rep. 910, 123 App. Div. 645, 108 N. Y. S. 175; Matter of David, (1904) 44 Misc. 516, 90 N. Y. S. 85; Feldmark v. Weinstein, (1904) 45 Misc. 329, 90 N. Y. S. 478.

The purpose of requiring a disclosure of the amount and the consideration of the debt, and the security held by the creditor, is to give to the other creditors and to the trustee accurate information as to the condition of the estate and to enable them to discover preferred or fraudulent debts. See Birkett v. Columbia Bank, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231; Fifth Ave. Bldg., etc., Assoc. v. Goldberg, (1903) 22 Pa. Super. Ct. 197.

The schedule of debts furnishes the basis for the notices which, under section 58a, are to be sent out to creditors; thus the bankrupt appears to be responsible for the correctness of the addresses of his creditors, and for their failure to receive notice in the event of a wrong address. Haack v. Theise, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905.

A debt barred by the statute of limitations may be omitted. In re Lipman, (S. D. N. Y. 1899) 94 Fed. 353; In re Resler, (D. C. Minn. 1899) 95 Fed. 804.

Giving out list in advance of filing, improper.—The giving out of a list of creditors, by a bankrupt, to attorneys, before the filing of his schedule, is a practice to be severely condemned. In re Lloyd, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96.

The effect of improper scheduling, on the release of a bankrupt's debts by his discharge in bankruptcy, has been considered under section 17a (3), infra, p. 577.

Sufficiency of schedule as to name of creditor.—In the following cases slight alterations in the spelling of names, obviously due to clerical errors, have been held to invalidate the schedule. Marshall v. English-American L. & T. Co., (1907) 127 Ga. 376, 56 S. E. 449 (wherein the English-American Loan & Trust Co. was listed as "The English-American Trust Co."); Armstrong v. Sweeney, (1905) 73 Neb. 775, 103 N. W. 436, (wherein Swen Morrine was listed as "Swan Morise"); Liesum v. Kraus, (1901) 35 Misc. 376, 71 N. Y. S. 1022 (wherein George Liesum was listed as "George Liesman"); Grosso v. Marx, (1904) 45 Misc. 500, 92 N. Y. S. 773 (wherein the firm of Jacob Ringle & Son was listed as "Jacob Ringler & Son," and Welwood Murray as "Murray and Walter Stewart");

Haack v. Theise, (1906) 51 Misc. 3, 99 N. Y. S. 905 (wherein James J. Haack was listed as "James Haack and wife").

Listing in name of actual creditor sufficient.

—The listing of a debt in the name of the actual instead of that of the nominal creditor is, however, sufficient. It has been so held in a case in which a bank, the actual owner of a note containing the name of the cashier of the bank as payee, was scheduled as the creditor. Ross-Lewin v. Goold, (1904) 211 Ill. 384, 71 N. E. 1028. See also Longfield v. Minnesota Sav. Bank, (1905) 95 Minn. 54, 103 N. W. 706.

The name of the transferee of a note or a mortgage, rather than that of the payee or mortgagee, must be inserted in the schedule as the creditor, provided the debtor has knowledge of the transfer. Birkett v. Columbia Bank, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, affirming (1903) 174 N. Y. 112, 66 N. E. 652; Fider v. Mannheim, (1899) 78 Minn. 309, 81 N. W. 2; Armstrong v. Sweeney, (1905) 73 Neb. 775, 103 N. W. 436; Broadway Trust Co. v. Manheim, (1905) 34 Civ. Pro. 310, 95 N. Y. S. 310, 47 Misc. 415, 95 N. Y. S. 93; Mueller v. Goerlitz, (1907) 53 Misc. 53, 103 N. Y. S. 1037.

But see Sellers v. Bell, (6th Cir. 1899) 94 Fed. 801, 36 C. C. A. 502, wherein it was held that a judgment was properly listed in the name of the original creditor, even though the debtor knew that the judgment had been sold.

The Christian name, as well as the surname, of the creditor, should appear in the schedule. In re Mackey, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

Schedule of partnership debts.—If the bankrupt is a member of a firm and wishes to be released from his firm as well as from his individual debts, the names of the creditors of the firm should also be inserted in the schedule. In re Laughlin, (N. D. Ia. 1899) 96 Fed. 589; Loomis v. Wallblom, (1905) 94 Minn. 392, 102 N. W. 1114; New York Inst., etc., v. Crockett, (1907) 117 App. Div. 269, 102 N. Y. S. 412. See also the annotation under section 5a, supra, p. 501.

It has been held that the name of the surviving partner of a firm holding a judgment may be inserted as the creditor. Kaufman v. Schreier, (1905) 108 App. Div. 298, 95 N. Y. S. 729.

Correct addresses must be given when possible.—The referees should require the addresses to be furnished, or satisfactory proof to be made that the same cannot be ascertained after due search. In re Dvorak, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66. See also Schiller v. Weinstein, (1905) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; Weindenfeld v. Tillinghast, (1907) 18 Am. Bankr. Rep. 531, 54 Misc. 90, 104 N. Y. S. 712.

Presumption as to receipt of notice incorrectly addressed.—There is no presumption, in the face of positive evidence to the contrary, that the postal authorities will deliver a letter addressed "Mulberry Street," to the person to whom it is addressed; though in the absence of such evidence there might possibly be a presumption to that effect. Cag-

liostro v. Indelle, (1907) 17 Am. Bankr. Rep. 685, 53 Misc. 44, 102 N. Y. S. 918.

Use of abbreviations.—While the ordinary and common abbreviations of the names of states may be used in stating the addresses of creditors, it is not proper to abbreviate such names of cities, towns, and villages as are not in common use. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

Ditto marks should not be used in stating the creditors' addresses. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

Sufficiency of schedule as to addresses.—Ordinarily a statement that the residence of a particular creditor is unknown is sufficient. But if it appears that the residence was ascertainable by inquiry, the schedule becomes defective, as the presumption arises that the address was omitted for the purpose of evading the duty of giving notice to such creditor. *Feldmark v. Weinstein*, (1904) 45 Misc. 329, 90 N. Y. S. 478; *Schiller v. Weinstein*, (1905) 47 Misc. 622, 94 N. Y. S. 763.

Thus it has been held that a schedule containing an erroneous address, particularly if the correct address can be ascertained, is insufficient. *Marshall v. English-American L. & T. Co.*, (1907) 127 Ga. 376, 56 S. E. 449; *Sutherland v. Lasher*, (1903) 41 Misc. 249, 84 N. Y. S. 56, *affirmed* (1903) 87 App. Div. 633, 84 N. Y. S. 1148; *Westheimer v. Howard*, (1905) 47 Misc. 145, 93 N. Y. S. 518; *Kaufman v. Schreier*, (1905) 108 App. Div. 298, 95 N. Y. S. 729; *Matter of Quackenbush*, (1907) 122 App. Div. 456, 106 N. Y. S. 773; *Murphy v. Blumenreich*, (1908) 123 App. Div. 645, 108 N. Y. S. 175.

But the mere fact that the bankrupt knew the creditor's address more than two years before the commencement of the proceeding has been held to be insufficient evidence that he knew the creditor's residence when he prepared the schedule. *Matter of Mollner*, (1902) 75 App. Div. 441, 78 N. Y. S. 281.

If the residence inserted is indefinite, the schedule is usually defective. *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814.

The address of a creditor residing at No. 141 Mulberry street, New York city, is not sufficiently shown by a statement that it is "Mulberry street, New York city." *Cagliostro v. Indelli*, (1907) 53 Misc. 44, 102 N. Y. S. 918.

The words "residence, 135 Bway," are not a sufficient designation of any residence. *Sutherland v. Lasher*, (1903) 11 Am. Bankr. Rep. 780, 41 Misc. 249, 84 N. Y. S. 56.

A statement that the creditor's address is "care of New York Clipper, New York city," is too indefinite. *Haack v. Theise*, (1906) 51 Misc. 3, 99 N. Y. S. 905.

It has been held, however, that the address of the creditor's attorney, who has informed the bankrupt that communications to the creditor may be so addressed, is sufficient. *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Vaughn v. Irwin*, (1905) 49 Misc. 611, 96 N. Y. S. 742.

In *Weidenfeld v. Tillinghast*, (1907) 54 Misc. 90, 104 N. Y. S. 712, 104 N. Y. S. 902, it was doubted whether the word "residence" includes the creditor's business address. See

also *Grosso v. Marx*, (1904) 45 Misc. 500, 92 N. Y. S. 773.

It has been held, however, that this view is too narrow, especially as a large percentage of creditors is usually composed of firms and corporations. See *Sutherland v. Lasher*, (1903) 41 Misc. 249, 84 N. Y. S. 56.

Sufficiency of description of debts.—A schedule which contains merely the names and addresses of the creditors is insufficient. *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400.

But as the chief purpose of the statute is that the creditors shall receive notice of the proceedings, the strict accuracy which is required in the statement of the names and addresses is relaxed in the description of the debt; though it has been held that the amount and consideration must be stated correctly. *Steele v. Thalheimer*, (1905) 74 Ark. 516, 86 S. W. 305; *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436; *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Bernheim v. Bloch*, (1904) 45 Misc. 581, 91 N. Y. S. 40; *Delta County Bank v. McGranahan*, (1905) 37 Wash. 307, 79 Pac. 796.

Where the bankrupt and his wife were joint obligors in a mortgage and bond, it was held that a statement in the schedule that the mortgage and bond had been given by the wife, omitting any reference to the indebtedness of the husband, was misleading. *Fifth Ave. Bldg., etc., Assoc. v. Goldberg*, (1903) 22 Pa. Super. Ct. 197.

III. FORM, VERIFICATION, AND AMENDMENT.

Form.—The official forms, prescribed by the Supreme Court, should be observed and used in the preparation of the schedules, with such alterations as may be necessary to suit the circumstances of any particular case. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Soper*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 193; *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 607.

Verification.—The schedule should be verified. But the oaths to the schedules, attached to a voluntary petition, need not be signed by the bankrupt where the petition itself is properly verified by him. *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418.

Amendment of schedules.—The court may, under general order in bankruptcy No. 11, allow the amendment of schedules on the application of the petitioner. *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318; *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72; *In re Morgan*, (W. D. Va. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472; *In re Tollett*, (6th Cir. 1901) 106 Fed. 868, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404; *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

As to the duty of the referee to cause the amendment of defective schedules, see section 39a (2), *infra*, p. 664.

The right of a bankrupt to amend his schedule to supply an omission, through mistake, to claim his exemptions is a valuable legal right; and the action of the District Court in refusing such an amendment may be reviewed by the Circuit Court of Appeals on a petition to revise. *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

On reopening of estate. — The court may

permit the reopening of an estate for the purpose of setting out additional property in the schedules. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306.

But after a discharge, it is too late for the bankrupt to come in and include creditors not named by him in his schedules, or brought in and made parties prior to the granting of the discharge. *In re Spicer*, (W. D. N. Y. 1906) 145 Fed. 431, 16 Am. Bankr. Rep. 802.

(9) [*Submit to examination.*] when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. [(1898) 30 Stat. L. 548.]

Cross-reference: As to

Examination of persons other than the bankrupt, see section 21a, *infra*, p. 589.

Duty to submit to examination. — The bankrupt must, when present at a first meeting of his creditors, and at such other times as the court shall order, submit to an examination for the purposes specified in section 7a (9). *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419; *In re Foerst*, (S. D. N. Y. 1899) 93 Fed. 190, 1 Am. Bankr. Rep. 259; *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Kamsler*, (S. D. N. Y. 1899) 97 Fed. 194; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 226; *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Horgan*, (2d Cir. 1899) 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253, *affirming* (S. D. N. Y. 1899) 97 Fed. 319; *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47; *In re Tudor*, (D. C. Colo. 1900) 100 Fed. 796, 4 Am. Bankr. Rep. 78; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507; *People's Bank v. Brown*, (3d Cir. 1902) 112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Worrell*, (E. D.

Pa. 1903) 125 Fed. 159, 10 Am. Bankr. Rep. 744; *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194; *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835; *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

Examination to establish objection to discharge. — A bankrupt may be ordered before the referee for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419; *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 226; *In re Peters*, (D. C. Mass. 1898) 1 Am. Bankr. Rep. 248.

Previous examination immaterial. — The fact that the bankrupt attended and was examined on the return of the order to show cause why his discharge should not be granted will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary. *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 226. See also *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

The fact that an adjournment at an examination was without day does not prevent the granting of an application for a further

examination. *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

Testimony forms part of record.—Testimony of a bankrupt, taken as authorized by the referee, is a part of the record; and creditors generally are entitled to access thereto, while it remains in the custody of the referee. *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

Expense.—The examination should be at the expense of the creditors, as respects any clerical or stenographic aid in taking notes. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419.

The bankrupt is not entitled to reimbursement for his expenses in returning for examination, where he has voluntarily removed his residence from the district after bankruptcy. *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 732.

Application for examination.—Any person who shows that he is a creditor of the bankrupt, either by having been named as a creditor in the bankrupt's schedule or by other evidence satisfactory to the referee, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim. *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Kuffler*, (E. D. N. Y. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587; *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

The application of a trustee to be allowed an examination of a bankrupt to ascertain whether he has made a full disclosure of assets need not set forth the nature and character of the testimony intended to be adduced. *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

Notice of examination.—Creditors are entitled to at least ten days' notice by mail, to their respective addresses as the same appear in the list of creditors, of all examinations of the bankrupt. See section 58a (1).

Time of examination—Before or after adjudication.—The authorities are not agreed as to whether the bankrupt may be compelled to submit to an examination prior to his adjudication. The weight of authority, however, is to the effect that there cannot be a compulsory examination until the debtor has been adjudged to be a bankrupt. *In re Crenshaw*, (S. D. Ala. 1907) 155 Fed. 271, 19 Am. Bankr. Rep. 266 (*explaining In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748); *In re Davidson*, (D. C. Mass. 1907) 158 Fed. 678, 19 Am. Bankr. Rep. 833 (*distinguishing In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194); *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835; *Skubinsky v. Bodek*, (3d Cir. 1909) 172 Fed. 332, 19 Ann. Cas. 1039, 97 C. C. A. 116, 22 Am. Bankr. Rep. 689; *In re Thompson*, (W. D. Pa. 1910) 179 Fed. 874.

Where an alleged bankrupt answered, denying that he had committed an act of bankruptcy, and the issues so raised were referred to the referee for examination and report, but there had been no adjudication, it was held that the estate was not in process

of administration, and that the court would not order the examination of the alleged bankrupt. *In re Davidson*, (D. C. Mass. 1907) 158 Fed. 678, *distinguishing In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81.

So, also, it has been held that section 21a does not authorize a reference for the examination of an alleged bankrupt before his adjudication, and before the time has arrived when he is required to answer the petition. *Skubinsky v. Bodek*, (3d Cir. 1909) 172 Fed. 332, 19 Ann. Cas. 1035, 97 C. C. A. 116, 22 Am. Bankr. Rep. 689.

But it has also been held that the bankrupt may be ordered to submit to an examination prior to his adjudication. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785.

Thus in *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194, the court said: "The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves, is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skillful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

And in *U. S. v. Liberman*, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734, it was said that the reason for allowing an examination prior to adjudication is the same as the reason for allowing an examination subsequent to adjudication, and prior to the first meeting of creditors.

In *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, Brown, J., said: "I do not find anything in the Bankrupt Act or the rules which limits the examination of the bankrupt to any particular time or occasion."

Where issue of sanity is raised.—The alleged bankrupt cannot be required to submit himself to an examination, before trial, as to his sanity; and an application for such order will be denied. *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

Examination before appointment of trustee.—It is not within the contemplation of the law, upon a motion to discover assets and to consider special questions, that an exhaustive examination of all the issues of the bankruptcy be covered before the appointment of a trustee. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

Examination prior to creditors' meeting.—In *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244,

the bankrupt was ordered to appear before the referee for examination pending the first meeting of his creditors, but such examination was limited solely to the purpose of preparing schedules.

Examination after discharge.—A creditor or trustee should have the right, even after the discharge, to examine the bankrupt to ascertain whether he has concealed, since his discharge, any property from his trustee, and this right should continue for a year, or during the period within which the discharge could be revoked. *In re Peters*, (D. C. Mass. 1898) 1 Am. Bankr. Rep. 248.

After an estate has been closed, a creditor who has failed to prove his claim has no standing on the reopening of the proceedings to examine the bankrupt therein. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

Scope of examination.—*Inquiry as to transactions occurring prior to four months period.*—On the examination of a bankrupt by his creditors for the purpose of determining the condition of his estate and the disposition he has made of his property, the inquiry is not limited to facts and transactions occurring within four months prior to the bankruptcy, but may be directed to matters anterior to that time, if the circumstances in question will throw any light upon the facts or issues pertinent to the proceedings. *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47.

But where the bankrupt, more than a year before the enactment of the bankruptcy law, had made an assignment for the benefit of his creditors under a state law, it is not material or proper, in his examination in the bankruptcy proceedings, to inquire into the circumstances under which the assignment was made, nor to require the assignee to produce the books and papers turned over to him at the time, unless a foundation is first laid for the belief that property of the bankrupt was withheld by him at the time of such assignment, and was still held as his at the time of the enactment of the bankruptcy law. *In re Hayden*, (S. D. Fla. 1899) 96 Fed. 199, 1 Am. Bankr. Rep. 670.

Inquiry as to combination of bankrupt's safe.—The president and treasurer of a bankrupt corporation, on an examination before the referee, may properly be required to make known to the trustee the combination of a safe owned by the corporation and alleged to contain assets. *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83.

Inquiry as to statements made by bankrupt.—A question as to whether a bankrupt did not make a certain statement in writing as to his assets, within a few months prior to his bankruptcy, upon which he obtained property on credit from certain of his creditors, is material and proper to be asked him on his examination. *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728.

Duty to answer truthfully.—The duty of submitting to an examination involves the duty of answering truthfully, and as intelligently and connectedly and fully as the bank-

rupt's mental equipment will permit; and the failure to do so is a contempt of court. *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785.

Incriminating questions.—The bankrupt cannot be compelled to answer questions, over his claim of privilege, where the answer would tend to criminate him; the privilege available in such case, however, is that provided for by the Federal Constitution, as section 7a (9) of the Bankruptcy Act is insufficient for this purpose. *In re Scott*, (W. D. Pa. 1899) 95 Fed. 815, 1 Am. Bankr. Rep. 49; *In re Rosser*, (E. D. Mo. 1899) 96 Fed. 305, 2 Am. Bankr. Rep. 755; *In re Walsh*, (D. C. S. D. 1900) 104 Fed. 518, 4 Am. Bankr. Rep. 693; *In re Feldstein*, (S. D. N. Y. 1901) 108 Fed. 794, 6 Am. Bankr. Rep. 458; *In re Smith*, (S. D. N. Y. 1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 114 Fed. 205, 4 Am. Bankr. Rep. 511; *In re Shera*, (S. D. N. Y. 1902) 114 Fed. 207, 7 Am. Bankr. Rep. 552; *In re Nachman*, (D. C. S. C. 1902) 114 Fed. 995, 8 Am. Bankr. Rep. 180; *In re Kanter*, (S. D. N. Y. 1902) 117 Fed. 356, 9 Am. Bankr. Rep. 104; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559; *In re Hark*, (E. D. Pa. 1905) 136 Fed. 984, 14 Am. Bankr. Rep. 624; *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83; *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663, 16 Am. Bankr. Rep. 306; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *In re Hathorn*, (E. D. La.) 2 Am. Bankr. Rep. 298; *In re Henschel*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 207; *In re Glassner*, (D. C. Md. 1902) 8 Am. Bankr. Rep. 184.

The filing of a voluntary petition in bankruptcy does not waive the right to claim the constitutional privilege of refusing to answer an incriminating question. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

Necessity of foundation for claim of privilege.—It is always a difficult thing to say at just what point a bankrupt who is compelled to answer, and who claims his privilege, should be allowed the exercise of his own unquestioned judgment of the danger of self-incrimination. *A priori* no question can be said to be outside of the range of proof of some crime, and to allow him to stand mute in all cases is to give him the privilege of keeping silent as to all his affairs, in the interest of merely pedantic and verbal integrity of principle. While in all cases he must be given the benefit of all doubts, there must be something which gives rise to a probability of damage upon which a doubt may be based. *In re Bendheim*, (S. D. N. Y. 1910) 180 Fed. 918.

If the court is convinced that the answer to the question cannot by any possibility criminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer. *In re Levin*, (S. D. N. Y. 1904) 131 Fed. 388, 11 Am. Bankr. Rep. 382.

Thus where an officer of a bankrupt corporation is under indictment in a state court for embezzlement of funds of the corporation, he cannot be required, on his examination before the referee, over his claim of privilege, to state whether or not he appropriated certain money of the corporation to his own use; but he may be required to state whether or not he has in his possession or under his control any property belonging to the bankrupt estate. *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83.

Production of books and papers.—The bankrupt will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 114 Fed. 205, 4 Am. Bankr. Rep. 511. And see the annotation under subdivision (4) of this section, *supra*, p. 520.

But a bankrupt is not permitted to withhold his books from his trustee or receiver on his mere assertion that they contain evidence which would tend to incriminate him; but he must produce them, so that the question may be determined by the court or referee; and if it appears that they do contain such evidence, the court may make such order as will protect the bankrupt from its use in any criminal case, and at the same time give the trustee the use of the books in the administration of the estate. *In re Harris*, (S. D. N. Y. 1908) 164 Fed. 292, 20 Am. Bankr. Rep. 911.

Subsequent use of evidence — Admissibility of evidence in subsequent proceedings.—The testimony of the bankrupt, so far as relevant, may be admitted in subsequent proceedings, where the person who takes the notes of

the bankrupt's examination testifies that they were truly and correctly taken. *In re Bard*, (S. D. N. Y. 1901) 108 Fed. 208, 5 Am. Bankr. Rep. 810. See also *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41.

The words "in any criminal proceeding," used in section 7a (9), are limited to providing immunity to the bankrupt from the use of his evidence only in such criminal proceedings as arise out of the conduct of his business or the disposition of his property, etc.; and these words do not protect the bankrupt from prosecution for false swearing in giving his evidence. *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *Wechsler v. U. S.*, (2d Cir. 1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1; *U. S. v. Brod*, (N. D. Ga. 1910) 23 Am. Bankr. Rep. 740.

But see *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41, wherein it appears that the bankrupt was indicted for perjury committed in giving testimony under oath before a referee in support of contested claims, and, in sustaining a demurrer to the indictment, the court said that the statute — section 7a (9) — was an effective obstacle to the conviction of the defendant.

Section 7a (9) does not exempt a bankrupt from prosecution for an offense growing out of a transaction concerning which a bankrupt has testified before the referee in bankruptcy. *Burrell v. Montana*, (1904) 194 U. S. 572, 24 S. Ct. 787, 48 U. S. (L. ed.) 1122, 12 Am. Bankr. Rep. 132, *affirming* (1902) 27 Mont. 282, 70 Pac. 982; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649.

SEC. 8. DEATH OR INSANITY OF BANKRUPTS. — a [Not to abate proceedings.] The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane; [(1898) 30 Stat. L. 549.]

Death or insanity does not abate proceedings.—If the jurisdiction of the bankruptcy court in a given case has once rightfully attached, it cannot be defeated by the subsequent death or insanity of the alleged bankrupt. *In re Burka*, (W. D. Tenn. 1901) 107 Fed. 674, 5 Am. Bankr. Rep. 843; *In re Hicks*, (D. C. Vt. 1901) 107 Fed. 910, 6 Am. Bankr. Rep. 182, 183; *In re Risteen*, (D. C. Mass. 1903) 122 Fed. 732; *In re Miller*, (E. D. Pa. 1904) 133 Fed. 1017, 13 Am. Bankr. Rep. 345; *In re Spalding*, (C. C. A. 2d Cir. 1905) 139 Fed. 244, 14 Am. Bankr. Rep. 129; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *In re Kehler*, (C. C. A. 2d Cir. 1908) 159 Fed. 55, *reversing* (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

But if the debtor was insane when the alleged acts of bankruptcy were committed, an adjudication of bankruptcy against him is improper. *In re Kehler*, (C. C. A. 2d Cir. 1908) 159 Fed. 55, *reversing* (W. D. N. Y.

1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596. And see the annotation to this effect under section 4b.

Although the insanity of a partner and the appointment of a conservator of his estate will not prevent an adjudication of bankruptcy against the partnership on the petition of its creditors. *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. And see also the annotation under section 5a.

Continuance of proceedings mandatory.—When the proceedings are commenced, the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court. *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

Personal representatives brought in.—Where an alleged voluntary bankrupt died after the filing of the petition, but before the service of process, his heirs and personal representatives should be brought in and made parties to the proceedings before adjudication.

Shute v. Patterson, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

Insanity does not bar discharge.—The insanity of a bankrupt, which has prevented his examination by creditors, and still continues, is not a bar to his discharge. *In re Miller*, (E. D. Pa. 1904) 133 Fed. 1017, 13 Am. Bankr. Rep. 345.

Dissolution of corporation as affecting bankruptcy proceedings.—Section 8 of the Bankruptcy Act, relating to the death or in-

sanity of a bankrupt, is by analogy applicable to a corporation which seeks by a dissolution to defeat proceedings in bankruptcy; and in such case, the proceedings do not abate. *Scheuer v. Smith, etc., Book, etc., Co.*, (C. C. A. 5th Cir. 1901) 112 Fed. 407, 7 Am. Bankr. Rep. 384. See also *White Mountain Paper Co. v. Morse*, (C. C. A. 1st Cir. 1904) 127 Fed. 643, 11 Am. Bankr. Rep. 633. And see the annotation to this effect under section 4b, *supra*, p. 495.

[*Dower and allowances for widow and children.*] *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence. [(1898) 30 Stat. L. 549.]

Dower rights.—The widow of a bankrupt who dies during the pendency of the bankruptcy proceedings is entitled to her dower rights as fixed by the laws of the state of the bankrupt's residence. *In re Shaeffer*, (E. D. Pa. 1900) 105 Fed. 352, 5 Am. Bankr. Rep. 248; *In re Slack*, (D. C. Vt. 1901) 111 Fed. 523, 7 Am. Bankr. Rep. 121; *In re Parschen*, (N. D. Ohio 1902) 119 Fed. 976, 9 Am. Bankr. Rep. 389; *In re Newton*, (D. C. Conn. 1903) 122 Fed. 103, 10 Am. Bankr. Rep. 345; *In re McKenzie*, (E. D. Ark. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 229; *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, 15 Am. Bankr. Rep. 679; *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132, decree vacated (8th Cir. 1910) 178 Fed. 1005, 101 C. C. A. 664; *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674; *In re Forbes*, (N. D. Ohio 1901) 7 Am. Bankr. Rep. 42.

It was the intention of Congress, and the public policy embodied in the bankruptcy law, to divide the estate of a bankrupt between him, and his wife and children on the one hand, and his creditors on the other hand, as the laws of the state of his domicile authorized its division under like circumstances. *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, 15 Am. Bankr. Rep. 679.

Section 8 does not confer or extend a right of dower, but makes the right of a bankrupt's widow to dower, and its nature and extent, dependent entirely upon the local law. *In re McKenzie*, (E. D. Ark. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 229.

The widow of a bankrupt who dies after the adjudication of bankruptcy and delivery of possession to a qualified trustee has no rights of dower in his unexempt personal property or its proceeds, under the laws of Arkansas, because he was not seized or possessed of such personal property at the time of his death. *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, 15 Am. Bankr. Rep. 679, *affirming* (E. D. Ark. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 227.

But, under a Vermont statute, it has been held that a bankrupt who died after the title to his real estate had vested in his trustee by the operation of the bankruptcy law, but before it had been disposed of, remained seized of the same until his death for the

purposes of inheritance; and that the widow of such bankrupt was entitled to have her dower therein set apart to her. *In re Slack*, (D. C. Vt. 1901) 111 Fed. 523, 7 Am. Bankr. Rep. 121.

Inchoate right of dower.—While the Act does not expressly make provision for the wife's inchoate right of dower, it has been held that she is entitled to it. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132; *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674; *In re Forbes*, (N. D. Ohio 1901) 7 Am. Bankr. Rep. 42. See also *Hurley v. Devlin*, (D. C. Kan. 1907) 151 Fed. 919; *Matter of Hawkins*, (D. C. R. I. 1903) 9 Am. Bankr. Rep. 598.

Dower rights in property recovered as having been preferentially transferred.—A wife's right of dower in her husband's real estate cannot be separated from the principal estate; and where a mortgage given by him to secure a debt of his own, in which she joined for the purpose of releasing her dower interest, is set aside after his bankruptcy as a preference and the property restored to his general estate, such mortgage is also inoperative to release or bar her dower right and cannot be enforced by the mortgagee as a conveyance of her dower interest in the property. *In re Lingafelter*, (C. C. A. 6th Cir. 1910) 181 Fed. 24, 24 Am. Bankr. Rep. 656.

Determination of right to dower.—In *Hurley v. Devlin*, (D. C. Kan. 1907) 151 Fed. 919, it was held that the bankruptcy court has exclusive jurisdiction to determine the rights of a widow to dower in the property of her husband who has died during the pendency of bankruptcy proceedings.

Lex loci rei sitæ.—The right of a bankrupt's widow to dower in lands owned by him is governed by the laws of the state in which the land is situated, and is not affected by the right of homestead and exemptions given by the law of his domicile. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132.

Sale of assets free of dower right.—Where a bankrupt's wife, by letter to his trustees, agreed to extinguish her dower interest in her husband's real estate for a specified price, she thereby consented to a sale of the real estate free from her dower interest, which the court thereupon had power to order. *In re*

Acretelli, (S. D. N. Y. 1909) 173 Fed. 121, 21 Am. Bankr. Rep. 537.

Allowance for support of widow and family of deceased bankrupt.—Where the state court of probate may allow from the estate of a deceased person, in process of settlement before such court, such amount as it may judge necessary for the support of the widow or family during the settlement of the estate, the federal District Court, sitting as a court of bankruptcy in such state, on the death of the bankrupt during the pendency of proceedings, is authorized to make a reasonable

allowance from such estate for the bankrupt's widow. *In re Newton*, (D. C. Conn. 1903) 122 Fed. 103, 10 Am. Bankr. Rep. 345.

Distribution of estate on bankrupt's death.—Where, pending bankruptcy proceedings, the bankrupt dies, his estate is distributable according to the bankruptcy law, and not according to the state statutes of distribution; so that the state is not entitled to a preference in the payment of its claims by virtue of such statute. *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170.

SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS.—*a* [Exemption from arrest.] A bankrupt shall be exempt from arrest upon civil process except in the following cases: [(1898) 30 Stat. L. 549.]

Exemption from arrest.—In accordance with the provisions of section 9a, a bankrupt is exempt from arrest upon civil process issued in an action based upon any claim which would be released by his discharge in bankruptcy. *In re Houston*, (D. C. Ky. 1899) 94 Fed. 119, 2 Am. Bankr. Rep. 107; *In re Lewensohn*, (S. D. N. Y. 1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594; *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270; *People v. Erlanger*, (S. D. N. Y. 1904) 132 Fed. 883, 13 Am. Bankr. Rep. 197, *disapproving In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74; *In re Chandler*, (N. D. Ill. 1904) 135 Fed. 893, 13 Am. Bankr. Rep. 614; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *U. S. v. Flynn*, (S. D. N. Y. 1909) 179 Fed. 316; *Turgeon v. Emery*, (D. C. Me. 1910) 182 Fed. 1016, 25 Am. Bankr. Rep. 694; *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89.

As to what claims are released by a discharge in bankruptcy, see the annotation under the several subdivisions of section 17a, *infra*, p. 570.

Action for breach of promise to marry.—Where a bankrupt was arrested on a writ of *capias* ad satisfaciendum, under a judgment of a state court entered after he was adjudged a bankrupt in a suit for breach of promise of marriage, on a verdict recovered before he filed his petition, it was held that he should be discharged on habeas corpus, under general order No. 30 in bankruptcy. *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258.

Process issued from federal Circuit Court.—A bankrupt is exempt from arrest or imprisonment upon civil process issued from a Circuit Court of the United States on a judgment of said court rendered prior to the bankruptcy proceedings. *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

Exemption from arrest pending appeal.—Bankruptcy proceedings are still pending in

the District Court, notwithstanding its dismissal of a petition to revoke an order for the discharge of the bankrupt, so as to authorize it to restrain the arrest of the bankrupt while the cause stands on review in the Circuit Court of Appeals. *In re Chandler*, (N. D. Ill. 1904) 135 Fed. 893, 13 Am. Bankr. Rep. 614.

Arrest prior to institution of bankruptcy proceedings.—The term "arrest" may be held to apply to the continued detention of a person in custody, although the word is frequently used to mean the original taking of a person into custody; and when the statute provides for the exemption of a bankrupt from arrest upon civil process, except in certain cases, it means not only that he shall not be taken in custody, but also that he shall not be detained in custody, after he becomes a bankrupt. *People v. Erlanger*, (S. D. N. Y. 1904) 132 Fed. 883, 13 Am. Bankr. Rep. 197; *Turgeon v. Emery*, (D. C. Me. 1910) 182 Fed. 1016, 25 Am. Bankr. Rep. 694, *disapproving In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74, 5 Am. Bankr. Rep. 812.

General orders in bankruptcy Nos. 12 and 30, providing that, on reference of a case to the referee, the bankrupt may receive protection against arrest, to continue until the final determination of his application for discharge, unless suspended or vacated by order of the court, and declaring that a debtor, imprisoned at the time of filing a claim in bankruptcy, may be discharged if in custody under process issued for the collection of a claim provable in bankruptcy, relate to the practice of section 9a. *U. S. v. Peters*, (E. D. Ill. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177, *reversed on other grounds* (7th Cir. 1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206.

Section 9a, and general orders in bankruptcy Nos. 12 and 30, relating to the protection of a bankrupt debtor from arrest, are *in pari materia*, and should be construed as a whole. *U. S. v. Peters*, (E. D. Ill. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177, *reversed on other grounds* (7th Cir. 1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206. See also *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270.

(1) [*Process issued from court of bankruptcy.*] When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; [(1898) 30 Stat. L. 549.]

Cross-references: As to

Contempts in bankruptcy generally, see the several subdivisions of section 41, *infra*, p. 668; see also section 2 (13) and (16), *supra*, pp. 479, 480.

(2) [*Process issued from state court.*] when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act. [(1898) 30 Stat. L. 549.]

Arrest for nondischageable debt.—A bankrupt is not exempt from arrest on civil process, issued by a state court of competent jurisdiction, upon a debt or claim from which the discharge in bankruptcy would not be a release, excepting when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the Bankruptcy Act. *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Marcus*, (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re Fritz*, (E. D. N. Y. 1907) 152 Fed. 562, 18 Am. Bankr. Rep. 244; *U. S. v. McAleese*, (C. C. A. 3d Cir. 1899) 1 Am. Bankr. Rep. 650; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67.

Even though a federal question has been raised, except in peculiar and urgent cases, the courts of the United States will not discharge a prisoner by habeas corpus in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error. *U. S. v. McAleese*, (C. C. A. 3d Cir. 1899) 1 Am. Bankr. Rep. 650.

The bankrupt is exempt from arrest when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the Bankruptcy Act, even though the process, upon which the arrest has been made, is one which has been issued upon a debt or claim from which the bankrupt would not be released by his discharge in the bankruptcy proceedings. *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416; *U. S. v. Flynn*, (S. D. N. Y. 1909) 23 Am. Bankr. Rep. 294.

Where a bankrupt, who resided in another

state, on being required to appear to testify before a referee, was given an order of protection prohibiting any person from arresting him on civil process while in the state in attendance on the hearing and for a stated time thereafter, it was held that an arrest on such a process before the expiration of the time was a violation of such order, and that he would be discharged by the court of bankruptcy on a writ of habeas corpus, regardless of whether or not the claim on which he was arrested was dischargeable in bankruptcy. *U. S. v. Flynn*, (S. D. N. Y. 1909) 179 Fed. 316.

Arrest for contempt of state court.—An order of a court of bankruptcy restraining a sheriff from arresting a bankrupt on civil process, following the language of section 9a does not prevent the commitment of the bankrupt by a state court for a contempt, where such commitment is intended as a punishment, and not for the collection of a debt. *In re Fritz*, (E. D. N. Y. 1907) 152 Fed. 562 18 Am. Bankr. Rep. 244.

But where the contempt for which a bankrupt has been arrested is the failure to pay a debt which would be released by his discharge in bankruptcy, it is the duty of the bankruptcy court to discharge the debtor from custody. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89. See also *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 101 Fed. 133, 4 Am. Bankr. Rep. 596, *affirming In re Houston*, (D. C. Ky. 1899) 94 Fed. 119. 2 Am. Bankr. Rep. 107. In that case, however, it appears that the prisoner was arrested for failure to pay alimony, and such debt was held to be a dischargeable one from which the defendant was entitled to be released from custody. This, however, is no longer true with respect to debts of that character. See the annotation under section 17a (2), *infra*, p. 573.

b [*Detention for examination.*] The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for

examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto. [(1898) 30 Stat. L. 549.]

Writ of ne exeat may issue.—The court may issue a writ, in the nature of a writ of ne exeat, to restrain a bankrupt within the district, where a proper showing of its necessity has been made. *In re Cohen*, (S. D. Ill. 1905) 136 Fed. 999, 14 Am. Bankr. Rep. 355. And see to the same effect *In re Lipke*, (S. D. N. Y. 1900) 98 Fed. 970, 3 Am. Bankr. Rep. 569; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1012, 22 Am. Bankr. Rep. 231; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

A petition for a writ of ne exeat is sufficiently supported by a sworn affidavit by one holding the positions of secretary, treasurer, and manager of the plaintiff corporation, containing the allegations of respondent's indebtedness in a fixed amount for goods sold and delivered, and respondent's action in securing passage for himself and family on a steamer about to depart for a foreign land, and that such departure will prejudice plaintiff's interest in such indebtedness. *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

Court not limited to purposes specified in section 9b.—The power of a court of bankruptcy to order the detention of a bankrupt, who is about to abscond from the jurisdiction with his assets, is not limited to the particular circumstances and specific purposes covered by section 9b. *In re Lipke*,

(S. D. N. Y. 1900) 98 Fed. 970, 3 Am. Bankr. Rep. 569.

Arrest of nonresident bankrupt.—Section 9b confers no authority upon a court of bankruptcy to issue a warrant for the arrest of a bankrupt who is not within the district, but who removed from it six months previously and before the proceedings in bankruptcy were instituted. *In re Hassenbusch*, (C. C. A. 6th Cir. 1901) 108 Fed. 35, *sub nom. In re Ketchum*, 5 Am. Bankr. Rep. 532.

Bond—Breach of condition.—A bond given to secure the release of a bankrupt when arrested under a writ of ne exeat, and conditioned that he shall not depart from the district, is to be construed in accordance with its terms; and the departure of the bankrupt from the district without leave of the court is a breach thereof, although he is present to abide the judgment of the court when rendered. *In re Appel*, (C. C. A. 1st Cir. 1908) 163 Fed. 1002, 20 Am. Bankr. Rep. 890.

Adjustment on breach.—A court of bankruptcy, acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, has power to adjust the bond, given for the release of a bankrupt when arrested under a writ of ne exeat, according to the equities. *In re Appel*, (C. C. A. 1st Cir. 1908) 163 Fed. 1002, 20 Am. Bankr. Rep. 890.

SEC. 10. EXTRADITION OF BANKRUPTS.—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another. [(1898) 30 Stat. L. 549.]

Extradition of bankrupts similar to extradition of other indicted persons.—Section 10 clearly does not deal with or concern the jurisdiction or power of the court in which the bankruptcy case is pending to issue a warrant for the apprehension of the bankrupt, but only confers power on a court, other than the one issuing the warrant, to ex-

tradite the bankrupt, just as a person under indictment in one district may be extradited from another district in which he is found, under the statute upon that subject. *In re Hassenbusch*, (C. C. A. 6th Cir. 1901) 108 Fed. 35, *sub nom. In re Ketchum*, 5 Am. Bankr. Rep. 532. See also section 2 (14), *supra*, p. 479.

SEC. 11. SUITS BY AND AGAINST BANKRUPTS.—*a* [Stay of suits.] A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such

person applies for a discharge, then until the question of such discharge is determined. [(1898) 30 Stat. L. 549.]

- I. IN GENERAL, 532.
- II. DISCRETION AS TO GRANTING STAYS, 532.
- III. STAY AS DEPENDENT ON DISCHARGE-ABILITY OF DEBT, 532.
- IV. STAY OF PROCEEDINGS ON VALID LIENS, 534.
- V. WHERE STATE COURT HAS COMPLETE JURISDICTION, 535.
- VI. STAY FOR PROTECTION OF ASSETS, 536.
- VII. STAY IN OTHER CASES, 537.
- VIII. VACATING STAY, 538.

I. IN GENERAL.

Who may grant stays. — It has been held that, under general order in bankruptcy No. 12 (3), a referee has no power to grant an injunction staying a proceeding in a state court. *In re Siebert*, (D. C. N. J. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251. See also *In re Steuer*, (D. C. Mass. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209.

Voluntary and involuntary bankruptcy included. — Section 11 applies not only to involuntary cases, but also to voluntary proceedings. *In re Geister*, (N. D. Ia. 1899) 97 Fed. 322, 3 Am. Bankr. Rep. 228.

Refusal of state court to stay proceeding not res judicata. — The fact that a creditor of a bankrupt applied to a state court for a stay of proceedings in a pending suit against the bankrupt, and that his application was denied, does not affect the jurisdiction of the court of bankruptcy to stay such proceedings on the application of the same creditor. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474.

II. DISCRETION AS TO GRANTING STAYS.

Stay discretionary. — Whether or not a stay shall be granted, under section 11a, is to a large extent within the sound judicial discretion of the court, to be exercised according as the best interests of the estate shall require. *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Lesser*, (C. C. A. 2d Cir. 1900) 99 Fed. 913, 3 Am. Bankr. Rep. 758; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447.

A District Court, as a court of bankruptcy, has exclusive power to determine whether a suit pending in a state court should be stayed or not, and the exercise of this power rests on the discretion of the judge, which will not be reviewed by an appellate court unless it appears to have been abused. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474.

The injunction, after adjudication, is always discretionary, and providing the cause of action is one dischargeable in bankruptcy, should usually be granted, (1) if the bank-

rupt is threatened with arrest or will be needlessly harassed, (2) if the suit is not yet in judgment, and (3) even after judgment if (a) the rights of the general creditors not parties to the suit will be jeopardized by further proceedings in the state court, or (b) the judgment is founded on a transaction which is an act of bankruptcy or a fraud on creditors or the law; but in the absence of either or both of the latter elements (a or b) it should never be granted after the judgment has ripened into an execution sale, provided the state court has, or can be given, jurisdiction of all parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy. *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447.

But the discretion as to the granting of a stay cannot be exercised unless the suit to be stayed is founded on a claim from which a discharge would be a release. *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30.

Interest of majority considered. — A court of bankruptcy, on the filing of a petition against a corporation by a small minority of its creditors, who are hostile to the plans of the majority, will not enjoin a sale of the corporation's property by order of a court of equity, which acquired prior jurisdiction by the appointment of receivers, where a large majority of the creditors desire such a sale, and it does not appear that it will be to the detriment of the minority or jeopardize their rights. *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284.

Consideration of comity. — Where a suit to establish a lien under a state statute, against property of a corporation, was pending before the Supreme Court of the state at the time of an adjudication in bankruptcy against the corporation, reasonable considerations of comity require, or at least authorize, the bankruptcy court to leave the question of the validity of the asserted lien to the determination of the state court, which is the appropriate tribunal to construe its statutes, and to direct the trustee to go there and present his case; the manner of carrying into effect the judgment of the state court, in case it upholds the lien, being a matter which may be determined after such judgment is rendered. *In re New England Breeders' Club*, (D. C. N. H. 1910) 175 Fed. 501. See also *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

III. STAY AS DEPENDENT ON DISCHARGE-ABILITY OF DEBT.

Determination of whether debt will be released. — The bankruptcy court has exclusive jurisdiction to determine, for the purpose of an application for an order staying proceed-

ings in a state court, whether or not the claim upon which such proceedings are founded is one provable in bankruptcy, and which will be released by a discharge, and its determination is conclusive until reversed. *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596; *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474.

A determination by a state court in an action against a bankrupt that the debt sued on was created by the fraud of the defendant while acting in a fiduciary capacity, and the awarding of an execution against his body under the state statute, are not conclusive upon the court of bankruptcy, on a petition for an injunction to restrain the enforcement of such execution, that the debt is one from which the bankrupt will not be released by a discharge; but that question is to be determined by the court of bankruptcy for itself under the federal laws and decisions. *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80.

Stay of actions on dischargeable debts. — Upon proper application being made therefor, under section 11a, the court may stay any suit which is founded upon a claim from which a discharge would release the bankrupt, and which was pending at the time the petition in bankruptcy was filed. *In re Kletchka*, (S. D. N. Y. 1899) 92 Fed. 901; *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Geister*, (N. D. Ia. 1899) 97 Fed. 322, 3 Am. Bankr. Rep. 228; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Lesser*, (C. C. A. 2d Cir. 1900) 99 Fed. 913, 3 Am. Bankr. Rep. 758; *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122; *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; *In re Cole*, (W. D. N. Y. 1901) 106 Fed. 837, 5 Am. Bankr. Rep. 780; *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 434; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *White v. Thompson*, (C. C. A. 5th Cir. 1903) 119 Fed. 868, 9 Am. Bankr. Rep. 653; *In re Butts*, (N. D. N. Y. 1903) 120 Fed. 966, 10 Am. Bankr. Rep. 16; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 414; *In re Burke*, (E. D. N. Y. 1907) 155 Fed. 703, 19 Am. Bankr. Rep. 51; *In re Van Buren*, (S. D. N. Y. 1908) 164 Fed. 883, 20 Am. Bankr. Rep. 896; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474; *Gleason v. O'Mara*, (C. C. A. 3d Cir. 1909) 180 Fed. 417; *In re Thaw*, (W. D. Pa. 1910) 180

Fed. 419; *Carpenter v. O'Connor*, (2d Cir. Ohio 1898) 1 Am. Bankr. Rep. 381; *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447; *In re Chambers*, (D. C. R. I. 1900) 3 Am. Bankr. Rep. 537; *In re Vastbinder*, (M. D. Pa. 1904) 13 Am. Bankr. Rep. 148; *In re Baughman*, (M. D. Pa. 1905) 15 Am. Bankr. Rep. 23; *Matter of Floyd*, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; *Matter of Pollman*, (S. D. N. Y. 1906) 16 Am. Bankr. Rep. 144; *Maas v. Kuhn*, (N. Y. 1909) 22 Am. Bankr. Rep. 91.

The word "suit," in section 11, means all steps or proceedings born of or following the judgment therein. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89.

No matter what the character of the suit, if the claim asserted be such as a discharge in bankruptcy would operate as a release therefrom, the bankrupt court is empowered to stay its prosecution, in furtherance of the policy of the Act authorizing the bankruptcy court to administer and distribute the insolvent estate. *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477.

Where proceedings supplementary to execution against the bankrupt, in a state court, begun within four months before the commencement of proceedings in bankruptcy, are pending at the time of the adjudication therein, the court of bankruptcy, by injunction, will stay all further proceedings in the action in the state court. *In re Kletchka*, (S. D. N. Y. 1899) 92 Fed. 901.

Action for breach of promise to marry. — A plaintiff may be enjoined from proceeding in the state courts for the enforcement of a judgment in an action for breach of promise to marry. *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122.

Contempt proceedings. — It is the duty of a court of bankruptcy to stay contempt proceedings against a bankrupt, in a civil suit against him in a state court on a debt or claim from which his discharge would be a release, for twelve months, or until his right to a discharge has been determined. *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 414.

A proceeding under a municipal ordinance for the removal of a fireman who has been adjudged a bankrupt, for the nonpayment of a dischargeable debt, will be enjoined until the expiration of twelve months from the date of the adjudication, or until the question of the bankrupt's discharge shall be determined. *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654.

Action begun after institution of bankruptcy proceedings. — A court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, though the action was begun after the filing of the petition in bankruptcy. *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235.

Stay of actions on nondischargeable debts.

—The court, under section 11a, has no authority to stay an action pending against the bankrupt, which is founded upon a claim from which a discharge in bankruptcy would not be a release. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47; *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re Cole*, (W. D. N. Y. 1901) 106 Fed. 837, 5 Am. Bankr. Rep. 780; *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *B. F. Roden Grocery Co. v. Bacon*, (C. C. A. 5th Cir. 1904) 133 Fed. 515, 13 Am. Bankr. Rep. 251; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Lawrence*, (N. D. Ala. 1908) 163 Fed. 131, 20 Am. Bankr. Rep. 698; *In re Mercedes Import Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 427, 21 Am. Bankr. Rep. 591; *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851; *In re Sims*, (S. D. N. Y. 1910) 176 Fed. 645, 23 Am. Bankr. Rep. 899; *In re Clipper Mfg. Co.*, (C. C. A. 2d Cir. 1910) 179 Fed. 843; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67; *Sayre First Nat. Bank v. Bartlett*, (Pa. 1908) 21 Am. Bankr. Rep. 88.

As to what debts are not released by a discharge in bankruptcy, see the annotation under the several subdivisions of section 17a, *infra*, p. 570.

Action on nonprovable claims.—Section 11 only authorizes the restraining of suits founded on claims from which a discharge will be a release, and therefore the Bankruptcy Court has no control over a suit on a nonprovable claim. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25. And see to the same effect *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67.

As to what are provable claims, see the several subdivisions of section 63.

Action based on bankrupt's fraud.—A court of bankruptcy is without jurisdiction to enjoin proceedings in a state court in an action based on the fraud of the bankrupt, as such action can in no manner affect the proceedings in bankruptcy, nor can the bankrupt's discharge constitute a defense thereto. *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re Lawrence*, (N. D. Ala. 1908) 163 Fed. 131, 20 Am. Bankr. Rep. 698.

Action against surety for bankrupt.—A court of bankruptcy is without jurisdiction to enjoin the plaintiffs, in suits against the

bankrupt in the state courts, from collecting their judgments from the surety on the bankrupt's bail bond. *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *In re Mercedes Import Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 427, 21 Am. Bankr. Rep. 591.

Thus it has been held that a pending action against bankrupts on a dischargeable debt, in which they were arrested and had given bail more than four months prior to their bankruptcy, may be permitted by the court of bankruptcy to proceed to judgment for the purpose of enabling the plaintiff therein to enforce his demand against the surety in the undertaking. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

Diminution of estate immaterial.—That a suit brought against the bankrupt in a state court may result in the diminution of the estate applicable in bankruptcy to the payment of his debts, is not a conclusive reason for restraining the prosecution of that suit, when the personal liberty of the bankrupt is not threatened, and when the judgment sought for is not to be enforced against him, but against some one else. *In re Franklin*, (D. C. Mass. 1901) 106 Fed. 666, 6 Am. Bankr. Rep. 285. See also *In re Horton*, (8th Cir. 1900) 102 Fed. 986, 43 C. C. A. 87.

Action to recover fine for contempt.—A court of bankruptcy will not stay proceedings against the bankrupt for the enforcement of a fine for contempt imposed by a state court. *In re Hall*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 498, following *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851.

IV. STAY OF PROCEEDINGS ON VALID LIENS.

Stay allowed.—It has been held that a District Court of the United States, in which proceedings in bankruptcy are pending, and which is in the actual possession of property conceded to belong to the bankrupt, has jurisdiction to determine the amount and order of priority of liens thereon and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this though the lienholders object, and it is not contended that their liens are preferential or fraudulent or invalid. *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Vastbinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148; *In re Baughman*, (M. D. Pa. 1905) 138 Fed. 742, 15 Am. Bankr. Rep. 23; *In re Dana*, (C. C. A. 8th Cir. 1909) 167 Fed. 529, 21 Am. Bankr. Rep. 683.

Stay denied.—As a general rule, however, proceedings for the enforcement of a valid lien will not be stayed; and where no good reason is shown to warrant the interference of the court of bankruptcy, an application for

such a stay will be denied. *In re Holloway*, (D. C. Ky. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659; *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Kimball*, (W. D. Pa. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910, 5 Am. Bankr. Rep. 358; *In re Lesser*, (S. D. N. Y. 1901) 108 Fed. 201, 5 Am. Bankr. Rep. 320; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259; *In re Shoemaker*, (W. D. Va. 1902) 112 Fed. 648, 7 Am. Bankr. Rep. 437, following *Pickens v. Dent*, (4th Cir. 1901) 106 Fed. 653, 45 C. C. A. 522; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *White v. Thompson*, (5th Cir. 1903) 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653; *Tennessee Producer Marble Co. v. Grant*, (C. C. A. 3d Cir. 1905) 135 Fed. 322, 14 Am. Bankr. Rep. 288; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594; *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Orr v. Tribble*, (S. D. Ga. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 177 Fed. 381, 24 Am. Bankr. Rep. 52; *Reed v. Equitable Trust Co.*, (1902) 8 Am. Bankr. Rep. 242, 115 Ga. 780, 42 S. E. 102. And see the cases cited *infra*, under subdivision V. *Where State Court Has Complete Jurisdiction*.

Thus where a mortgagee has obtained a judgment for foreclosure and sale in a state court before the institution of proceedings in bankruptcy against the mortgagor, and the court of bankruptcy is satisfied that the mortgaged property will not sell for enough to pay the mortgage debt, whether sold under authority of the state court or by the trustee in bankruptcy, and that the mortgagee has no intention to delay the sale unreasonably or prevent the property bringing a fair price, proceedings in the state court will not be stayed, nor will the bankruptcy court take control of the property for the purpose of a sale by the trustee. *In re Holloway*, (D. C. Ky. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659. See also *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594.

So, also, it has been held that a court of bankruptcy has no jurisdiction to enjoin the sale of property on a judgment rendered in a state court, enforcing mortgage liens of a date long prior to four months preceding the filing of the petition or adjudication of the mortgagor as a bankrupt. *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D. N. Y. 1907), 158 Fed. 647, 18 Am. Bankr. Rep. 594; *In re Lattimer*, (E. D. Pa. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388. See also *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715.

But, where the facts warrant it, the trustee

will be permitted, or directed, to intervene in a foreclosure suit in the state court. *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259.

V. WHERE STATE COURT HAS COMPLETE JURISDICTION.

The court of bankruptcy will not stay proceedings, instituted in a state court, where it appears that the state court has acquired complete jurisdiction over the subject-matter of the action and the parties thereto. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47; *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *In re Price*, (S. D. N. Y. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; *In re Horton*, (C. C. A. 8th Cir. 1900) 102 Fed. 986, 4 Am. Bankr. Rep. 486; *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910, 5 Am. Bankr. Rep. 358; *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re Franklin*, (D. C. Mass. 1901) 106 Fed. 666, 6 Am. Bankr. Rep. 285; *In re Neely*, (S. D. N. Y. 1901) 108 Fed. 371, 5 Am. Bankr. Rep. 836, (C. C. A. 2d Cir. 1902) 113 Fed. 210, 7 Am. Bankr. Rep. 312; *In re Shoemaker*, (W. D. Va. 1902) 112 Fed. 648, 7 Am. Bankr. Rep. 437; *In re Wells*, (W. D. Mo. 1902) 114 Fed. 222, 8 Am. Bankr. Rep. 75; *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *White v. Thompson*, (5th Cir. 1903) 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653; *In re Kanter*, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 9 Am. Bankr. Rep. 372; *In re Spitzer*, (C. C. A. 2d Cir. 1904) 130 Fed. 879, 12 Am. Bankr. Rep. 346; *Tennessee Producer Marble Co. v. Grant*, (C. C. A. 3d Cir. 1905) 135 Fed. 322, 14 Am. Bankr. Rep. 288; *Linstroth Wagon Co. v. Ballew*, (C. C. A. 5th Cir. 1907) 149 Fed. 960, 18 Am. Bankr. Rep. 23; *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Orr v. Tribble*, (S. D. Ga. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Bluestone*, (N. D. W. Va. 1909) 174 Fed. 53, 23 Am. Bankr. Rep. 264; *In re New England Breeders' Club*, (D. C. N. H. 1910) 175 Fed. 501; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 24 Am. Bankr. Rep. 52. And see the cases cited, *supra*, under subdivision IV. *Stay of Proceedings on Valid Liens*.

The reason why the bankruptcy court will refrain from interfering with proceedings in a state court and anticipate its judgment, is the obligation of the comity necessary to be observed to avoid conflict between the state and federal courts; but this reason would be wanting if the other court waived its priority

of right to possession. *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

Considering the peculiar character of our government, and keeping in view the forbearance which courts of co-ordinate jurisdiction exercise towards each other, it follows that the court which first obtains rightful jurisdiction over the subject-matter of a controversy must be permitted to proceed therein to final judgment. The federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court, nor will they permit the courts of the states to interfere concerning litigation rightfully submitted to the decision of the courts of the United States. The Bankrupt Act does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to, or interested in, the subject-matter of such controversy. *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 177 Fed. 381, 24 Am. Bankr. Rep. 52.

Mere interest of trustee does not oust jurisdiction of state court.—The mere fact that a trustee in bankruptcy may be interested in the result of litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the bankrupt court. *In re Horton*, (C. C. A. 8th Cir. 1900) 102 Fed. 986, 4 Am. Bankr. Rep. 486.

Suit to set aside fraudulent deed.—A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraudulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against the property, is not within the jurisdiction of a court of bankruptcy, especially where instituted by the bankrupt himself. *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47. See also *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190.

Proceeding commenced prior to enactment of bankruptcy law.—A court of bankruptcy is without jurisdiction to enjoin further proceedings, under the judgment of a state court, in a judgment creditor's action commenced before the passage of the Bankruptcy Act. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36.

Suit to determine ownership of property not claimed by bankrupt's estate.—A court of bankruptcy is without authority to enjoin a suit in a state court to recover property from one claiming to have purchased the same from a bankrupt's trustee, where such property was not claimed nor scheduled by the bankrupt, nor in fact sold by the trustee,

and the bankruptcy court, therefore, never had any jurisdiction over it or to determine its ownership. *In re Bluestone*, (N. D. W. Va. 1909) 174 Fed. 53, 23 Am. Bankr. Rep. 264.

VI. STAY FOR PROTECTION OF ASSETS.

As a general rule a court of bankruptcy will grant an injunction to restrain the disposition of, or interference with, the assets of the bankrupt estate; and, for a like purpose, proceedings pending in other courts may be stayed. *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385; *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; *In re Emalie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Riker*, (S. D. N. Y. 1901) 107 Fed. 96, 5 Am. Bankr. Rep. 720; *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751; *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *In re Vastbinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689; *In re Baughman*, (M. D. Pa. 1905) 138 Fed. 742, 15 Am. Bankr. Rep. 23; *In re Van Buren*, (S. D. N. Y. 1908) 164 Fed. 883, 20 Am. Bankr. Rep. 896; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881; *In re Schwartzman*, (D. C. S. C. 1909) 167 Fed. 399, 21 Am. Bankr. Rep. 885; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; *In re Kimmel*, (E. D. Pa. 1910) 183 Fed. 665; *Matter of Pollman*, (S. D. N. Y. 1906) 16 Am. Bankr. Rep. 144.

An assignee for the benefit of creditors may be enjoined from disposing of the assets of the bankrupt in his hands, and required to hold the same subject to the orders of the court in bankruptcy. *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385.

Disposition of property conveyed in fraud of creditors may be stayed.—Where an insolvent debtor, who has conveyed all his property to a trustee, with directions to sell the same and distribute the proceeds to the creditors of the grantor, is adjudged bankrupt in involuntary proceedings, on the ground that such conveyance was intended to delay and defraud creditors, the court of bankruptcy, pending the appointment of a trustee, may enjoin the trustee under the deed from disposing of the property, or exercising any of the powers given him by the deed except to

hold possession of the property and preserve it. *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704.

Suits to establish claim against assets.—The court of bankruptcy, on petition of the trustee, will enjoin the prosecution of an action brought by a claimant against the trustee, in a state court, to establish a claim to the assets of the estate. *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252.

Stay of proceedings to impose lien on assets.—Proceedings in a state court, instituted to impose a lien on certain of the bankrupt's property, may be stayed. *New River Coal Land Co. v. Ruffner*, (4th Cir. 1908) 165 Fed. 881, 91 C. C. A. 559, 21 Am. Bankr. Rep. 474.

Foreclosure stayed.—Where a creditor, claiming a mechanic's lien on property of the bankrupt over which the court of bankruptcy has acquired jurisdiction, brings an action in a state court for the foreclosure of such lien without leave of the bankruptcy court, it is an unwarrantable interference with the assets of the estate in the custody of the latter court, and the further prosecution of such action will be stayed. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

A preferential mortgagee may be enjoined from selling or otherwise disposing of the property pending the adjudication in bankruptcy; and it is immaterial that the mortgage was given to secure a debt contracted in good faith before the passage of the Bankruptcy Act. *In re Nathan*, (D. C. Nev. 1899) 92 Fed. 590.

Bankrupt's landlord restrained from interfering with leased premises.—A court of bankruptcy has power to restrain a landlord from interfering with the possession, by a trustee, of a store occupied by the bankrupt under an unexpired lease, and which contains a valuable stock of goods, until the trustee has had a reasonable time to dispose of the same, where they cannot be removed without serious loss to the estate, on the giving of a bond to protect the landlord from loss. *In re Schwartzman*, (D. C. S. C. 1909) 167 Fed. 399, 21 Am. Bankr. Rep. 885. See also *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318.

In re Kimmel, (E. D. Pa. 1910) 183 Fed. 665, it appeared that the bankrupt was a lessee for a term of five years, and that his trustee received an offer for the unexpired term, and the good will of the business, together with certain personal property, and that the referee ordered the acceptance of such offer; and it was held that, pending the offer and its acceptance, dispossession proceedings, instituted by the landlord in a state court, might be restrained.

And where a receiver was appointed to take charge of the assets, and prior to his qualification the bankrupt's lessors instituted summary proceedings in the state court to recover the leased premises which contained such assets, but no possession had been ob-

tained prior to the qualification of the receiver, it was held that the receiver was entitled to an injunction restraining the summary proceedings. *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604.

VII. STAY IN OTHER CASES.

Stay in aid of jurisdiction.—In many instances the granting of a stay of proceedings, instituted in another court, has been deemed to be necessary for the protection of the bankruptcy proceedings and in order to give effect to the statute; and where this element appears a stay will be allowed. *Lea v. George M. West Co.*, (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *In re Mustin*, (N. D. Ala. 1908) 165 Fed. 506, 21 Am. Bankr. Rep. 147.

And see also *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178, wherein it was held that after an adjudication in bankruptcy, an action in replevin cannot be commenced and maintained against the bankrupt to recover property in the possession of, and claimed by, the bankrupt, at the time of the adjudication, which property was in the possession of a referee in bankruptcy when the action of replevin was begun.

Stay of proceedings annulled by adjudication.—A court of bankruptcy will stay, on request, all further action in the state courts on such proceedings as are annulled under the provisions of subdivisions c or f of section 67. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 758; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472. See also *In re Nathan*, (D. C. Nev. 1899) 92 Fed. 590; *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704. And see the annotation under section 67f.

Stay of action directed against exempt property.—Where a creditor of a bankrupt holds a written waiver of exemptions, which is permitted by the law of the state, the court of bankruptcy should not, on application of the bankrupt, enjoin him from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, at least not longer than until the property shall have been set aside as exempt by the trustee, the validity of the waiver being a matter immaterial to the court of bankruptcy, and one for the state court to determine. *B. F. Roden Grocery Co. v. Bacon*, (C. C. A. 5th Cir. 1904) 133 Fed. 515, 13 Am. Bankr. Rep. 251. See also *Sayre First*

Nat. Bank v. Bartlett, (Pa. 1908) 21 Am. Bankr. Rep. 88.

Stay of suits brought against officers.—Where a receiver in bankruptcy acts as an officer of the court in the administration of the estate, the bankruptcy court has jurisdiction to determine the validity of his acts, even to the extent of preventing an action at law by one who is raising no question and relying on no right which is not within the jurisdiction of the bankruptcy court in the bankruptcy proceeding, the parties being the same; but such court has no jurisdiction to prevent the maintenance of an action against the receiver to enforce a liability *in personam* against him for acts done beyond the scope of his authority. *In re Spechler*, (E. D. N. Y. 1911) 185 Fed. 311. And see to the same effect *In re Kanter*, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 9 Am. Bankr. Rep. 372. See also *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 251, 3 Am. Bankr. Rep. 658; *In re Spitzer*, (C. C. A. 2d Cir. 1904) 130 Fed. 879, 12 Am. Bankr. Rep. 346; *In re Kalb*, etc., Mfg. Co., (C. C. A. 2d Cir. 1908) 165 Fed. 895, 21 Am. Bankr. Rep. 393.

Stay to prevent bankrupt's arrest.—It is the duty of the judge or referee, charged with the administration of the bankruptcy law, to stay proceedings in a state court which will, or may, result in the arrest and imprisonment of the bankrupt during the pendency of proceedings in which he is the bankrupt; and this is true even though such arrest and imprisonment might be a contempt of court, and the bankrupt still have the right to a discharge from custody through habeas corpus. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89. And see the annotation under section 9a, *supra*, p. 529.

VIII. VACATING STAY.

When stay will be vacated.—A stay order restraining the prosecution of an action against a bankrupt, entered under section 11a, is in its nature temporary only, and should ordinarily be vacated as a matter of course, on application of the creditor, after the bankrupt has been discharged. *In re Rosenthal*,

(S. D. N. Y. 1901) 108 Fed. 368, 5 Am. Bankr. Rep. 799.

By the terms of the statute the stay is granted only for the time during which the question of discharge may be open and pending. If a discharge is denied, or the time for asking one is allowed to expire without making the application therefor, there is no occasion for a stay. If the discharge is granted, the right of action is brought under its effect and the bankrupt is entitled to its protection by proper legal remedies. The vacation of the stay, however, should be made without prejudice to the rights of the bankrupt under the discharge. *In re Flanders*, (D. C. Vt. 1903) 121 Fed. 936, 10 Am. Bankr. Rep. 379.

Vacation as to persons not within jurisdiction.—A motion to vacate a stay will be granted in so far as the stay applies to persons outside of the territorial jurisdiction of the court, and not personally subject to its orders within the jurisdiction. *In re Isaac Harris Co.*, (E. D. N. Y. 1909) 173 Fed. 735, 23 Am. Bankr. Rep. 237.

Vacation to permit sale of property.—Where a bankrupt owned a remainder interest in certain real property in the hands of trustees subject to a valid judgment lien on the bankrupt's interest, and it did not appear that the trustee could obtain a sufficient amount for the bankrupt's rights in the estate in the remainder to justify a direction that the trustee attempt to sell such rights and pay off the undisputed lien of the judgment creditor, a stay precluding the creditor from proceeding to enforce the judgment against such remainder will be vacated, subject to the right of the trustee to join in any proceeding taken by the creditor, or to protect any equity which might arise. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

Vacation to permit proceedings for contempt.—A stay of proceedings against the bankrupt in the state court will be vacated so as to permit creditors to move the state court to punish the bankrupt for contempt committed prior to the filing of the bankruptcy petition. *In re Sims*, (S. D. N. Y. 1910) 176 Fed. 645, 23 Am. Bankr. Rep. 899.

b [Appearance of trustee.] The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. [(1898) 30 Stat. L. 549.]

Intervention by trustee may be allowed.—Under the express terms of section 11b, the court may order the trustee to enter his appearance and defend any suit pending against the bankrupt. *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *Conti v. Sunseri*, (Pa. 1907) 18 Am. Bankr. Rep. 891.

Allowance discretionary.—Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed, in the dis-

cretion of the bankruptcy court, according as the interests of the bankrupt's creditors shall require. *In re St. Albans Foundry Co.*, (D. C. Vt. 1900) 4 Am. Bankr. Rep. 594. See also *Victor Talking Mach. Co. v. Hawthorne*, etc., Mfg. Co., (E. D. Pa. 1909) 173 Fed. 617, 23 Am. Bankr. Rep. 234.

Intervention in attachment suits.—Where creditors of an insolvent debtor sue out attachments on his property in a state court, and cause the same to be sold thereunder and the proceeds paid into court, and within four months thereafter he is adjudged bankrupt on a petition alleging such attachments to be preferential and to constitute acts of bankruptcy, an intervening petition filed by the

trustee in bankruptcy in the state court should be limited to a demand for the proceeds of sale remaining in court. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

The fact that a warrant of attachment has been levied upon the property of the bankrupt does not authorize the trustee in bankruptcy to intervene, in the action in which attachment issued, for the purpose of obtaining possession of the attached property. *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408.

An order of the bankruptcy court, permitting intervention, but leaving the question of the effect and validity of the attachments to be determined in the state court, is erroneous. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

Intervention to protect assets.—Where, at the time of an adjudication in bankruptcy, property of the bankrupt is in the hands of a receiver appointed by a state court in a suit brought against the bankrupt by a judgment creditor, the trustee in bankruptcy, when appointed, should intervene in such suit in the state court, by petition, for the protection of the interests of the general creditors of the estate. *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174.

Intervention does not oust jurisdiction of state court.—A trustee in bankruptcy by intervening in an action to enforce a specific lien upon an insolvent, pending in a state court, cannot thereby oust the jurisdiction of the court. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121.

Effect of state statutes and rules of practice on intervention.—The bankruptcy law, however mandatory it may be, does not control the practice in state courts, and was not

intended to do so. If an order be made, under section 11b, commanding the trustee to intervene in a state court in an action to which the bankrupt is a party, the trustee performs his full duty when he makes a proper application to such state court to be let into the action therein pending. In disposing of such an application the state statutes and rules of practice must necessarily govern the same as when any other party invokes the court's jurisdiction. *Bank of Commerce v. Elliott*, (Wis. 1901) 6 Am. Bankr. Rep. 409, following *National Distilling Co. v. Seidel*, (1899) 103 Wis. 489, 79 N. W. 744.

The judgment of the state court is conclusive on the trustee, where he has intervened in a suit pending therein by permission of the court of bankruptcy, even though he was not a necessary party to the suit. *Linstroth Wagon Co. v. Ballew*, (C. C. A. 5th Cir. 1907) 149 Fed. 960, 18 Am. Bankr. Rep. 23. See also *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re Van Alstyne*, (N. D. N. Y. 1900) 100 Fed. 929, 4 Am. Bankr. Rep. 42; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121.

Plaintiff may make trustee party defendant.—Where, pending a suit in equity for infringement of a patent against a corporation, the defendant is adjudged a bankrupt, the complainant is entitled to file a supplemental bill, making its trustee a party defendant, that he may be bound by a decree, so far as that result may properly follow, whether or not he will make a defense being a matter to be determined by him and the bankruptcy court. *Victor Talking Mach. Co. v. Hawthorne, etc., Mfg. Co.*, (E. D. Pa. 1909) 173 Fed. 617, 23 Am. Bankr. Rep. 234.

c [Prosecution of suit by trustee.] A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. [(1898) 30 Stat. L. 549.]

Prosecution of suit by trustee.—A trustee in bankruptcy may, with the approval of the court, be permitted to prosecute any suit commenced by the bankrupt prior to the adjudication, with the same force and effect as though such action had been instituted by the trustee. *In re Price*, (S. D. N. Y. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; *Griffin v. Mutual L. Ins. Co.*, (1904) 11 Am. Bankr. Rep. 622, 119 Ga. 663, 46 S. E. 870; *Hahlo v. Cole*, (1906) 15 Am. Bankr. Rep. 591, 112 App. Div. 636, 98 N. Y. S. 1049; *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 267.

Approval of bankruptcy court essential.—It is improper for the state court to permit the substitution of the trustee in bankruptcy as plaintiff in an action begun by the bankrupt therein, prior to adjudication, unless the consent of the federal court thereto is first obtained and affirmatively shown. *Hahlo v. Cole*, (1906) 15 Am. Bankr. Rep. 591, 112

App. Div. 636, 98 N. Y. S. 1049; *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 267. See also *Traders' Ins. Co. v. Mann*, (Ga. 1903) 11 Am. Bankr. Rep. 269; *Callahan v. Israel*, (1904) 186 Mass. 383, 71 N. E. 812.

Prosecution must be beneficial.—Section 11 relates only to actions in which the estate of the bankrupt has an interest, and which may be prosecuted by the trustee for the benefit of the creditors. *In re Haensell*, (N. D. Cal. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286.

Failure of trustee to intervene does not abate action against bankrupt.—If no trustee is appointed, or if the bankruptcy court does not consider it to the interest of the estate to permit the trustee to prosecute a suit previously brought by the bankrupt, the action does not thereby abate, nor is the bankrupt's debtor discharged from liability in the pending action. *Griffin v. Mutual L. Ins. Co.*,

(1904) 11 Am. Bankr. Rep. 622, 119 Ga. 664, 46 S. E. 870; *Hahlo v. Cole*, (N. Y. 1906) 15 Am. Bankr. Rep. 591.

Costs.—The trustee will not be held liable

for costs in an action wherein he has not intervened, and in the prosecution of which he has taken no part. *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 257.

d [Time for bringing suit against trustee.] Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. [(1898) 30 Stat. L. 549.]

Time within which trustee may sue.—A trustee in bankruptcy may maintain an action to set aside a conveyance made by the bankrupt at any time within two years after the estate is closed, provided the action was not barred by the state law at the time the petition in bankruptcy was filed. *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923.

Leave to sue trustee unnecessary.—A trustee in bankruptcy may be sued without first obtaining leave from the bankruptcy court. *In re Smith*, (S. D. N. Y. 1903) 121 Fed. 1014, 9 Am. Bankr. Rep. 603.

Continuance of suit, brought by trustee, after closing estate.—A suit brought by a trustee in bankruptcy may, after the estate has been closed, be maintained by the bank-

rupt for his own benefit, in the name and with the consent of the trustee. *Stone v. Jenkins*, (Mass. 1900) 4 Am. Bankr. Rep. 568.

Suits against bankrupt and receiver unauthorized.—Section 11 clearly indicates that suits against a bankrupt and the receivers are not to be authorized by the court in any event, and not against any one prior to the appointment of a trustee who is to represent the creditors. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

Costs.—A court of bankruptcy cannot, by a summary order, require a trustee to pay a judgment for costs rendered against him in another jurisdiction, where there are no funds of the estate in his hands. *In re Howard*, (N. D. Cal. 1904) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—*a* [When offer may be made.] A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed. [(Amended 1910) 36 Stat. L. 839.]

Construction of section 12.—The provisions of the Bankruptcy Act prescribing the requisites of a composition with creditors are to be strictly construed as against those who seek by this means to deprive nonassenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199.

Offer of composition.—Prior to the amendment of 1910 it was held that a composition could not be offered before the adjudication; but that amendment provides for the offer of a composition either before or after adjudication. The offer must be made after, and not before, the bankrupt has been examined in open court or at a meeting of his creditors, and after he has filed in court the schedule of his property and a list of creditors required to be filed by bankrupts. See the following cases which were decided prior to the enactment of the 1910 amendment. *In re*

Rider, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Hilborn*, (S. D. N. Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199.

To whom composition must be offered.—A composition, to be valid, must have been offered by the bankrupt to all of his general creditors, whether or not they have proved their debts at the time of the offer; and all must have a reasonable opportunity to consider it. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

But secured creditors are not necessary or proper parties to a composition proceeding. *In re Kahn*, (S. D. N. Y. 1902) 121 Fed. 412, 9 Am. Bankr. Rep. 107.

The term "in open court" refers to proceedings before the referee. *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156.

The schedule provided for in section 12a is the schedule required by section 7a (8) to be filed within ten days after adjudication, and not schedules filed prior to adjudication.

cation. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

The examination of the bankrupt referred to in section 12a is not an examination of the bankrupt as a witness on the issues of insolvency and the commission of acts of bankruptcy charged, but the examination to which the bankrupt is required to submit by section 7a (9). *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

b [Application for confirming.] An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. [(1898) 30 Stat. L. 549.]

Presenting application for confirmation.—The provision that an application for the confirmation of a composition may be filed in the court of bankruptcy, after the consideration and the cost of the proceedings have been deposited in a place designated by, and subject to the order of, the judge, requires those matters to be presented to the judge rather than the referee. *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372.

Acceptance by majority.—Before an application for the confirmation of a composition may be filed, it is necessary that the terms of such composition shall have been accepted in writing by a majority in number of all creditors whose claims have been allowed; and such majority must represent, also, a majority in amount of such claims. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Messengill*, (E. D. N. C. 1902) 113 Fed. 366, 7 Am. Bankr. Rep. 669; *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944; *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859; *Matter of Fox*, (N. D. Ohio 1910) 6 Am. Bankr. Rep. 525.

The procedure in compositions requires the bankrupt to make an offer of specific terms upon which he shall have back his estate. He must get the consent of one-half of his creditors who have filed claims, and deposit enough money to pay all of them who have been scheduled or filed claims up to that time. Then he may file a petition and compel the remainder to accept the terms if he can induce the court so to order. *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859.

Assignee of several claims counted as one creditor.—In determining whether a majority have accepted an offer of composition an assignee of a large number of claims should be counted as one creditor only, and not as the number of creditors who have assigned

Necessity of calling special meeting.—The calling of a special meeting of creditors to receive an offer of composition is not required; and a submission of an offer of composition to the creditors at their first meeting, after an examination of the bankrupt, is competent and sufficient. *In re Hilborn*, (S. D. N. Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741.

But where composition is offered before adjudication, it will be observed that the statute provides for the calling of a special meeting.

claims to him. *In re Messengill*, (E. D. N. C. 1902) 113 Fed. 366, 7 Am. Bankr. Rep. 669.

A composition of a bankrupt partner of a bankrupt firm, individually, without the consent of a majority in number and amount of his individual creditors, cannot be effected by the consent of the firm creditors, though the consenting majority be more than a majority of the number and amount of all creditors. *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944.

Withdrawing acceptance.—Creditors of a bankrupt, who have signed an acceptance of an offer of composition and invoked the action of the court thereon, will not be permitted to withdraw their signatures, where it is not alleged that they were procured by fraud or misrepresentation. *In re Levy*, (W. D. Pa. 1901) 110 Fed. 744, 6 Am. Bankr. Rep. 299.

Deposit.—The consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority under section 64, and the costs of the proceeding, must be deposited in such place as shall have been designated by, and is subject to, the order of the judge, before the application for the confirmation of a composition is filed. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Harris*, (W. D. Tenn. 1902) 117 Fed. 575, 9 Am. Bankr. Rep. 20; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345; *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372; *Matter of Fox*, (N. D. Ohio 1910) 6 Am. Bankr. Rep. 525.

The judge must require the money to be deposited, and designate what sum shall be deposited, and it must be deposited subject to his orders. *In re Bloodworth-Stembridge*

Co., (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156.

The court will not confirm a composition offered by a bankrupt to his creditors, where the money deposited by him to cover the cost of the proceedings is not sufficient in amount. In re Rider, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

Taxes must be provided for.—The deposit required on the making of a composition must provide for the payment of taxes, which by section 64a are made a preferred claim against the bankrupt's assets. *In re Flynn, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720.*

Secured claims.—The bankrupt is not required to deposit sufficient to secure a percentage on secured claims, nor for any supposed deficiency, if it has not yet been ascertained and filed. *In re Harvey, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345.*

The intention in the enactment of section 12b was to authorize a majority in numbers and amounts of all creditors, whose claims have been allowed, to pass upon the question of the acceptance of a composition; but after that has been determined, then this section requires the bankrupt to deposit a sufficient sum to cover the percentage offered in the compromise of all the scheduled claims of creditors, and any unscheduled claims which have been presented and allowed before confirmation, because these scheduled claims are undoubtedly provable claims and discharged by a confirmation of a composition by section 14c (Glover Grocery Co. v. Dorne, (1902) 8 Am. Bankr. Rep. 702, 116 Ga. 216, 42 S. E. 347), and unless there is a deposit sufficient to cover them the claimant is without a remedy. As to all unsecured and unscheduled claims provision is made for these by section 17a (3) in that they are not discharged by the confirmation of a composition if they have not been duly scheduled in time for proof and allowance, and the creditor has had no notice or actual knowledge of the proceeding in bankruptcy. So that as to these claims the creditor is protected, and after a composition has been effected and the bankrupt discharged, such a creditor could recover on his claim against such property as the bankrupt might own when suit is brought, at least so much as he paid his other creditors who participated in the composition. But as to a creditor whose claim has been duly scheduled in time for proof and allowance, it seems that he must be protected by a deposit of a sufficient percentage to cover his claim, whether it has been proven or not. There is no hardship in this on the bankrupt, because he knows what debts he owes, and it is presumed he will not schedule more debts, or

debts for larger amounts, than he actually owes, and when they are so scheduled by him, and he offers a compromise, he should deposit sufficient to cover all scheduled debts without regard to whether they have been proven or not. *Per Holland, D. J., in In re Harvey, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345.*

Costs.—"Composition is wholly a matter of arrangement by the bankrupt and his creditors, and the negotiations always should comprehend a disposition of all the costs, with a definite understanding of amounts and the method of their payment. If there be an attorney's fee not waived the attorney should agree with the parties on the amount, or, if disagreed, application should be made to the court to fix the fee, and so of the receiver or the trustee; and with every item not distinctly fixed by the statutes or rules of practice, this should be done, as a preliminary of the composition agreement, and as a part of it. When the amounts are ascertained, the parties should agree whether the costs come out of the deposit for creditors, or whether the bankrupt provides an additional sum to meet costs. If he is to do this, he should bring the cost money with the other, to be deposited in court. It is all, however, purely a matter of agreement by negotiation, and the court will take no part in it by compelling either to do anything about it. It is a mistake to suppose that the statute requires the bankrupt, as a matter of law, to pay the costs in addition to what he agrees to pay the creditors. He is not obliged to pay the creditors anything whatever, nor the costs, and unless all the elements of the composition are mutually settled by the agreement they make, the technical and logical result is that the composition fails, or rather the attempt at composition fails, and the ordinary administration of the assets goes on as if there had been no attempt to compound the debts. The costs then come out of the assets, and practically out of the creditors, always being paid out of whatever fund is in court, unless otherwise agreed upon and provided for by the parties. Hence, the payment of the costs by the bankrupt under composition is in a proper sense voluntary." *Per Hammond, J., in In re Harris, (W. D. Tenn. 1902) 117 Fed. 575, 9 Am. Bankr. Rep. 20.*

Attorney fees.—Where a composition offered by a bankrupt, which includes the payment of all costs, is confirmed after opposition, the bankrupt's attorney will not be allowed fees from the estate for his services in securing the confirmation. *In re Martin, (E. D. N. Y. 1907) 152 Fed. 582, 18 Am. Bankr. Rep. 250. And see annotation under section 62.*

c [Date and place of hearing.] A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. [(1898) 30 Stat. L. 550.]

Specifications in opposition to the confirmation of a bankrupt's composition with creditors must be similar to specifications in op-

position to a discharge. Dallas City Nat. Bank v. Doolittle, (C. C. A. 5th Cir. 1901) 107 Fed. 236, 5 Am. Bankr. Rep. 736; Adler

v. Jones, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245. And see the annotation under section 14b, *infra*, p. 549, as to specifications of objection to a discharge.

Necessity of entering appearance and filing objections.—Where the requisite proportion of the creditors of a bankrupt have executed the composition agreement, opposing creditors should be required to enter their appearance and file specifications in writing of the grounds of opposition. *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

Hearing.—*The judge must fix a date for the hearing*; that is, a hearing before him. *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156. See also *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

But proposed composition may be referred to ascertain whether there are grounds for believing that the objections are well founded, and what grounds there are for believing that the composition offered will be for the best interests of the creditors. *In re Levy*, (D. C. Mass. 1908) 172 Fed. 780, 22 Am. Bankr. Rep. 769. See also *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

The proper practice is for a referee, when requested in accordance with a rule of court, to appoint a day for bringing the composition before the court, and to issue the required notices to creditors, suggesting in his report any legal questions arising upon the composition papers. *In re Hilborn*, (S. D. N.

Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741.

Notice of hearing.—Creditors are entitled to at least ten days' notice by mail to their respective addresses of all hearings of applications for the confirmation of a composition. See section 58a (2).

Where an unscheduled creditor acquires notice or actual knowledge of the bankruptcy proceedings, after the bankrupt's application for the confirmation of the composition, but before the final order of confirmation, such creditor is not bound by the composition. *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 416, 95 N. Y. S. 93.

Where, after the appointment of a trustee for a bankrupt firm, an assignee of the firm's assets was ordered to deliver such assets to the trustee, the latter to hold the assignee harmless from any claims against the assignee with reference to any money or property transferred to the trustee, and he, with notice of the petitioner's claim, before the confirmation of a composition, proceeded therewith without notice to the petitioner and distributed the proceeds, it was held that the trustee was either guilty of negligence, or of a conscious effort to cut the petitioner off from any recourse to the fund; and, the petitioner having recovered judgment in a state court in an action in which the trustee was a party, the trustee was bound thereby, and was liable for the amount of the judgment. *In re Cadenas*, (S. D. N. Y. 1910) 178 Fed. 158.

d [When judge shall confirm.] The judge shall confirm a composition if satisfied that

(1) [Best interests of creditors.] it is for the best interests of the creditors; [(1898) 30 Stat. L. 550.]

Creditors' interests prevail.—The court will not confirm a composition unless it is satisfied that it is for the best interests of the creditors. *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245; *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64; *In re Waynesboro Drug Co.*, (S. D. Ga. 1907) 157 Fed. 101, 19 Am. Bankr. Rep. 487; *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508; *Riley v. Pope*, (S. D. Ga. 1911) 186 Fed. 857; *In re J. B. & J. M. Cornell Co.*, (S. D. N. Y. 1911) 186 Fed. 859; *In re Criterion Watch Case Mfg. Co.*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 206.

It is for the court to determine whether nonassenting creditors have met the burden of showing that the offer of composition is inadequate, and that a substantially larger sum may reasonably be expected to result from the administration of the assets under the regular course of bankruptcy proceedings. *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508.

The determination of the question whether a proposed composition is for the best interest of creditors depends on whether they would receive more or less under the composition than might reasonably be expected

by the administration of the assets of the bankrupt in due course. *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

The court will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings, with compulsory sales and expenses of administration. *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64.

A composition should be confirmed upon the recommendation of the referee showing that there is no probability of the estates paying over ten per cent. more than has been offered as being for the best interests of the creditors. *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64.

The decision of the creditors is prima facie evidence that the composition is for their best interest; and the burden rests upon objecting creditors to show such gross discrepancy between the offer and the amount to be reasonably expected from a sale of the assets as to justify a refusal to confirm. *In re Waynesboro Drug Co.*, (S. D. Ga. 1907)

157 Fed. 101, 19 Am. Bankr. Rep. 487; *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508.

But the assent of creditors does not relieve the court from passing on the question whether the composition is for the best interests of all the creditors. This question is addressed to the judicial discretion of the court, and from its conclusion either party may appeal. *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508.

When composition will not be confirmed.—If the court is satisfied upon the hearing that the composition offered would be considerably less than the creditors might reasonably expect to realize in the administration of the assets in due course, then the composition is not for the best interest of the creditors, and will not be confirmed. *In re H. J. Arrington Co.*, (E. D. Va. 1902)

(2) [*Acts which would bar discharge.*] the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and [(1898) 30 Stat. L. 550.]

Where discharge is barred.—In accordance with the requirements of section 12d (2), the court will not confirm a composition where it has been made to appear that the bankrupt has been guilty of any of the acts, or failed to perform any of the duties, which will bar his discharge. *In re Wilson*, (E. D. Pa. 1901) 107 Fed. 83, 5 Am. Bankr. Rep. 849; *In re Godwin*, (E. D. Pa. 1903) 122 Fed. 111, 10 Am. Bankr. Rep. 252; *In re Olman*, (S. D. Ohio 1902) 134 Fed. 681, 13 Am. Bankr. Rep. 398; *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65; *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944.

As to what will bar a discharge, see the several subdivisions of section 14b and section 29b, *infra*, pp. 549, 646.

Thus it has been held that if the bankrupt has been guilty of any of the acts which would be a bar to a discharge, the court is without power to confirm a composition, even if satisfied that it would be for the best interests of the creditors to do so. *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65. See also *In re Godwin*, (D. C. Pa. 1903) 122 Fed. 111, 10 Am. Bankr. Rep. 252; *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792.

And in such case the fact that only one creditor is actively objecting, while a large majority is in favor of taking what the bank-

rupt offers, is of no importance. *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792.

The fact that an objecting creditor purchased his claim for the purpose of forcing a settlement in a suit brought by the trustee, by the threats of opposition to the confirmation of a composition, is immaterial, where it is shown that the bankrupt has committed any of the acts which would bar his discharge. *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65.

Elements to bar discharge must be present.—It is necessary that the elements essential in order to bar a discharge be equally present in order to be effective as against the confirmation of a composition; thus, where it is charged that the bankrupt made a false statement, it will not justify the court in refusing to confirm a composition agreement, where it does not appear that the statement was materially false or made for the purpose of obtaining credit. *In re Seligman*, (E. D. N. Y. 1908) 163 Fed. 549, 20 Am. Bankr. Rep. 774.

So, also, where the failure to keep books, from which the bankrupt's financial condition might be ascertained, was urged in opposition to the confirmation of a composition, it was held that where the failure to keep such books was not shown to have been with a fraudulent intent, it was insufficient to prevent the confirmation of a composition. *In re Wilson*, (E. D. Pa. 1901) 107 Fed. 83, 5 Am. Bankr. Rep. 849.

(3) [*Good faith.*] the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. [(1898) 30 Stat. L. 550.]

Good faith and compliance with statute required.—The court will refuse to confirm a composition where the offer, and its acceptance, are not made in good faith; or where they have been procured by means or promises forbidden by the statute, or in any other manner excepting as provided by the statute.

In re Lockwood, (S. D. N. Y. 1900) 104 Fed. 794, 4 Am. Bankr. Rep. 731; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199; *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65; *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131.

Irregular settlements, and compromises, and so-called compositions, are not cognizable by the court or the judge, except when they are brought in question in a proper manner, or interfere with the due administration of the bankrupt estate according to law. In such cases the court or judge would be called upon to declare their illegality. *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199. See also *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131.

Irregular composition subject to rights of nonparticipating creditors.—An order entered by consent of all known creditors in proceed-

ings against an insolvent corporation for the settlement of the estate and distribution of the proceeds as therein provided, but not in accordance with any express provision of the Bankruptcy Act, must be held subject to the rights of any unknown creditors who may appear and present their claims within the time given by law. *In re Lockwood*, (S. D. N. Y. 1900) 104 Fed. 794, 4 Am. Bankr. Rep. 731.

An agreement for a provisional order of adjudication, as a part of a composition agreement, will not be approved. *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131.

e [Distribution of consideration—administration when no confirmance.]

Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. [(1898) 30 Stat. L. 550.]

Effect of confirmation.—The confirmation of a composition has precisely the same effect as the granting of a discharge in bankruptcy. And, as a discharge, it may be pleaded in bar in a subsequent suit against the bankrupt, wherein it is sought to recover debts which were released thereby. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *Ross v. Saunders*, (C. C. A. 1st Cir. 1901) 105 Fed. 915, 5 Am. Bankr. Rep. 350; *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45; *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137; *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776; *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 152 Fed. 839, 19 Am. Bankr. Rep. 417; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944; *Stone v. Jenkins*, (1900) 4 Am. Bankr. Rep. 568, 176 Mass. 544, 57 N. E. 1002; *Glover Grocery Co. v. Dorne*, (1902) 8 Am. Bankr. Rep. 702, 116 Ga. 216, 42 S. E. 347; *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 95 N. Y. S. 93; *Mandell v. Levy*, (N. Y. 1905) 14 Am. Bankr. Rep. 549; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, (1907) 19 Am. Bankr. Rep. 862, 121 App. Div. 764, 106 N. Y. S. 599; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634; *Gorden v. Mechanics*, etc., Ins. Co., (1907) 22 Am. Bankr. Rep. 649, 120 La. 441, 45 So. 384.

As to the effect of a discharge, with respect to the release of debts, see the annotation under the several subdivisions of section 17, *infra*, p. 570.

When the composition is paid the creditors have no further claim upon the debtor or his property. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

Dismissal on confirmation.—Section 12e does not mean that after confirming a composition the court has lost all further power over the case except to distribute the consideration. The case is to be dismissed; but "dismissed" in this connection can mean no more than that the court is not to proceed further with its administration of the estate under the Bankruptcy Act. It does not mean that there is to be no longer any case

before the court, as if the petition of the proceedings had been dismissed under sections 3c, 18d, 18e, 58a (8), 59d, or 59g. Since the consideration must in every case remain to be distributed, and since compositions are not infrequently confirmed within the year allowed for proving claims, the court must retain jurisdiction for these purposes at least. Immediate dismissal is neither directed nor intended. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

Distribution—Creditors only entitled to percentage agreed upon.—In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more. If he does not enforce his bargain, his failure should inure to the bankrupt's benefit, not to the benefit of another creditor. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

Scheduled creditors are entitled to share in a composition, even if they did not file their claims before the confirmation. *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525.

A creditor whose claim is barred by his failure to prove it is not entitled to recognition for the purpose of distribution in composition proceedings. *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452. See also *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525.

Claims not scheduled or filed.—The court has no power to require the bankrupt to pay the composition to a creditor whose claim was not scheduled or filed: his only remedy being to procure the setting aside of the composition for fraud. *In re Abrams*, (S. D. N. Y. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25. See also *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

And where a composition offered by a bankrupt has been accepted, and some of the creditors have failed to claim their dividends, the bankrupt is entitled to object to the payment of a preferred claim of a creditor, omitted from the schedule in good faith, whose claim was not proved within a year after the adjudication. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

SEC. 13. COMPOSITIONS, WHEN SET ASIDE. — *a* [When fraud practiced.] The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition. [(1898) 30 Stat. L. 550.]

Section 13 defines exclusively the ground upon which a composition may be vacated, and operates as a limitation upon the general grant of authority in section 2 (9), which gives to the courts of bankruptcy jurisdiction to set aside compositions and reinstate the cases. *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114; *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814; *In re Abrams*, (S. D. N. Y. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25; *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634.

Composition set aside for fraud. — The judge may, on a proper application and showing, set aside a composition because of fraud practiced in the procurement thereof. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128; *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193; *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814.

The burden is upon the petitioner to show fraud in procuring the composition. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

The joining of the trustee with the bankrupt to effect a composition to the detriment of creditors by means of false representations as to the assets is ground for setting aside the composition. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

Secret agreement for more than pro rata share. — A secret arrangement, by which a creditor who joins with others in a composition receives the note of a third person from the debtor for a substantial amount to apply on his claim, and the same percentage as other creditors on the remainder, is fraudulent in law, whether the note was given to induce him to become a party to the composition, or, under the circumstances, in consideration of his advancing money to enable the debtor to make the payments. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

But a motion to set aside a composition should be denied, notwithstanding the fact that it is shown that some creditors fraudulently obtained notes for more than the pro rata share of their debts, where the applicant for the order also obtained a preference, and, because of the fact that the bankrupt was unable to pay the composition notes, new proceedings in bankruptcy have been instituted against him, in which the innocent creditors can be best protected by the disal-

lowance of the fraudulent claims. *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814.

Making false schedule. — That a bankrupt made a false schedule, or a false oath to his schedule, constitutes ground for setting aside a composition for fraud, if not known to the petitioning creditor until after the confirmation, notwithstanding the fact that the order confirming the composition recites that it appears that the bankrupt has not been guilty of any acts which would be a bar to his discharge, and that the offer and its acceptance are in good faith, and have not been made or procured by means contrary to the Acts of Congress relating to bankruptcy. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

Mistake in creditor's scheduled address. — A composition will not be set aside on the ground that a creditor has failed to get notice of the proceedings because his address was misstated in the bankrupt's schedule by mistake. *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

The fact that a bankrupt has failed to fulfil a composition agreement affords no ground for setting aside the composition, whatever its effect may be on the operation of the composition as a discharge. *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776.

Petition to set aside composition — *Allegation as to petitioner's knowledge*. — A petition to set aside a composition filed within the six months allowed therefor, and which alleges that the fraud charged was not known to the petitioner until after the confirmation, is sufficient, and need not allege the time or manner in which the petitioner's knowledge was acquired. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

Leave to file a petition to set aside the confirmation of a composition in bankruptcy should be refused only when the petition on its face shows that the petitioner cannot under any circumstances be entitled to relief. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

A creditor of a bankrupt, who has assigned his claim, receiving a consideration therefor, is no longer a "party in interest" who can maintain a petition to set aside the confirmation of a composition subsequently entered, although the assignment was obtained through the fraud and misrepresentation of the trustee and the bankrupt. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

A verification in the usual form of a bill in equity is sufficient on a petition for the revocation of a composition. *In re Roukous*,

(D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

When application to set aside must be made. — A court has no power to set aside a composition after the lapse of six months from the date of its confirmation. *In re Eisenberg*, (S. D. N. Y. 1906) 143 Fed. 325, 16 Am. Bankr. Rep. 776; *In re Ennis*, (S. D.

N. Y. 1910) 183 Fed. 859; *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 18 Am. Bankr. Rep. 417.

The application to vacate should be made to the judge who made the order of confirmation. *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859.

SEC. 14. DISCHARGES, WHEN GRANTED. — a [*Application for discharge.*]

Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months. [(1898) 30 Stat. L. 550.]

Applicant for discharge must comply with statutory conditions. — A discharge in bankruptcy is an act of grace, and the person who applies for it must comply with the conditions required, as essential to its granting, at the time he applies for it. *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

A discharge is not an absolute right existing at the time of filing the petition in bankruptcy. The right or privilege arises subsequently, and is granted upon the conditions of the statute, and is dependent in part upon the conduct of the bankrupt after the filing of his petition in bankruptcy; and those conditions cannot be applied until application has been made for a discharge. *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640.

To whom application must be made. — All matters relating to the discharge of the bankrupt are, under section 38a (4), expressly excepted from the jurisdiction of the referee; and, therefore, the application for the bankrupt's discharge should be made to the judge of the District Court. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814. See also *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

An application for a bankrupt's discharge is in the nature of a separate proceeding from the original cause, so that the reference of the original cause confers no jurisdiction on the referee over the application for discharge. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

But the application may be referred to a special master to ascertain and report the facts. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110.

Notice of application. — The amendment of 1910 provides that the creditors shall have thirty days' notice of all applications for the discharge of the bankrupt. See section 58a (9).

A petition by a bankrupt asking a special reference to the referee, requiring him to take proof and report whether or not he is entitled to be discharged, will not be considered until the trustee and the creditors have

notice of the petition. *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264.

Service of notice. — Creditors of a bankrupt are not deprived of their property without due process of law, because the Bankruptcy Act does not require personal service of the notice of the application for a discharge. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

When application must be made. — Excepting where the time has been extended by the judge for good cause, the bankrupt must apply for his discharge within the twelve months subsequent to the adjudication; and his failure to make such application within that time will prevent his discharge. *In re Marshall Paper Co.*, (D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653, *affirmed* (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re Wolff*, (N. D. Cal. 1900) 100 Fed. 430, 4 Am. Bankr. Rep. 74; *In re Royal*, (E. D. N. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636; *In re Fahy*, (N. D. Ia. 1902) 116 Fed. 239, 8 Am. Bankr. Rep. 354; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Fiengenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13; *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000; *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640; *In re Wagner*, (D. C. Nev. 1905) 139 Fed. 87, 15 Am. Bankr. Rep. 100; *In re Kuffer*, (C. C. A. 2d Cir. 1907) 151 Fed. 12, *reversing* (E. D. N. Y. 1906) 144 Fed. 445, 16 Am. Bankr. Rep. 305; *In re Silverman*, (C. C. A. 2d Cir. 1907) 157 Fed. 675; *The Pokanoket*, (E. D. Va. 1908) 161 Fed. 383; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588, 20 Am. Bankr. Rep. 402; *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171; *In re Holmes*, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339; *In re Schnabel*, (E. D. N. Y. 1909) 166 Fed. 383; *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513;

In re Stone, (D. C. Ore. 1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24; *In re Levenstein*, (D. C. Conn. 1910) 180 Fed. 987; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414; *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118; *In re Harris*, (E. D. Pa. 1906) 15 Am. Bankr. Rep. 705.

After a year and a day from the date of the adjudication has elapsed, the court has no jurisdiction to grant a discharge, unless it shall have extended the time for six months by reason of unavoidable delay. *In re Holmes*, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339.

If, after adjudication, the bankrupt shall fail to file a petition for discharge, within the time fixed by the statute, his right to such discharge is lost to him forever. *In re Levenstein*, (D. C. Conn. 1910) 180 Fed. 987.

Bankrupt need not be notified of expiration of time.—It is no part of the duty of a referee in bankruptcy to notify the bankrupt or his attorney of the date of the expiration of the time for filing a petition for a discharge; both the bankrupt and his attorney are required to take notice thereof. *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503.

Effect of failure to apply for discharge on subsequent bankruptcy proceedings.—A bankrupt who has failed to apply for his discharge within the time limited cannot thereafter file a second petition, and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy proceeding. *In re Fliegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000; *In re Silverman*, (C. C. A. 2d Cir. 1907) 157 Fed. 675; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588, 20 Am. Bankr. Rep. 402; *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513; *In re Stone*, (D. C. Ore. 1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414.

Res judicata.—Where a bankrupt failed to apply for a discharge on a former petition within the time allowed, the denial of his discharge is *res judicata*, precluding his discharge from debts then scheduled, and re-scheduled in his subsequent petition. *In re Stone*, (D. C. Ore. 1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414.

And the fact that the second bankruptcy proceeding has been instituted in a different district does not render the failure to apply for a discharge in the first proceeding any the less *res judicata*. *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000.

Extension allowed because of unavoidable delay.—The court may extend the time for the filing of an application for the discharge of a bankrupt, for six months; but such extension can only be granted where it is made clearly to appear that the bankrupt was unavoidably prevented from filing his application for discharge within the twelve months period specified in the statute. *In re Wolff*, (N. D. Cal. 1900) 100 Fed. 430, 4 Am. Bankr. Rep. 74; *In re Fahy*, (N. D. Ia. 1902)

116 Fed. 239, 8 Am. Bankr. Rep. 354; *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13; *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503; *In re Anderson*, (D. C. Mont. 1905) 124 Fed. 319, 14 Am. Bankr. Rep. 221; *In re Lewin*, (W. D. Tex. 1905) 135 Fed. 252, 14 Am. Bankr. Rep. 358; *In re Wagner*, (D. C. Nev. 1905) 139 Fed. 87, 15 Am. Bankr. Rep. 101; *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171; *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408; *In re Harris*, (E. D. Pa. 1906) 15 Am. Bankr. Rep. 705.

Extension must be applied for within the six months period.—In express terms the discretion of the judge is limited to the six months following the expiration of the year beginning with the date of the adjudication; and this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the Act, the court of bankruptcy is without the power and jurisdiction to grant a discharge. If the court, yielding to equitable considerations, should grant a discharge in form to the bankrupt, its validity could be impeached before any court wherein it might be pleaded as a bar to a claim, on the ground of want of jurisdiction to entertain the petition for discharge; the record showing on its face that the petition was not filed within eighteen months of the date of the adjudication. *In re Fahy*, (N. D. Ia. 1902) 116 Fed. 239, 8 Am. Bankr. Rep. 354.

Inquiry whether a bankrupt was unavoidably prevented from applying for a discharge within the year should be had within the additional six months period during which filing may be allowed on such showing. *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408.

Application for extension must be sustained by proof.—A petition filed by a bankrupt asking an extension of time for filing an application for discharge on the ground that he was unavoidably prevented from filing it within the year allowed therefor is not evidence of the facts therein alleged; and, on a reference of such petition, they must be sustained by proof, although no formal answers may be filed thereto. *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171. See also *In re Lewin*, (W. D. Tex. 1905) 135 Fed. 252, 14 Am. Bankr. Rep. 358.

Failure to apply because of previous discharge.—In *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535, it appears that a bankrupt was adjudicated within six years of his former voluntary bankruptcy proceedings, and that he requested an extension of six months' time within which to file his application for discharge in the second proceeding, on the ground that he was unavoidably prevented from making such application within the twelve months period because, if the applica-

tion were made within that period, it would be within six years of his former discharge. In disposing of this contention the court said: "Section 14b (5) was intended to prevent the filing of voluntary petitions in bankruptcy by the same person oftener than once in six years, and not merely to space discharges to the same person six years apart." And see the annotation under section 14b (5), *infra*, p. 587.

Notice of application for extension.—An application by a bankrupt for an extension of time within which to file an application for discharge being addressed wholly to the discretion of the judge, it is not necessary that notice thereof be given to all creditors; the notice of hearing required to be given by section 58a being sufficient. *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408.

Effect of extending time.—Where bankrupts have been allowed to file a petition for a discharge, notwithstanding more than a year has passed since the adjudication, the only question open thereafter is whether they are entitled to a discharge; and creditors seeking to oppose the discharge are confined to the statutory objections. *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13.

Though the court entertains a petition for a bankrupt's discharge more than a year after the adjudication, on an insufficient showing, the remedy is by motion to vacate; and it is too late to contest the matter on the hearing of the petition. *In re Haynes*, (M.

D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13.

Verification.—An application for a bankrupt's discharge should be considered a pleading within section 18c; and, therefore, should be verified. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479. And see to the same effect, *In re Holman*, (S. D. Ia. 1899) 92 Fed. 514; *In re Brown*, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 394.

Filing.—An application for a bankrupt's discharge must be filed with the clerk of court, and not with the referee. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

It is improper to mail the application for a discharge to the judge, instead of filing it with the clerk. *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669.

But where an application for a bankrupt's discharge, though erroneously filed with the referee instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after adjudication, and no objection had been taken by the objecting creditor to the improper original filing, it was held that the petition would be regarded as properly filed. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

Under District Court rule 11 in bankruptcy, in the southern district of New York, which makes the office of the referee the office of the court, the filing of a petition for discharge with the referee is sufficient. *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331.

b [Hearing application and granting discharge.] The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has [(Amended 1910) 36 Stat. L. 839.]

I. GENERALLY, 549.

II. OBJECTIONS TO BANKRUPT'S DISCHARGE, 550.

III. HEARING AND PROOF, 553.

IV. DETERMINATION, 555.

I. GENERALLY.

Congress may prescribe any regulations concerning discharges in bankruptcy that are not so grossly unreasonable as to be incompatible with the fundamental law. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *In re Dresser*, (C. C. A. 2d Cir. 1906) 146 Fed. 383, 16 Am. Bankr. Rep. 561.

Construction—Statute to be liberally construed.—The adjudged cases favor a liberal construction of section 14 in the matter of the discharge of honest bankrupts. *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457.

Statutory provisions regulating the conditions on which bankrupts may be discharged

are remedial in their nature with respect to the bankrupts or to their creditors, or to both, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them. *In re Scott*, (D. C. Del. 1904) 126 Fed. 981, 11 Am. Bankr. Rep. 327.

Sections 14 and 17 should be construed together. Each bears upon a different subject; the one relating to the discharge, the other to the debts from which such discharge will relieve the debtor. The matters and things which will prevent a discharge in bankruptcy are different from those set out in the section which will not relieve from liability in case there is a discharge of the bankrupt. The bankrupt may be discharged and still be held liable for the classes of debts mentioned in section 17 of the Act; and in seeking to hold a party liable, who has been discharged in bankruptcy, the ground for such liability must be found in section 17, and not in section 14, which enumerates the grounds upon which a discharge shall be refused. *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740.

Construction with regard to purpose.—The well-settled and uniformly recognized purpose of the bankruptcy law is to secure to the creditors of an insolvent person, coming within the terms of the act, a full and honest disclosure and an equitable distribution of his property, and, this being accomplished, to give to the honest debtor a full discharge. This twofold purpose should be kept in view in construing and enforcing the provisions of the statute. *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703.

The right to a discharge is determined by the good faith of the bankrupt; and the effect of a discharge is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents. *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 24 Am. Bankr. Rep. 261.

Governed by law at time of filing petition.—A bankrupt's right to a discharge is governed by the law as it stood at the time he filed his petition. *Matter of Petersen*, (D. C. Minn. 1903) 10 Am. Bankr. Rep. 355.

Moral turpitude involved.—It is noticeable that, of the six reasons for refusing a discharge, recited in section 14b, all except the last two (which stand by themselves on a ground that affects the administration of the law) imply moral turpitude on the part of the bankrupt. *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494.

II. OBJECTIONS TO BANKRUPT'S DISCHARGE.

Who may object to granting of discharge.—Under section 14b, an objection to the granting of a discharge must be made by "the trustees or other parties in interest." This includes creditors. *In re Fries*, (S. D. Ia. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; *In re Maples*, (D. C. Mont. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426; *In re Brown*, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; *In re Conroy*, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512; *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; *In re Harr*, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; *In re Hendrick*, (D. C. Conn. 1906) 143 Fed. 647, 16 Am. Bankr. Rep. 218; *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *Talcott v. Friend*, (C. C. A. 7th Cir. 1909) 179 Fed. 676; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414.

Need not prove claim in order to object to discharge.—A creditor of a bankrupt having a claim, dischargeable in bankruptcy and provable in the pending proceeding, may oppose the bankrupt's discharge, though the claim is not proved. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56. See also *In re Conroy*, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249.

One who has a suit pending against a bank-

rupt for the recovery of a debt, which is contested, is a party in interest, and entitled to contest the bankrupt's right to a discharge. *In re Conroy*, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249.

Creditor barred by limitation.—The fact that a creditor's claim is barred by limitation at the time he files objections to the bankrupt's discharge does not deprive him of a subsisting cause of action so as to bar his right to object. *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414.

Objection in behalf of dissolved partnership.—Where a partnership, which had proved a claim against a bankrupt estate, was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, it was held that in order to maintain objections to the bankrupt's discharge it was necessary to show affirmatively that all of the partners assented. *In re Hendrick*, (D. C. Conn. 1906) 143 Fed. 647, 16 Am. Bankr. Rep. 218.

Debts not provable in, or unaffected by, bankruptcy.—If a creditor of a bankrupt, opposing his discharge, has a debt not provable, or which the discharge would not affect, the bankrupt's remedy is by a motion to expunge the claim or strike out the specifications. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56.

Effect of failure to object to allowance of claim.—The bankrupt has an equitable right to insist that objection shall be made to illegal claims, and his failure to exercise such right by requesting the trustee to make such objection estops him to deny the standing of a creditor, whose claim is allowed without objection, to file objections to his discharge. *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343.

Specification of objections—General requisites.—The specification of objections to a discharge is in the nature of a pleading, and the allegations thereof must be distinct, specific, and definite, and set forth with almost the exactness of an indictment, particularly where the offense charged is one included in section 29, so that the bankrupt may be advised of the acts charged, which bring him within the inhibition of the statute, so far as it relates to his discharge. *In re Holman*, (S. D. Ia. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; *In re Thomas*, (S. D. Ia. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re Hixon*, (S. D. Ia. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re Idzall*, (S. D. Ia. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741; *In re Hirsch*, (W. D. Tenn. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re Rhutassel*, (N. D. Ia. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re Kaiser*, (D. C. Minn. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; *In re Wetmore*, (E. D. Pa. 1900) 99 Fed. 703, 3 Am. Bankr. Rep. 704; *In re Peacock*, (E. D. N. C. 1900) 101 Fed. 560, 4 Am. Bankr. Rep. 136; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re McGurn*, (D. C. Nev. 1900) 102 Fed. 743, 4 Am. Bankr. Rep. 469; *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re*

Mudd, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 242; *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Brown*, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 317; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512; *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re McCarthy*, (S. D. N. Y. 1909) 170 Fed. 859, 22 Am. Bankr. Rep. 499; *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566; *In re Wolfensohn*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 60; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

Must show objector to be party in interest. — Where the specification fails to show that the party making the same is a party in interest who will be affected by the discharge, but affirmatively shows that he will not be, the court itself may take notice of this, although the specification is not excepted to; for opposition to a discharge will not be heard or determined at the instance of one who does not show in his specification that he is a party in interest, and therefore entitled to oppose the same. *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271.

An objection to a bankrupt's discharge, reciting that the objector "being interested as a creditor in the estate of [the bankrupt], does hereby oppose," etc., sufficiently shows that petitioner is "a party interested" in the bankrupt's estate. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56.

Statutory language insufficient. — So-called specifications of objection to the discharge of a bankrupt which merely state the grounds for refusing a discharge, in the language of the statute, without any attempt to specify any particular act of the bankrupt, are, as a general rule, wholly insufficient, and no evidence can be received thereunder, nor do they afford any basis for amendment. *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747. See also *In re Hirsch*, (W. D. Tenn. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re Wetmore*, (E. D. Pa. 1900)

99 Fed. 703, 3 Am. Bankr. Rep. 704; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 317; *Remmers v. Merchants'-Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78. And see generally the annotation of each statutory objection under subdivisions (1), (2), (3), (4), (5), and (6) of this (14b) subsection, *infra*, pp. 557-568.

Duplicity. — A charge that the bankrupt made a false oath in the proceeding, and that he has concealed assets from the trustee, is objectionable as including two grounds in one specification. *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

Several creditors may join in same specification. — Where several creditors of a bankrupt desire to urge the same objections to the bankrupt's discharge, they are not required to sign separate specifications of objection, but are entitled to join in the same specification. *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

Proceeding on specification abandoned by another creditor. — One creditor of a bankrupt may adopt and prosecute the objections filed by another to the bankrupt's discharge, when the latter has declared his intention to abandon the same. *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 830; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

A claim by a creditor, whose objections to a discharge are held to be insufficient, of the right to proceed under objections filed on behalf of another creditor, who did not appear on the hearing, should be passed upon by the district judge, and not the referee. *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

Must allege statutory objection. — It is incumbent on a creditor, opposing a bankrupt's discharge, to allege in his specification of objections at least one of the statutory grounds for withholding the discharge; objections not specified in the act being unavailable. *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

The grounds of refusing a discharge in bankruptcy are statutory and limited, and do not cover general dishonesty or unfair and sharp dealing with creditors, or oral misrepresentations made in obtaining property on credit, or even false oaths, unless they relate to matters material to the bankruptcy proceedings. *In re Chamberlain*, (N. D. N. Y. 1910) 180 Fed. 304.

That a bankruptcy petition was filed to defeat the claims of a judgment of an objecting creditor against the bankrupt is no ground for denying a discharge. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

The omission of creditors from the schedule of a bankrupt is not ground for refusing his discharge. *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

Larceny. — A creditor cannot procure the denial of the bankrupt's discharge because of the alleged offense of larceny, or larceny as bailee, committed by the bankrupt against

the objecting creditor more than a year before the petition was filed. *In re Wolf*, (E. D. Pa. 1908) 159 Fed. 299, 20 Am. Bankr. Rep. 304.

Owing nondischargeable debts.—It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for wilful and malicious injury to property, or a claim founded upon the fraud of the bankrupt for his misfeasance as a fiduciary. Such debts will not be affected by the discharge when granted, but they do not defeat the bankrupt's right to be discharged. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815.

Verification.—The authorities are practically unanimous to the effect that specifications of objection to the discharge of a bankrupt are pleadings, and should be verified as required by section 18c of the Bankruptcy Act; but the failure so to verify them is amendable. *In re Brown*, (5th Cir. 1901) 112 Fed. 49, 50 C. C. A. 118; *In re Baerncoepf*, (E. D. Pa. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 520; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *In re Robinson*, (D. C. R. I. 1903) 123 Fed. 844, 10 Am. Bankr. Rep. 477; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; *In re Meurer*, (E. D. Pa. 1906) 144 Fed. 445, 15 Am. Bankr. Rep. 823; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

But it has been held that a specification of objections to the discharge of a bankrupt is not a pleading within the meaning of section 18c, and that such specification need not be verified. *In re Jamieson*, (N. D. Ill. 1903) 120 Fed. 697, 9 Am. Bankr. Rep. 681.

Who should verify.—Specifications of objection to a bankrupt's discharge should be verified by the objecting creditors, and not by his counsel, unless some reason is given why the oath is not taken by the creditor. *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305. See also *In re Baerncoepf*, (E. D. Pa. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

Sufficient verification.—Affidavits to specifications of objection to a bankrupt's discharge, sworn to "to the best of affiant's knowledge, information, and belief," are sufficiently verified. *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

Special master may allow amendment.—A special master, to whom was referred a bankrupt's application for discharge, has power to permit the amendment of specifications of objection filed in behalf of a number of creditors, but signed and verified only by an agent of one, by allowing the same to be signed and verified by one of the other creditors. *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843.

Waiver of objection to verification.—Where no objection to the want of verification of a petition for a bankrupt's discharge was made until after the evidence on the application was heard before the referee, it was held that it was too late. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

Time to file specifications.—The time for filing objections to a bankrupt's discharge is governed by rule 32 of the general orders in bankruptcy, which provides that "a creditor opposing the application of a bankrupt for his discharge . . . shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge." *In re Frice*, (S. D. Ia. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; *In re Albrecht*, (E. D. Pa. 1900) 104 Fed. 974, 5 Am. Bankr. Rep. 223; *In re Clothier*, (E. D. Pa. 1901) 108 Fed. 199, 6 Am. Bankr. Rep. 203; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Grant*, (E. D. Pa. 1905) 135 Fed. 889, 14 Am. Bankr. Rep. 398; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 18 Am. Bankr. Rep. 252, and see to the same effect under a former statute *In re Grefe*, (S. D. N. Y. 1868) 2 Nat. Bankr. Reg. 329, 10 Fed. Cas. No. 5,794; *In re Levin*, (C. C. A. 1st Cir. 1910) 176 Fed. 177, 23 Am. Bankr. Rep. 845.

Extension of time.—The judge may, in his discretion, extend the time for entering an appearance as well as for filing the specification; and may do so after the time has expired, as well as before. *In re Levin*, (C. C. A. 1st Cir. 1910) 176 Fed. 177, 23 Am. Bankr. Rep. 845.

But a creditor has no right to enter an appearance after return day, and should not be allowed to do so, except for good cause shown in excuse of the delay. *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Grant*, (E. D. Pa. 1905) 135 Fed. 889, 14 Am. Bankr. Rep. 398.

Amendment.—The specification of objections to the granting of a discharge may be amended with the same liberality as is allowed in the case of other pleadings in bankruptcy proceedings. *In re Hixon*, (S. D. Ia. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re Morgan*, (W. D. Ark. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 242; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *In re Osborne*, (C. C. A. 1st Cir. 1902) 115 Fed. 1, 8 Am. Bankr. Rep. 165; *In re Carley*, (C. C. A. 3d Cir. 1902) 117 Fed. 130, 8 Am. Bankr. Rep. 720; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1903) 121 Fed. 822, 10 Am. Bankr. Rep. 375; *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am.

Bankr. Rep. 244; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56; *In re Wittenberg*, (E. D. Pa. 1908) 160 Fed. 991, 20 Am. Bankr. Rep. 398; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271.

Thus it has been held that where specifications of objection to a bankrupt's discharge, alleging perjury by the bankrupt in his examination before the referee, are not sufficiently definite, they will not be wholly disregarded, but the creditor may be given an opportunity to cure the defect by amendment. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Wittenberg*, (E. D. Pa. 1908) 160 Fed. 991, 20 Am. Bankr. Rep. 398.

So also it has been held that an opposing creditor may amend his specifications of objection to a bankrupt's discharge, by supplying allegations that the acts relied upon were knowingly and fraudulently committed by the bankrupt, at any time before the evidence is closed. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

It has also been held that, under certain circumstances, the specifications may be amended to conform to the proofs. *In re Lesser*, (S. D. N. Y. 1901) 108 Fed. 205; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187. See also *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

And that specifications opposing a bankrupt's discharge, though entirely defective, may be amended at the discretion of the court. *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391.

Who may allow amendment.—Leave to amend the specifications, filed in opposition to the discharge of a bankrupt, can only be granted by the judge. *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747.

Must be something to amend.—It has been held that specifications of objection to the discharge of a bankrupt which are in the language of the statute without more, and contain no statement of facts, are not amendable. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972; *In re Bromley*, (E. D. Pa. 1907) 152 Fed. 493, 18 Am. Bankr. Rep. 227.

A new issue cannot be presented by amendment.—Objections to the application of a bankrupt for a discharge cannot be amended so as to present a new issue, after the evidence is in and the objections have been overruled. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

Time of allowance.—The court undoubtedly has the right to amend the specifications at any stage of the case. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

Rule 32 in bankruptcy does not operate as a statute of limitations to prevent the court, in its discretion, from permitting creditors to file amended specifications of objection to a

bankrupt's discharge after the expiration of ten days. *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56.

But it has been held that an amendment of objections to the discharge of a bankrupt in matters of substance is only allowable, after the time within which objections are required to be filed, where the amendment is no more than an amplification, by the supplying of details, of charges which are substantially stated in the original. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

Waivers of defects in specification.—It has been held in several cases that the right to take advantage of a defective specification of objections may be waived by the failure to take prompt exception thereto. *In re Osborne*, (C. C. A. 1st Cir. 1902) 115 Fed. 1, 8 Am. Bankr. Rep. 165; *In re Baernooft*, (E. D. Pa. 1902) 117 Fed. 875, 9 Am. Bankr. Rep. 133; *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591; *In re Robinson*, (D. C. R. I. 1903) 123 Fed. 844, 10 Am. Bankr. Rep. 477; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302.

Total failure to state ground of objection not cured by waiver.—But where specifications of objection to the discharge of a bankrupt wholly fail to state any statutory ground for the refusal of a discharge, their insufficiency is not waived by the bankrupt by failing to except thereto, and they may be disregarded. *In re McCarthy*, (S. D. N. Y. 1909) 170 Fed. 859, 22 Am. Bankr. Rep. 499.

Answering specifications of objection.—The bankrupt may answer, or plead otherwise in resistance of the specification of objections; but he is not obliged to do so. *In re Logan*, (D. C. Ky. 1900) 102 Fed. 876, 4 Am. Bankr. Rep. 525; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795.

The bankrupt's failure to answer, or plead to specifications of objection to the granting of a discharge, is not an admission of their legal sufficiency; nor does it preclude the bankrupt from relying on the fact that the proof thereunder is insufficient to prevent his discharge. *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1.

Prosecution of objection in forma pauperis.—A creditor who objects to the discharge of a bankrupt may prosecute his objections in *forma pauperis* by virtue of the Act of July 20, 1892, c. 209, 27 Stat. L. 252, 2 Fed. Stat. Annot. 294, which gives any citizen entitled to commence "any suit or action in any court of the United States" such right on making the required showing. *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 630.

III. HEARING AND PROOF.

Necessity of hearing.—A motion for a bankrupt's discharge cannot be granted until specifications of objection have been disposed of. *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

Hearing must be had before judge.—An application for a discharge in bankruptcy, with such briefs and pleas as may be made in opposition thereto, must be heard and determined by the judge of the court of bankruptcy. The decision of the question whether or not a discharge shall be granted cannot be delegated to a referee. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110; *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

It is an irregularity for a referee to take testimony on an application for discharge against which an objection has been filed, before returning the same to the court; but where both parties appear, so that no prejudice can result, testimony so taken will not be stricken out. *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380. See also *In re Polakoff* (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358.

In the northern district of New York, it is settled practice to require all objections to the sufficiency of specifications of objection to the discharge of a bankrupt, to be raised before the judge on motion, within a specified time. *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591.

Reference to special master.—As the District Court is invested with jurisdiction, under section 2, both at law and in equity, to enable it to exercise original jurisdiction in bankruptcy proceedings, such court has power to order a reference of an issue made by creditors by filing objections to a bankrupt's petition for discharge; and, in such cases, the court may avail itself of preliminary assistance by the appointment of a special master to hear and report on the facts, as in other proceedings in equity; and this course is usually pursued. *In re Kaiser*, (D. C. Minn. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110; *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; *In re Eldred*, (E. D. N. Y. 1907) 152 Fed. 491, 18 Am. Bankr. Rep. 243; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Gillardon*, (E. D. Pa. 1911) 187 Fed. 289; *In re Rauchenplat*, (D. C. Porto Rico 1903) 9 Am. Bankr. Rep. 763.

Under rule 41 in the eastern district of New York, it is the duty of objecting creditors to see that the objections to a bankrupt's application for discharge are referred to a special master, and to arrange for the hearing thereon. *In re Eldred*, (E. D. N. Y. 1907) 152 Fed. 491, 18 Am. Bankr. Rep. 243.

It is the duty of a special master to whom have been referred a bankrupt's petition for discharge and specifications of objection thereto, to take and report all the testimony of-

fered, with his rulings as to its admissibility. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

A finding by a special commissioner, to whom were referred a bankrupt's application for discharge, and objections thereto, should be followed; unless there is no evidence to support it. *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

Bankrupt must attend hearing.—The bankrupt's attendance on the hearing of objections to his application for a discharge, if demanded by the creditors, cannot be dispensed with by the referee, under the requirements of section 7a (1). *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109.

Specifications of objection must be proved.—The opposition to a discharge is in the nature of a new suit, and requires proof in support of the allegations presented. The burden of proof is on the opposing creditors, and they must satisfy the conscience of the court that the grounds of objection urged are true, and that the bankrupt is not entitled to a discharge, because of having committed some one of the offenses specified in the several subdivisions of section 14b. *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Idzall*, (S. D. Ia. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741; *In re Phillips*, (S. D. N. Y. 1900) 98 Fed. 844, 3 Am. Bankr. Rep. 542; *In re Finkelstein*, (S. D. N. Y. 1900) 101 Fed. 418, 3 Am. Bankr. Rep. 800; *In re Brice*, (S. D. Ia. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355; *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Cashman*, (S. D. N. Y. 1900) 103 Fed. 67, 4 Am. Bankr. Rep. 326; *In re Fitchard*, (N. D. N. Y. 1900) 103 Fed. 742, 4 Am. Bankr. Rep. 609; *In re Ferris*, (N. D. Ia. 1900) 105 Fed. 356, 5 Am. Bankr. Rep. 246; *In re Howden*, (N. D. N. Y. 1901) 111 Fed. 723, 7 Am. Bankr. Rep. 191; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Salisbury*, (N. D. N. Y. 1902) 113 Fed. 833, 7 Am. Bankr. Rep. 771; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Dauchy*, (N. D. N. Y. 1903) 122 Fed. 688, 10 Am. Bankr. Rep. 527; *In re Chamberlain*, (W. D. N. Y. 1903) 125 Fed. 629, 11 Am. Bankr. Rep. 95; *In re Hamilton*, (W. D. N. Y. 1904) 153 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Prager*, (N. D. W. Va. 1905) 134 Fed. 1006, 13 Am. Bankr. Rep. 527; *In re Keefer*, (W. D. N. Y. 1905) 135 Fed. 885, 14 Am. Bankr. Rep. 290; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Eades*, (C. C. A. 7th Cir. 1905) 143 Fed. 293, 16 Am. Bankr. Rep. 30; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 832; *Troeder v. Lorsch*, (1st Cir. 1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387; *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am.

Bankr. Rep. 457; *In re Wermuth*, (N. D. N. Y. 1910) 179 Fed. 1009; *In re Chamberlain*, (N. D. N. Y. 1910) 180 Fed. 304; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 181; *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Wolfensohn*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 60; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703; *Matter of Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251.

Clear, positive, and direct proof required.—The burden of proof is upon an opposing creditor to establish the ground for refusing a discharge by clear, positive, and direct evidence. *In re Chamberlain*, (W. D. N. Y. 1903) 125 Fed. 629, 11 Am. Bankr. Rep. 95.

Evidence must be clear and convincing.—On an application for a bankrupt's discharge, the burden of proof is on the opposing creditors to establish the truth of the objections set out in the specification, by clear and convincing evidence. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461.

Evidence to satisfy conscience of court sufficient.—The strict rules applicable to the trial of the bankrupt under an indictment should not be applied in the case of discharge proceedings. It is sufficient ground for refusing a discharge, if the conscience of the court is satisfied by proper and sufficient evidence that the bankrupt is not entitled to receive it. *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271.

Proof need not preclude reasonable doubt.—A creditor objecting to the discharge of a bankrupt is not bound to prove his specifications beyond a reasonable doubt. *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94.

Suspicion of fraud insufficient.—The burden of proof rests upon the creditor, and while the acts charged may be established by inference from the facts proved, it is not sufficient that such facts justify a suspicion of fraud, but they must be inconsistent with honesty and good faith. *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52.

Where question of law is presented.—Though generally the burden is on the creditor to sustain his opposition to the bankrupt's discharge, that rule does not apply where the question presented is one of law, e. g., the construction of a statute, and not one of fact. *In re Gilpin*, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

Evidence.—The ordinary rules of evidence are applicable in a contest of the bankrupt's right to be discharged. *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461.

Testimony given by the bankrupt, under section 7a (9), may be used to defeat his application for discharge. *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380. See also

In re Bard, (S. D. N. Y. 1901) 108 Fed. 208; *In re Wilcox*, (2d Cir. 1900) 109 Fed. 628, 48 C. C. A. 567; *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71.

But the testimony of third persons, given under section 21a before the referee, is not directed to a defined issue, and is inadmissible on a subsequent hearing of specifications against the bankrupt's application for discharge. *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380.

Testimony given at other hearings must be duly proved.—It has been held that a referee, acting as a special master on a hearing in proceedings for a discharge, must confine himself to the evidence produced before him as such special master; and that he cannot, in the determination of such hearing, base his findings upon testimony given before him as a referee. *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Walder*, (D. C. Conn. 1907) 152 Fed. 489, 18 Am. Bankr. Rep. 419; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700.

IV. DETERMINATION.

When discharge should be granted.—It has been held that it is the duty of the court to grant a bankrupt his discharge, unless the commission of one of the acts specified in the several subdivisions of section 14b has been committed by him, and such commission has been duly proved. *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re Eades*, (C. C. A. 7th Cir. 1905) 143 Fed. 293, 16 Am. Bankr. Rep. 30; *In re Wolf*, (E. D. Pa. 1903) 159 Fed. 299, 20 Am. Bankr. Rep. 304; *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703.

Discharge not discretionary.—The refusal to grant a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed offenses. *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703.

The fact that a bankrupt is a nonresident of the district does not affect his right to a discharge. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493. See also *In re Clisdell*, (N. D. N. Y. 1900) 101 Fed. 246, 4 Am. Bankr. Rep. 95.

Only such grounds as are specified by the objecting creditors will be considered in opposition to the discharge of a bankrupt. *In re Adams*, (N. D. N. Y. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696.

But it has been held that the judge is not confined to the consideration of those objections which are set forth by the creditors, and that he should investigate the merits of the application. *In re Marshall Paper Co.*,

(D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653.

The court is not required to grant a discharge to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted, although no cause for refusing it is shown under section 14b. In re Luftig, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773.

The Bankruptcy Act is liberal in its provisions for a discharge of the bankrupt from his debts, and that spirit must be observed and carried out in the consideration of objections thereto. If it plainly appears, however, that the applicant has intentionally and substantially violated the Act, in either of the particulars stated in section 14b, the duty of the court is equally clear to deny the benefits of a discharge. *In re McBachron, (E. D. Wis. 1902) 116 Fed. 783, 8 Am. Bankr. Rep. 732.*

Dismissal of petition for discharge because of failure to prosecute.—Where a bankrupt filed a petition for discharge, but took no further steps in the matter for a year thereafter, it was held that he was chargeable with an abuse of the proceedings for the purpose of delaying creditors; and that, on proper application by a creditor, his petition for discharge should be dismissed. *In re Lederer, (S. D. N. Y. 1903) 125 Fed. 96, 10 Am. Bankr. Rep. 492.*

The specification of objections may be disregarded where the objector does not appear on the hearing of the application for a discharge. *In re Chase, (D. C. Mass. 1910) 186 Fed. 408.*

So, also, it has been held that it is the duty of objecting creditors to bring the matter on for hearing; otherwise the court is warranted in dismissing the specifications. *In re Fritz, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84.*

But see *In re Wolff, (N. D. Cal. 1904) 132 Fed. 396, 18 Am. Bankr. Rep. 95*, wherein it was held that a court of bankruptcy is not authorized to dismiss a bankrupt's petition for discharge, filed in due time, because of delay in bringing the matter to a hearing after specifications of objection have been filed.

Withholding decision.—*A claimant holding a lien against garnishees indebted to a bankrupt is entitled to a stay of the bankrupt's discharge for a reasonable time to enable such claimant to enforce his rights against the garnishees, and the sureties on a bond to dissolve the garnishment. In re Maher, (N. D. Ga. 1909) 169 Fed. 997, 22 Am. Bankr. Rep. 290.*

Stay to determine rights.—Where creditors of a bankrupt hold obligations containing a waiver of the right of exemption, the bankruptcy proceedings may be stayed until the rights of such creditors have been determined in a state court. *In re Allen, (W. D. Va. 1904) 134 Fed. 320, 19 Am. Bankr. Rep. 518.* And see to the same effect *Lockwood v. Exchange Bank, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107; B. F. Roden Grocery Co. v. Bacon,*

(C. C. A. 5th Cir. 1904) 133 Fed. 515, 13 Am. Bankr. Rep. 251; In re Castleberry, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; In re Olansky, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

And where it was contended that a bankrupt was not entitled to retain property claimed as against a judgment for breach of a marriage promise, and the only way in which the judgment creditor could test the question was by proceedings in the state courts, it was held that the bankrupt's discharge should be withheld until the judgment creditor was afforded a reasonable opportunity to test her rights. *In re Brumbaugh, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204.*

So, also, it has been held that where there seems to be probable cause for opposition to the petitioner's discharge in bankruptcy, on the ground that his petition did not contain a full, true, and correct statement of assets or financial condition, a discharge will be refused until the charge can be regularly investigated, and the record submitted to a proper tribunal, where he may be tried and punished if guilty as the Act prescribes. *In re Steed, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.*

A court of bankruptcy will not stay its decision upon a bankrupt's application for discharge, to await the result of a pending action in a state court, where the issues are not identical, and the decree of the state court would not determine the right of the bankrupt to be discharged. In re Coriell, (S. D. N. Y. 1899) 97 Fed. 29.

A motion to withhold the bankrupt's discharge, in order that a creditor may pursue a remedy for the collection of a judgment lien in the state court, will be denied where it appears that the discharge cannot, under the law of the state, affect the rights of such judgment creditor with respect to the collection of his lien. *In re Hartsell, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177; In re Weaver, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.*

The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly, and of themselves are not to be corrected by the withholding of a discharge. *In re Fanning, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55.*

Amendment of discharge.—A court of bankruptcy has power, after the term at which a discharge has been granted, to amend the same; and also to permit the amendment of the application for discharge, when necessary, to set out correctly and more specifically the character of the debts scheduled and provable, and upon which the discharge operated. *In re Kaufman, (E. D. N. Y. 1905) 136 Fed. 262, 14 Am. Bankr. Rep. 393.*

Res judicata.—An adjudication refusing a discharge in bankruptcy finally determines for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. *Bluthenthal v. Jones,*

(1907) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595.

But where the subsequent proceeding is in a different district, a creditor who claims immunity therefrom because of a former proceeding must plead such former proceeding. *Bluthenthal v. Jones*, (1907) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288.

Refusal to grant discharge as affecting subsequent bankruptcy proceedings.—A bankrupt who has been refused a discharge is not debarred from filing a second petition and obtaining a discharge thereunder; and such discharge, when granted, will be made general, leaving its effect as to debts proved under the first petition, but not under the second, to be determined whenever the occasion may arise. *In re Claff*, (D. C. Mass. 1901) 111 Fed. 506, 7 Am. Bankr. Rep. 128.

Court may limit discharge in second proceeding.—Where a bankrupt is not entitled to a discharge as to certain debts scheduled in a former proceeding, the court has power to limit a subsequent discharge so as to exclude such claims. *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414.

The denial of the application of a bankrupt for a discharge renders the issue as to his right to a discharge *res judicata* as to

debts which were provable in that proceeding; and where in a subsequent voluntary proceeding the bankrupt schedules the same debts and the same assets, the second proceeding is a manifest attempt to evade the effect of the former, and the bankrupt should be restrained by the court from prosecuting a second application for a discharge; but where a considerable time has elapsed and new debts are also scheduled, the bankrupt has the right to maintain the proceeding as to those, and an order granting a stay should be limited accordingly. *In re Kuffler*, (C. C. A. 2d Cir. 1907) 151 Fed. 12, 18 Am. Bankr. Rep. 16, *reversing* (E. D. N. Y. 1906) 144 Fed. 445, 16 Am. Bankr. Rep. 305. See also *In re Kuffler*, (E. D. N. Y. 1907) 155 Fed. 1018, 19 Am. Bankr. Rep. 181.

Costs.—The power to award costs against a creditor who files specifications of objection in opposition to a bankrupt's discharge is inherent in a District Court as a court of equity, and may be exercised in proper cases, although such power is not specifically conferred by the Bankruptcy Act. See *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 830; *In re Wolpert*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 436; *In re Gaylord*, (N. D. N. Y. 1901) 5 Am. Bankr. Rep. 805.

(1) [*Commission of offense.*] committed an offense punishable by imprisonment as herein provided; or [(1898) 30 Stat. L. 550.]

Commission of offense.—Under section 14b (1) the bankrupt must be denied a discharge where it has been proven that he has committed an offense punishable by imprisonment as provided by the bankruptcy statute. The offenses to which the Act refers are those specified in the several subdivisions of section 29 and have been considered generally thereunder.

Making false oath.—A bankrupt who has made a false oath or account in, or in relation to, any bankruptcy proceedings will be denied a discharge; the making of such oath being an offense set out in section 29b (2). *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Royak*, (E. D. N. C. 1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Gailey*, (C. C. A. 7th Cir. 1904) 127 Fed. 538, 11 Am. Bankr. Rep. 539; *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684.

A bankrupt who has intentionally testified falsely respecting a material fact, at the first meeting of creditors, is not entitled to a discharge, even though he could not be convicted of perjury because of the provisions of section 7a (9). *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1.

Subsequent correction ineffective.—Where

a bankrupt knowingly omitted certain assets from his schedules, the fact that he listed the property and amended his schedules after his attempt to conceal such assets, and after the fact that he had made a false oath, had been discovered, is insufficient to relieve him of the consequences of his acts and entitle him to a discharge. *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684.

False oath in another proceeding.—The making of a false oath by a bankrupt in a proceeding in bankruptcy, not against him, but against the corporation of which he was an officer and stockholder, is not ground for refusing his discharge. *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

Offense must be knowingly and fraudulently committed.—In order to render the commission of an offense, as provided by section 29, available as an objection to the granting of a discharge, under section 14b (1), it must be alleged and proved that such offense was committed knowingly and fraudulently. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Bryant*, (E. D. Tenn. 1900) 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *Smith v. Keegan*, (C. C. A. 1st Cir. 1901) 111 Fed. 157, 7 Am. Bankr. Rep. 4; *In re Salisbury*, (N. D. N. Y. 1902) 113 Fed. 833, 7 Am. Bankr. Rep. 771; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Blalock*, (D. C. S. C.

1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686, 12 Am. Bankr. Rep. 119; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; *In re Luftig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773.

Thus it has been held that while certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule and did not mention them. *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412.

The fact that a bankrupt, after the filing of the petition against him, procured the buying up of a creditor's claim, and furnished the money therefor, with intent to defeat the Bankruptcy Act, is not ground for refusing his discharge, where it is not shown that the creditor knew that the bankrupt furnished the money, so as to render him guilty of an offense under section 29b (4). *In re Luftig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773.

Where a bankrupt firm did not anticipate any reversion in certain lumber which it transferred to a creditor, and one of the partners testified that the firm was morally certain that the creditor would not realize near the amount of the firm's debt, it was held that such partner's oath to the schedules, omitting such reversionary interest, was insufficient to bar his discharge. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

And where a proposed voluntary bankrupt, who had no property except such as was exempt, borrowed fifty dollars wherewith to pay the fees and costs of his attorney, just before filing his petition, it was held that he was not required to list the amount so borrowed in his schedule of assets, and his omission to do so was not a sufficient ground of opposition to his discharge. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529.

(2) [*Concealment of financial condition.*] with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or [(*Amended 1903*) 32 Stat. L. 797.]

Concealment of financial condition. — A bankrupt who has destroyed, concealed, or failed to keep books of account or records, from which his financial condition may be ascertained, with the intent to conceal such financial condition, will not be granted a dis-

charge in bankruptcy proceedings. *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160; *In re Conley*, (N. D. Ga. 1902) 120 Fed. 42, 9 Am. Bankr. Rep. 496; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360. And see *supra*, p. 550, annotation II. *Objections to Bankrupt's Discharge.*

Alleging false oath. — Where it is specified, as an objection to the discharge of a bankrupt, that he has committed the crime of perjury in his testimony before the referee, the objection must set out the testimony alleged to be false, together with the facts relied on to prove its falsity, so as to present a specific issue. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723.

Evidence. — To justify the denial of a bankrupt's discharge on the ground that he made a false oath to his schedules, the evidence must be of a sufficiently clear and convincing character in order to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury. *Remmers v. Merchants' Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383. And see *supra*, p. 553, annotation III. *Hearing and Proof.*

The burden is upon the creditors to prove the crime charged by clear and positive proof. *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84.

On the hearing of an objection to a bankrupt's discharge on the ground that he has committed an offense punishable by imprisonment, while the opposing creditor is not required to establish such offense beyond a reasonable doubt, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723.

charge in bankruptcy proceedings. *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160; *In re Conley*, (N. D. Ga. 1902) 120 Fed. 42, 9 Am. Bankr. Rep. 496; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371;

In re Studebaker, (C. C. A. 2d Cir. 1904) 127 Fed. 951, 11 Am. Bankr. Rep. 384, reversing (S. D. N. Y. 1903) 124 Fed. 945, 10 Am. Bankr. Rep. 205; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Alvord*, (D. C. Conn. 1905) 135 Fed. 236, 14 Am. Bankr. Rep. 264; *In re Lewin*, (S. D. N. Y. 1907) 155 Fed. 501, 18 Am. Bankr. Rep. 72; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; *In re Goldich*, (E. D. Pa. 1908) 164 Fed. 882, 21 Am. Bankr. Rep. 249; *In re Brod*, (N. D. Ga. 1909) 166 Fed. 1011, 21 Am. Bankr. Rep. 426; *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843; *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444, 21 Am. Bankr. Rep. 857; *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389; *In re Koelle*, (E. D. Pa. 1909) 171 Fed. 257, 22 Am. Bankr. Rep. 515; *In re Wiedmann*, (W. D. N. Y. 1911) 188 Fed. 684; *Matter of Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251.

Effect of concealment immaterial.—Any failure by a bankrupt to keep books "with intent to conceal his financial condition" defeats his right to a discharge, whatever its actual effect on creditors may have been. *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

Entry of loans made prior to enactment of bankruptcy law.—The fact that loans made to a bankrupt and not entered by him in his regular account books were made before the Bankruptcy Act was passed does not excuse his failure to enter them as required by the Act. *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160.

Where books are unnecessary.—The bankrupt's omission to keep books of account cannot be made a ground of opposition to his discharge, when it appears that, since a time more than three years prior to the passage of the Bankruptcy Act, he has not been engaged in any business to which the keeping of books would be necessary or appropriate. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529.

So when a bankrupt is merely an employee, and not engaged in any business of his own, his failure to keep books showing his financial condition does not indicate a fraudulent intent which justifies the refusal of his discharge. *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412.

Intention to conceal.—In order that the destruction or concealment of books or records, or the failure to keep them, may constitute a valid objection to the granting of a discharge in bankruptcy, it is necessary that such destruction or concealment of books of accounts or records, or failure to keep them, be done with the intent to conceal the bankrupt's financial condition. *In re Brice*, (S. D.

Ia. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355; *In re Spear*, (D. C. Vt. 1900) 103 Fed. 779; *In re Schultz*, (S. D. N. Y. 1901) 109 Fed. 264, 6 Am. Bankr. Rep. 91; *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 286; *In re Studebaker*, (C. C. A. 2d Cir. 1904) 127 Fed. 951, 11 Am. Bankr. Rep. 384, reversing (S. D. N. Y. 1903) 124 Fed. 945, 10 Am. Bankr. Rep. 205; *Van Ingen v. Schopenhofen*, (C. C. A. 8th Cir. 1904) 120 Fed. 352, 12 Am. Bankr. Rep. 24; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Alldorf*, (N. D. Ia. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Mackenzie*, (D. C. Conn. 1904) 132 Fed. 114, 13 Am. Bankr. Rep. 605; *In re Halsell*, (N. D. Tex. 1904) 132 Fed. 562, 13 Am. Bankr. Rep. 107; *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Prager*, (N. D. W. Va. 1905) 134 Fed. 1006, 13 Am. Bankr. Rep. 527; *In re Keefer*, (W. D. N. Y. 1905) 135 Fed. 885, 14 Am. Bankr. Rep. 290; *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 831; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Burstein*, (D. C. Conn. 1908) 160 Fed. 765, 20 Am. Bankr. Rep. 399; *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Haskell*, (S. D. N. Y. 1908) 164 Fed. 301, 20 Am. Bankr. Rep. 914; *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768; *In re Barthier*, (D. C. Mass. 1910) 188 Fed. 394; *In re Idzall*, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 741; *In re Rauchenplat*, (D. C. Porto Rico 1903) 9 Am. Bankr. Rep. 764; *In re Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251.

Thus it has been held that where a book entry was made for the purpose of deceiving the general creditors into a belief that an ordinary sale had been made to an unsecured creditor, whereas in fact the transaction was an unlawful preference, while such conduct is reprehensible, it is not sufficient to bar a discharge, where there was no intention to conceal the bankrupt's financial condition. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

Intent must be shown.—Where a creditor seeks to prevent a discharge on the ground of failure to keep books of account, etc., the burden is on him not only to show that the bankrupt failed to keep books of account, but that his omission to do so was with the intent to conceal his financial condition. *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 831. See also *In re Halsell*, (N. D. Tex. 1904) 132 Fed. 562, 13 Am. Bankr. Rep. 107.

Mere negligence immaterial.—A refusal of a discharge to a bankrupt on the ground that he failed to keep books is not warranted, unless there is evidence from which, at least, it can fairly be inferred that there was an actual intent to conceal his condition. Mere negligence in the keeping of books is not suffi-

cient. *In re Haskell*, (S. D. N. Y. 1908) 164 Fed. 301, 20 Am. Bankr. Rep. 914.

Need not be a fraudulent intent. — But the failure of a bankrupt to keep correct books of account, "with intent to conceal his financial condition," debars him from the right to a discharge, whether his intent was fraudulent or not. *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843.

The fraud of a partner in so keeping the firm books, of which he had sole charge, as to conceal from his partner as well as creditors withdrawals of money by himself, cannot be imputed to the innocent partner, so as to defeat his right to a discharge. *In re Schultz*, (S. D. N. Y. 1901) 109 Fed. 264, 6 Am. Bankr. Rep. 91.

But to entitle a member of a partnership to a discharge, notwithstanding the fact that the firm failed to keep proper books with the intent on the part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of participation therein. *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

Intention presumed. — *Prima facie* a man must be held to intend the natural and probable consequence of his acts; and where the inevitable consequence of an omission to keep books of account is the concealment of such financial condition, the intent to conceal must be presumed; though such presumption may be rebutted. *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444; *In re Koelle*, (E. D. Pa. 1909) 171 Fed. 257, 22 Am. Bankr. Rep. 515.

Thus, where a bankrupt, who was a man of business experience, failed to keep any books whatever from which his financial condition might be ascertained, it was held that it must be presumed that he intended to conceal such condition, and that he was not entitled to a discharge. *In re Alvord*, (D. C. Conn. 1905) 135 Fed. 236, 14 Am. Bankr. Rep. 264.

(3) [*Obtained money or property upon false statement.*] obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or [(*Inserted 1903*) 32 Stat. L. 797; (*amended 1910*) Stat. L. 339.]

False statement in writing. — Where a bankrupt has obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person, he will not be entitled to a discharge. *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380; *In re Harr*, (E. D. Mo. 1906) 143 Fed. 423; *In re Hardie*, (W. D. Tex. 1906) 143 Fed. 607; *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331; *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147; *In re Darevski*, (E. D. Pa. 1909) 171 Fed. 288, 22 Am. Bankr. Rep. 571; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am.

The specification of objections to the discharge of a bankrupt on the ground that he, with fraudulent intent to conceal his true financial condition, failed to keep books of account, is sufficient if made in the language of the Act. *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Ginsburg*, (E. D. Pa. 1904) 120 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; *In re Brod*, (N. D. Ga. 1909) 166 Fed. 1011, 21 Am. Bankr. Rep. 426; *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444, 21 Am. Bankr. Rep. 857.

But see *In re Milgram*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306, wherein it was held that a specification of objection in the statutory language was insufficient.

Particularity of description not required.

— A specification of objection to the bankrupts' discharge, alleging that the bankrupts, with intent to conceal their financial condition, did destroy, through the agency of their regularly authorized bookkeeper, canceled checks drawn by the bankrupts, together with stubs of such checks, from which such condition might be ascertained, is not objectionable for the failure to more definitely describe the checks and stubs alleged to have been destroyed. *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302.

Allegation of intent necessary. — An objection to the discharge of a bankrupt because of his failure to keep proper books of account, which does not state that such failure was with intent to conceal his financial condition, is insufficient, but such a defect is amendable. *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768.

Bankr. Rep. 414; In re Russell, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. Rep. 850; *In re Augspurger*, (S. D. Ohio 1909) 181 Fed. 174; *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71; *In re Neyland*, (S. D. Miss. 1910) 184 Fed. 144; *In re Petersen*, (D. C. Minn. 1903) 10 Am. Bankr. Rep. 355; *Katzenstein v. Reid*, (1905) 16 Am. Bankr. Rep. 740, 41 Tex. Civ. App. 106, 81 S. W. 360; *Matter of Broner*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 644; *Mooney v. Davis*, (1889) 75 Mich. 188, 42 N. W. 862, 13 Am. St. Rep. 425; *Wilmot v. Lyon*, (1897) 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

The statute applies to any false statement which has to do with the extension of credit affecting the bankruptcy proceeding. *In re Berg*, (D. C. Mass. 1910) 183 Fed. 335.

Good faith immaterial.—Where a creditor relied on a bankrupt's statement, which was materially false in fact, in selling him goods on credit, it was held that the bankrupt was not entitled to a discharge, though the mistake was made in good faith and was not intentional. *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147.

Credit must have been extended on faith of statement.—Where it appears that credit was not extended because of an alleged false statement, but that the creditor refused to act thereon, and required the giving of security, before the credit was extended, the statement is not sufficient to bar the bankrupt's discharge. *In re Kaplan*, (E. D. Pa. 1905) 141 Fed. 463, 15 Am. Bankr. Rep. 534.

Creditor estopped with respect to false statement.—An agreement by a creditor, based on a valuable consideration, which recites that one of its purposes is to cancel and surrender certain written statements made by a debtor on which he obtained credit, the truthfulness of which was in controversy between the parties, and by which the creditor expressly cancels and "agrees to surrender up the same, and concedes that any inaccuracies therein . . . were inadvertent and without wrongful intent," debars the creditor from using such statements as a ground of objection to the debtor's discharge in bankruptcy. *In re Russell*, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. Rep. 850.

A written financial statement made by a business firm to a commercial agency, reciting that it is made as a basis for credit with the associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made directly to them, and, if materially false, will debar the debtor firm from the right to a discharge. *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331. See also *In re Augspurger*, (S. D. Ohio 1909) 181 Fed. 174.

Where a bankrupt made a false statement to a commercial agency in order to prevent "unfavorable reports" being given out concerning him, and later attempted to correct such statement by another, which was also false, and he referred to the same and was granted credit on the basis thereof, it was held that he was guilty of wilfully making a false statement for credit, which was sufficient to deprive him of the right of discharge. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

But it has been held that it is not a valid objection to a bankrupt's discharge that he made a false statement concerning his financial condition to a commercial agency, on the faith of which credit was extended, where it does not appear that such statement was made directly to such creditors, and the bankrupt does not make the commercial agency his representative for the purposes of communicating such statement. *In re Foster*, (S. D. Miss. 1910) 186 Fed. 254.

And see *In re Russell*, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. Rep. 850, wherein it was said that if the bankrupt gave to the reporter of a commercial agency a

report to be filed with said agency for the purpose of securing a rating, and not for the purpose of obtaining property on credit, such statement is not within the language of section 14b (3). But if the circumstances were such that the bankrupt knew that a certain proposed creditor was making inquiries at the agency concerning him, then the giving of such false statement to the reporter was equivalent to authorizing the commercial agency to repeat such statement to the proposed creditor; and although the latter never saw the original statement, the copy which was sent to it by the commercial agency would be as effective to bind the bankrupt as if he had signed and delivered it personally. In that event, however, the "materially false statement in writing" would be the one which was delivered to the proposed creditor, and upon which it relied.

Borrowing money is obtaining "property" on credit within the meaning of section 14b (3). *In re Gilpin*, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374, *disapproving In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807.

Statement as continuing representation.—A financial statement made by a bankrupt for credit, to a commercial agency, is a continuing representation for a reasonable time that the facts stated therein are true. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

But the omission by a bankrupt to state an item of indebtedness, in a statement made at the request of a wholesale house to which he had previously sent an order for goods, cannot be considered as rendering it a materially false statement, made for the purpose of obtaining other goods which were not ordered until eight months thereafter—the goods ordered at the time having been paid for in the meantime, so as to defeat the right to a discharge. *In re Allendorf*, (N. D. Ia. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320.

Statement made by mistake.—A statement of assets and liabilities, made by a merchant from his books and believed by him to be correct, will not warrant a denial of his discharge in bankruptcy, although it was in fact materially erroneous by reason of the failure of his bookkeeper, through illness, to enter on the books certain liabilities which existed at the time the statement was made, and which were in consequence omitted therefrom. *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688.

False statement made by partner.—A materially false statement in writing made by a partner in the ordinary course of business of the partnership in buying merchandise for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy to another partner who did not participate in the wrongful act and had no knowledge of it. *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457, *reversing In re Collins*, (W. D. Tex. 1906) 16 Am. Bankr. Rep. 313.

The bar to a discharge by reason of a false

statement in writing is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person is a member. *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 181.

Intent — Guilty knowledge essential. — It is clear that the plain language of section 14b (3) requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, "false statement" denotes a guilty scienter on the part of the bankrupt. *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Dresser*, (S. D. N. Y. 1905) 144 Fed. 318, 13 Am. Bankr. Rep. 637; *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688; *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457; *Gilpin v. Merchants' Nat. Bank*, (3d Cir. 1908) 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. N. S. 1023; *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, 23 Am. Bankr. Rep. 468; *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *W. S. Peck Co. v. Lowenhein*, (C. C. A. 4th Cir. 1910) 178 Fed. 178; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 181.

The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon credit. *Gilpin v. Merchants' Nat. Bank*, (3d Cir. 1908) 165 Fed. 607, 611, 91 C. C. A. 445, 449, 20 L. R. A. N. S. 1023; *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, 23 Am. Bankr. Rep. 468.

In *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, it was held that a discharge can only be refused where the bankrupt has been guilty of such acts as would sustain a civil

action for fraud or deceit, and where the statements were either knowingly false or fraudulent, or made so recklessly as to warrant a finding that the bankrupt acted fraudulently.

All presumptions are in favor of honesty, and if the actions of a party are such that the presumption of honesty is as strong as that of wrong, the law requires that the theory of honesty, rather than that of guilt, be adopted. *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688.

The word "false," as used in section 14b (3), means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive; and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue. *Gilpin v. Merchants' Nat. Bank*, (C. C. A. 3d Cir. 1908) 165 Fed. 607, 21 Am. Bankr. Rep. 429; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261.

In order to be "false" so as to bar a discharge, the representations made by a bankrupt to obtain credit must have been wilfully or intentionally misleading. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

Who may object. — The right to oppose a discharge on the ground that the bankrupt has obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit, is not limited to the creditor defrauded, but might be properly pleaded by any creditor of the bankrupt. *In re Harr*, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147.

Specification of objections. — The objections must not only set out the false representations, but the name of the person alleged to have been defrauded must be given. *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312. See also *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302.

(4) [*Concealment, etc., of assets.*] at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or [(*Inserted 1903*) 32 Stat. L. 798.]

Concealment, etc., of assets. — The bankrupt is not entitled to a discharge, under section 14b (4) if at any time subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy he has transferred, removed, destroyed, or concealed, or permitted the removal, destruction, or concealment of, any of his property, with the intent to hinder, delay, or defraud his creditors. *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep.

586; *In re Dewa*, (D. C. R. I. 1899) 96 Fed. 181, 3 Am. Bankr. Rep. 691; *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re O'Gara*, (D. C. Ore. 1899) 97 Fed. 932, 3 Am. Bankr. Rep. 349; *In re Welch*, (S. D. Ohio 1899) 100 Fed. 65, 3 Am. Bankr. Rep. 93; *In re Finkelstein*, (S. D. N. Y. 1900) 101 Fed. 418, 3 Am. Bankr. Rep. 800; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re Hoffmann*, (S. D. N. Y. 1900) 102 Fed. 979,

4 Am. Bankr. Rep. 331; *In re Bemis*, (N. D. N. Y. 1900) 104 Fed. 672, 5 Am. Bankr. Rep. 36; *In re Heyman*, (S. D. N. Y. 1900) 104 Fed. 677, 4 Am. Bankr. Rep. 735; *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Bullwinkle*, (S. D. N. Y. 1901) 111 Fed. 364, 6 Am. Bankr. Rep. 756; *Osborne v. Perkins*, (C. C. A. 1st Cir. 1901) 112 Fed. 127, 7 Am. Bankr. Rep. 250; *In re Royal*, (E. D. N. C. 1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Stoddard*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; *In re Holstein*, (D. C. Conn. 1902) 114 Fed. 794, 8 Am. Bankr. Rep. 147; *In re Otto*, (D. C. N. J. 1902) 115 Fed. 860, 8 Am. Bankr. Rep. 305; *Fields v. Karter*, (C. C. A. 5th Cir. 1902) 115 Fed. 950, 8 Am. Bankr. Rep. 351; *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727; *Hudson v. Mercantile Nat. Bank*, (8th Cir. 1902) 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Fleishman*, (N. D. Ill. 1902) 120 Fed. 960, 9 Am. Bankr. Rep. 557; *In re Dauchy*, (N. D. N. Y. 1903) 122 Fed. 688, 10 Am. Bankr. Rep. 527; *In re Gailey*, (C. C. A. 7th Cir. 1904) 127 Fed. 538, 11 Am. Bankr. Rep. 539; *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684; *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; *In re Breitling*, (C. C. A. 7th Cir. 1904) 133 Fed. 146, 13 Am. Bankr. Rep. 126; *Barton v. Texas Produce Co.*, (C. C. A. 8th Cir. 1905) 136 Fed. 355, 14 Am. Bankr. Rep. 502; *In re Young*, (E. D. N. C. 1905) 140 Fed. 728, 15 Am. Bankr. Rep. 477; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 359; *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694, 17 Am. Bankr. Rep. 435; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 19 Am. Bankr. Rep. 103; *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780; *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, 21 Am. Bankr. Rep. 140; *In re Goodman*, (E. D. Pa. 1909) 171 Fed. 287, 22 Am. Bankr. Rep. 570; *In re Nelson*, (S. D. N. Y. 1909) 179 Fed. 320; *In re McCann*, (E. D. Pa. 1910) 179 Fed. 575; *In re Borg*, (D. C. Minn. 1910) 184 Fed. 640; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Steindler*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 63; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271; *Ablowich v. Stursburg*, (C. C. A. 2d Cir. 1901) 5 Am. Bankr. Rep. 403, *affirming In re Ablowich*, (S. D. N. Y. 1900) 99 Fed. 81, 3 Am. Bankr. Rep. 586; *In re Cabus*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 156.

The purpose of section 14b (4) is to prevent dishonest and unscrupulous debtors from

imposing upon the public in general, and their creditors in particular; and in order to be entitled to a discharge it is essential that a bankrupt should come into court with clean hands, and show that his conduct has been that of an honest, upright man. *In re James*, (C. C. A. 4th Cir. 1910) 181 Fed. 476.

Necessity of transfer being within four-months period. — The statute requires that a fraudulent transfer, in order to prevent a discharge, must be made within four months. *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204. See also *In re Dauchy*, (C. C. A. 2d Cir. 1904) 130 Fed. 532, 11 Am. Bankr. Rep. 511.

Continuing concealment. — The word "concealed" is sufficiently elastic in its meaning to include a continuous concealment; and a bankrupt who concealed property from his creditors while insolvent before the four-months' period, and kept the same concealed until within the four months, and until it was discovered by another, is not entitled to a discharge. *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703, *affirmed* (C. C. A. 4th Cir. 1910) 181 Fed. 476. See also *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

Property conveyed in fraud of creditors prior to four months period. — The failure of a bankrupt to include in his petition and schedules real estate which he caused to be conveyed to another some years before for the purpose of defrauding his then creditors, and which is still held by the grantee on a secret trust for the bankrupt, is a fraudulent concealment of property from his trustee. *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362. See also *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

What constitutes concealment, removal, or destruction of property — *Transfer to bankrupt's wife*. — Where a debtor, four months prior to filing his petition in bankruptcy, transfers real and personal property to his wife, without consideration, and with intent to defraud his creditors, and then states in his schedule that he has no property of any kind, he is guilty of knowingly and fraudulently concealing from his trustee property belonging to his estate in bankruptcy, and is not entitled to be discharged. *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163.

So, also, where the bankrupt has an interest in real estate which stands in his wife's name, he should include such interest in his schedules; and his failure to do so is ground for refusing his discharge. *In re Borg*, (D. C. Minn. 1910) 184 Fed. 640.

But the fact that a bankrupt did not schedule or turn over to his trustee the produce of lands which he claimed were owned by his wife, where there was no concealment of the property, and the claim was openly made, does not constitute a knowing and fraudulent concealment of property which will defeat his right to a discharge, although the property may have been, as matter of law, a part of his estate. *In re Marsh*, (D. C. Vt. 1901) 109 Fed. 602.

So, also, it has been held that the fact that a bankrupt transferred property to his wife before the passage of the bankruptcy law, and that he failed to schedule such property, constitutes no ground for refusing him a discharge, when it does not appear that the wife holds the property in secret trust for his benefit. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493.

Transfer to bankrupt's children.—Where, on an application by a bankrupt for a discharge, it appears that he considered a large portion of his legal liabilities to be unjust, that in view of bankruptcy he contemplated transferring considerable property directly to his daughter, but was deterred from doing so by being warned that such proceeding would probably get him into trouble, and that he then, by a series of questionable trades, so manipulated his property that his children were benefited to the extent of several thousand dollars, at the expense of his estate, it was held that his discharge should be denied. *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727.

Property conveyed to relative.—If a bankrupt, while insolvent, conveys property to a near relative without consideration, and afterwards fails to disclose the existence of such property in his schedules, he is *prima facie* guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed. But if his innocence is made to appear, the conveyance, and the subsequent omission of the property from the schedules, will interpose no obstacle to the bankrupt's discharge. *In re McCann*, (E. D. Pa. 1910) 179 Fed. 575.

Property held in trust for bankrupt.—The intentional omission by a bankrupt to schedule or bring to the attention of his trustee an interest in real estate which a short time prior to his bankruptcy he conveyed in trust, the income to be paid to another during life, and the property then to be held for his own benefit, constitutes ground for refusing him a discharge. *In re Stoddart*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762.

So, also, where a bankrupt's mother bequeathed one-half the residue of her estate to the bankrupt's wife, in trust, to pay the interest and income to the bankrupt free from the claims of creditors, and to pay from time to time to the bankrupt so much of the principal as the trustee should deem proper, in such manner as to free it from the claims of creditors, it was held that, before he could secure a discharge, the bankrupt must assign his interest in the income to his trustee in bankruptcy, though his right to the principal, being conditioned on the option of the trustee, need not be so assigned. *In re Fleishman*, (N. D. Ill. 1902) 120 Fed. 960, 9 Am. Bankr. Rep. 557.

The failure to schedule a resulting trust amounts to a fraudulent concealment of property from the trustee, and justifies the court in refusing a discharge. *Hudson v. Mercantile Nat. Bank*, (8th Cir. 1902) 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432.

Concealment of valueless property.—But

it is no ground for refusing a bankrupt's application for discharge that he omitted to list in his schedule a leasehold interest in realty, under a yearly lease, where there is no evidence that the use of the property was worth more than the rent. *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344.

And where a bankrupt failed to schedule a piece of real estate of small and uncertain value it was held not to justify the withholding of his discharge. *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407. See also *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770.

Transfer by chattel mortgage.—Where, on the hearing of objections to the discharge of bankrupt partners on the ground of having fraudulently concealed property from their trustee, it was shown that they aided and assisted in a transfer of the partnership property to a creditor by means of the foreclosure of a chattel mortgage previously given by them more than four months prior to the bankruptcy, the question whether such acts were sufficient in law to bar their discharge depends on the validity of the chattel mortgage and its foreclosure, and a discharge will not be granted until that question has been determined in a proper proceeding therefor. *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

Property which does not pass to trustee.—The fact that a bankrupt does not schedule or turn over to his trustee property which forms no part of the estate in bankruptcy, cannot be said to be a concealment of such property, and does not bar the bankrupt's right to a discharge. *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 295; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 244; *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *In re Dauchy*, (C. C. A. 2d Cir. 1904) 130 Fed. 532, 11 Am. Bankr. Rep. 511; *In re Doherty*, (D. C. Conn. 1904) 135 Fed. 432, 13 Am. Bankr. Rep. 549. And see generally the annotation under the several subdivisions of section 70a, as to what property passes to the trustee in bankruptcy.

Property acquired after the adjudication does not vest in the trustee, and the fact that such property has not been scheduled does not constitute a defense to a petition for discharge. *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548.

Exempt property.—A bankrupt who, in the schedules accompanying his petition, declares that he has no property, but later on, as a part of his state exemption, claims certain property, is not on this account to be charged with concealing such property so as to lose his right to a discharge. *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351. See also *In re Todd*, (D. C. Vt.

1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770. And see annotation under sec. 6, *supra*, p. 508.

A claim for alimony, made by a married woman in a suit for divorce, which was pending at the time of her bankruptcy, is not property which she could have disposed of, such as would vest in her trustee; and her failure to schedule the same is not a concealment of property which defeats her right to a discharge; nor is her refusal to convey to the trustee property subsequently awarded to her as alimony, and which she claims under the statute as her homestead, sufficient ground for refusing a discharge. *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733.

Intent.—In order to be effective as an objection to the bankrupt's discharge, it is essential that the transfer, removal, destruction, or concealment of property inhibited by section 14b (4) be made with the intention to hinder, delay, or defraud the bankrupt's creditors. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Morrow*, (N. D. Cal. 1899) 97 Fed. 574, 3 Am. Bankr. Rep. 283; *In re Freund*, (S. D. N. Y. 1899) 98 Fed. 81, 3 Am. Bankr. Rep. 418; *In re Wood*, (S. D. N. Y. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572; *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Wetmore*, (E. D. Pa. 1900) 99 Fed. 703, 3 Am. Bankr. Rep. 700; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re Locks*, (W. D. N. Y. 1900) 104 Fed. 783, 5 Am. Bankr. Rep. 136; *In re Bryant*, (E. D. Tenn. 1900) 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re Conn*, (D. C. Ore. 1901) 108 Fed. 525, 6 Am. Bankr. Rep. 217; *In re Marsh*, (D. C. Vt. 1901) 109 Fed. 602; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770; *In re Lesser*, (C. C. A. 2d Cir. 1902) 114 Fed. 83, 8 Am. Bankr. Rep. 15, reversing (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 330; *In re Miner*, (D. C. Ore. 1902) 114 Fed. 998, 8 Am. Bankr. Rep. 248; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *Woods v. Little*, (C. C. A. 3d Cir. 1905) 134 Fed. 229, 13 Am. Bankr. Rep. 742; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Berry*, (S. D. N. Y. 1906) 146 Fed. 623, 16 Am. Bankr. Rep. 564; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Fanning*, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306; *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *In re Polakoff*, (N. D. N. Y. 1899) 1

Am. Bankr. Rep. 358; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *Matter of Harris*, (D. C. N. J. 1904) 11 Am. Bankr. Rep. 649; *In re Schofield*, (E. D. Pa. 1905) 17 Am. Bankr. Rep. 918; *In re Alleman*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 745.

The mere concealment of property by the bankrupt is not ground for denying a discharge, if it was not done knowingly and fraudulently. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

A fraudulent conveyance by the bankrupt is not in itself a bar to the bankrupt's discharge. *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383.

Preferential transfer.—Section 14b (4) does not include a mere preferential payment made to a creditor, which does not constitute a transfer of property with intent to defraud other creditors. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340. See also *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

Intent alone insufficient.—While intent is a material inquiry on an issue as to the concealment of the assets by a bankrupt, nevertheless a fraudulent intent alone does not justify a refusal of a discharge; it is necessary that assets belonging to the estate were actually concealed or withheld. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694, 17 Am. Bankr. Rep. 435.

Concealment of firm assets by one member of a partnership alone, will not deprive another partner of his right to a discharge. *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

Advice of counsel.—The failure to schedule, or to turn over to the trustee, certain assets, upon the advice of counsel, to whom the facts have been fully disclosed, and whose advice is sought, received, and acted upon in good faith, and not with the intention of evading the bankruptcy law, will tend to relieve the bankrupt in so far as that such failure will not bar his discharge. *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Stoddart*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762; *In re Breitling*, (C. C. A. 7th Cir. 1904) 133 Fed. 146, 13 Am. Bankr. Rep. 126; *Woods v. Little*, (C. C. A. 3d Cir. 1904) 134 Fed. 229, 13 Am. Bankr. Rep. 742; *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *Remmers v. Merchants' Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *In re Schreck*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 366; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Schofield*, (E. D. Pa. 1905) 17 Am. Bankr. Rep. 918; *In re Alleman*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 745.

Thus where the question whether a bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in his grandfather's estate on which he could raise money, it was held that his failure to schedule such interest as a part of his estate

in bankruptcy did not preclude his discharge. *Woods v. Little*, (C. C. A. 3d Cir. 1905) 134 Fed. 229, 13 Am. Bankr. Rep. 742.

So where a bankrupt had borrowed the full surrender value on his life insurance, and had been advised by counsel that it was not necessary to mention the policies in his schedules, whereupon he gave them to his wife, it was held that he was not guilty of a fraudulent concealment of assets. *In re Lyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

Specification of objections.—The specification of objections should state the nature of the ground relied on, and give a description of the property concealed from the trustee, the names of the persons holding the title, the name of the transfer, and other facts necessary to identify the transaction. *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459.

Allegation of knowledge and intent.—The specification charging concealment of assets must contain the allegation that the acts were done knowingly and fraudulently. *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

But it has also been held that, since the amendment of 1903, it is not necessary to allege that the transfer was "knowingly and fraudulently" made. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

Sufficient specification.—The specification of objection to the bankrupt's discharge alleging that, within four months immediately preceding the filing of the petition, the bankrupts transferred, removed, destroyed, or concealed their property, with intent to defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they concealed large quantities of merchandise in a certain house, with intent to hinder, delay, and defraud their creditors, and thereafter, on a day specified, removed from their place of business and concealed other large quantities of merchandise with like intent, was held to be sufficient. *In re Milgram*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

So, also, it has been held that specifications of objection to the discharge of a bankrupt, alleging that, within four months prior to the filing of his petition, in contemplation of bankruptcy, and with intent to defraud his creditors, he purchased certain household goods specified, which he transferred to a woman to whom he expected to be, and was afterward, married, and which were not included in his schedules, are legally sufficient. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

And it has been held that objections to the discharge of a bankrupt, charging in effect a fraudulent transfer of the bankrupt's property within the four months period, are sufficient. *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768.

Insufficient specification.—A specification of objections to a bankrupt's discharge, that at the time of filing his petition he was the

owner of a stock of drugs and general merchandise, no part of which was ever delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof, has been held to be insufficient in the absence of an allegation that he concealed the same, or in any manner prevented the trustee from taking possession thereof. *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360.

Evidence—Burden of proof on opposing creditors.—Creditors opposing the bankrupt's application for a discharge, on the ground of his having concealed property from his trustee in bankruptcy, must establish the fact by satisfactory and sufficient evidence, or their opposition will be overruled and the discharge granted. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Howden*, (N. D. N. Y. 1901) 111 Fed. 723, 7 Am. Bankr. Rep. 191; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; *In re Baerneopf*, (E. D. Pa. 1902) 117 Fed. 976, 9 Am. Bankr. Rep. 133; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Tillyer*, (E. D. Pa. 1905) 147 Fed. 860, 17 Am. Bankr. Rep. 125; *In re Hedley*, (W. D. N. Y. 1907) 156 Fed. 314, 19 Am. Bankr. Rep. 409; *In re Burstein*, (D. C. Conn. 1908) 160 Fed. 765, 20 Am. Bankr. Rep. 399; *In re Delmour*, (S. D. N. Y. 1908) 161 Fed. 589, 20 Am. Bankr. Rep. 405; *In re Boner*, (N. D. W. Va. 1909) 169 Fed. 727, 22 Am. Bankr. Rep. 151; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *In re Margolis*, (D. C. Mass. 1909) 181 Fed. 591.

Preponderance of evidence sufficient.—On specifications of objection to a bankrupt's petition for discharge, it is not necessary to establish concealment of assets beyond a reasonable doubt. A fair preponderance of credible testimony is sufficient. *In re Delmour*, (S. D. N. Y. 1908) 161 Fed. 589, 20 Am. Bankr. Rep. 405.

Suspicion not enough.—An objection to a bankrupt's discharge because of the fraudulent concealment of assets must be established by clear and convincing proof, and is not the subject of mere suspicion or inference. *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *In re Taylor*, (N. D. Ala. 1911) 181 Fed. 479.

Property in bankruptcy must be shown.—Specifications in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee in bankruptcy, must be supported by evidence showing the existence of property in the bankrupt, or in trust for his use, at the time of filing the petition in bankruptcy. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29.

Where a bankrupt fails to schedule or to surrender to his trustee goods shown to have been in his possession a short time prior to his bankruptcy, the burden rests upon him to

account for the same; and if he fails to do so, the presumption is that he sold them and conceals the proceeds. *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, 21 Am. Bankr. Rep. 140.

Creditor concluded by judgment of state court. — The judgment of a state court, in a

suit brought by a bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt, as fraudulent, concludes creditors, who cannot, therefore, set up the same ground to defeat the bankrupt's discharge. *In re Tiffany*, (S. D. N. Y. 1906) 147 Fed. 314, 13 Am. Bankr. Rep. 310.

(5) [*Discharge in voluntary proceedings.*] in voluntary proceedings been granted a discharge in bankruptcy within six years; or [(*Inserted 1903*) 32 Stat. L. 798.]

Discharge within six years. — A bankrupt is not entitled to be discharged, under section 14b (5), where he has previously been discharged in voluntary proceedings within the preceding six years. *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *In re Seaholm*, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292; *In re Haase*, (S. D. N. Y. 1907) 155 Fed. 553, 17 Am. Bankr. Rep. 528; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408; *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535.

Section 14b (5) was intended to prevent the filing of voluntary petitions in bankruptcy by the same person oftener than once in six years, and not merely to space discharges to the same person six years apart. *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535.

Section 14b (5) is not retroactive, but applies only to cases begun after amendment took effect (Feb. 5, 1903). *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *In re Seaholm*, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292.

The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought.

(6) [*Refusal to obey lawful orders.*] in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: [(*Inserted 1903*) 32 Stat. L. 798.]

Cross-references: As to

Duty to answer questions generally, see section 7a, (9), *supra*, p. 524, and section 21a, *infra*, p. 589.

Duty to comply with all lawful orders, see section 7a, (2), *supra*, p. 519.

Refusal to obey lawful orders or to appear and testify, as contempt, see the several subdivisions of section 41a, *infra*, p. 668.

To come within the phrase "approved by the court," as used in section 14b (6), no more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions. *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387.

Refusal to answer proper questions. — The refusal of a bankrupt on his examination to answer a question as to what was done with a large sum of money drawn by him from the bank a short time before the bankruptcy is sufficient to warrant the refusal of a discharge, although, after such objection to the

In re Seaholm, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292.

The limitation refers to the time between the first and the second discharge, and not between the first discharge and the filing of the second petition; and hence it is immaterial to the right of a person to be adjudged an involuntary bankrupt that he has previously been discharged in bankruptcy within six years. *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640.

The six years is measured backward from the time of the hearing on the application for the second discharge, and not from the time of the commencement of the second proceeding. *In re Haase*, (S. D. N. Y. 1907) 155 Fed. 553, 17 Am. Bankr. Rep. 528. See also *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640; *In re Jordan*, (E. D. Pa. 1905) 142 Fed. 292, 15 Am. Bankr. Rep. 449.

Discharge refused under former law immaterial. — An order refusing to discharge a bankrupt, under the Bankruptcy Act of 1867, does not estop the bankrupt from applying for a discharge upon the same facts, and as to the same debt, under the Act of 1898. *In re Herrman*, (S. D. N. Y. 1900) 102 Fed. 753.

discharge was made, he offered to answer the question. *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387.

Refusal under claim of privilege. — The fact that the refusal of a bankrupt to answer material questions, in the course of the proceedings which were approved by the referee, was based on the claim of his constitutional privilege not to incriminate himself, does not deprive the court of the right to deny him a discharge because of such refusal. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only. *In re Dresser*, (C. C. A. 2d Cir. 1906) 146 Fed. 383, 16 Am. Bankr. Rep. 561.

Evasive answers. — While evasive and disingenuous testimony by a bankrupt is not a ground for refusing a discharge, it is a material consideration in determining his credibility when testifying as to what became of certain money. *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561.

But where a bankrupt did not wilfully

conceal testimony preventing his creditors from obtaining property, the fact that he apparently gave evasive and disrespectful answers to questions concerning the same is not ground for denying his discharge. *In re*

Fanning, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55. And see to the same effect *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84.

[*When trustee may interpose objections.*] *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose. [(*Inserted 1910*) 36 Stat. L. 840.]

c [*Confirmation of composition.*] The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. [(1898) 30 Stat. L. 550.]

The effect of the confirmation of a composition has been considered under sec. 12e, *supra*, p. 545, and compositions generally are treated under the other subdivisions of sec.

12, *supra*, p. 540. The setting aside of a composition is annotated under sec. 13, *supra*, p. 546.

SEC. 15. DISCHARGES, WHEN REVOKED. — a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge. [(1898) 30 Stat. L. 550.]

Revocation of discharge. — Where it appears that a bankrupt has obtained his discharge through fraud the court may, upon a proper showing presented in due time, revoke such discharge where the actual facts did not authorize the granting thereof. *In re Dietz*, (S. D. N. Y. 1899) 97 Fed. 563, 3 Am. Bankr. Rep. 316; *In re Meyers*, (S. D. N. Y. 1900) 100 Fed. 775, 3 Am. Bankr. Rep. 722; *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Roosa*, (N. D. Ia. 1902) 119 Fed. 542, 9 Am. Bankr. Rep. 531; *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 582; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Luftig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773; *In re Mauzy*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59.

When power to revoke may be exercised. — It is to be borne in mind that the power of the judge to revoke a discharge is confined and limited. It must be exercised (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essen-

tial to be proven. *In re Mauzy*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59.

Inducing creditor to withdraw opposition. — Where a creditor who has filed specifications in opposition to the discharge of a bankrupt is induced to withdraw the same, and suffer the discharge to be granted, in consideration of part payment of his claim made to him by a friend of the bankrupt, it was held to be a fraud upon the Act, and ground for vacating the discharge, although it was done without the procurement or participation of the bankrupt, if he was privy to the arrangement and consented to it. *In re Dietz*, (S. D. N. Y. 1899) 97 Fed. 563, 3 Am. Bankr. Rep. 316.

The omission to schedule a debt is not ground for setting aside the discharge. *In re Monroe*, (D. C. Wash. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706.

Section 15 does not apply where the discharge results by operation of law from the confirmation of the bankrupt's offer of composition. *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417.

Undue laches. — An application for the revocation of a discharge will be denied where the applicant has been guilty of undue laches in its presentation to the court. *In re Hoover*, (E. D. Pa. 1900) 105 Fed. 354, 5 Am. Bankr. Rep. 247; *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Oleson*, (N. D. Ia. 1901) 110 Fed. 798, 7 Am. Bankr. Rep. 22; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *In re Upson*, (N. D. N. Y.

1903) 124 Fed. 980, 10 Am. Bankr. Rep. 758; *Arrington v. Arrington*, (E. D. N. C. 1904) 132 Fed. 200, 13 Am. Bankr. Rep. 89; *In re Spioer*, (W. D. N. Y. 1906) 145 Fed. 431; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Mady*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59; *Vary v. Jackson*, (C. C. A. 5th Cir. 1908) 164 Fed. 840, 21 Am. Bankr. Rep. 334; *In re Wright*, (W. D. N. Y. 1910) 24 Am. Bankr. Rep. 437.

Absence of laches must clearly appear.—Where a mortgage given by the bankrupt, covering substantially all his personal property, was shown by his schedules, but its validity was not questioned by any creditor during the pending of the case, and until nearly a year after the bankrupt's discharge, the court is not justified in then entertaining a petition for the revocation of the discharge, on the ground that such mortgage was fraudulent, unless it is made clear that the creditor filing it has not been guilty of laches, and that cannot be done by general averments of conclusions to the effect that he has not been guilty of negligence or has acted with due diligence. *In re Oleson*, (N. D. Ia. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22.

Failure to prove claim.—The fact that a creditor of a bankrupt failed to file or prove his claim within a year after the adjudication and was thereby precluded from thereafter proving it, or sharing in any dividend which might be declared if the discharge was vacated, does not deprive him of the right to move to vacate such discharge as a party in interest; since, if the discharge were vacated, the creditor would be entitled to collect his claim from any property acquired by the bankrupt after bankruptcy. *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

But see *Arrington v. Arrington*, (E. D. N. C. 1904) 132 Fed. 200, 13 Am. Bankr. Rep. 89, wherein it was held that a claimant against the estate is not entitled to have the bankrupt's discharge set aside on account of a claim which was not proved in the bankruptcy proceedings, of which he had notice.

Failure to object to granting of discharge.—A creditor who had ample opportunity during the pendency of the proceedings to fully examine the bankrupt as to all matters, and who appeared in opposition to his discharge, and was given time to file specifications of objection, but failed to do so, and permitted the discharge to be granted without further objection, is guilty of such undue laches as will prevent his being heard on a subsequent application to revoke the discharge. *In re Upson*, (N. D. N. Y. 1903) 124 Fed. 980, 10 Am. Bankr. Rep. 758.

Knowledge of trustee chargeable to creditors.—The revocation of a discharge for an alleged fraud, which is shown to have come

to the knowledge of the petitioner since the discharge was granted, will not be allowed where the trustee had knowledge of all the facts prior to the granting of the discharge; such knowledge being deemed to be that of the creditors whom he represents. *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747.

Application for revocation.—The application for the revocation of a discharge should set forth sufficient facts to warrant the revocation under section 15. *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 582; *Vary v. Jackson*, (C. C. A. 5th Cir. 1908) 164 Fed. 840, 21 Am. Bankr. Rep. 334.

Must show interest of petitioners.—An averment in a petition for the revocation of the discharge of a bankrupt, merely that petitioners are "creditors" of the bankrupt, is insufficient to show that they are "parties in interest," entitled to object to the discharge or to file such petition. *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512.

An amendment of such petition may be allowed as in other cases. *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 582; *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

But a petition to revoke a discharge cannot be amended after the expiration of one year from the time of the discharge. *In re Wright*, (D. C. N. Y. 1910) 24 Am. Bankr. Rep. 437.

Who may revoke discharge.—No one but the court may revoke a discharge; and it must be done in the manner prescribed by the statute. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

Revocation by court on its own motion.—A court of bankruptcy has the general power to amend its decrees in its discretion; and, on its own motion, to vacate a discharge, in the furtherance of justice, before the expiration of a year after it was granted. *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

The bankrupt cannot surrender or vacate his discharge.—He can revive a debt by a new promise, or waive his discharge by failing to plead it when sued, but he cannot vacate the order of discharge. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

Time of filing application to revoke.—The revocation of a discharge must be applied for within one year after the discharge has been granted. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

SEC. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. [(1898) 30 Stat. L. 560.]

Cross-reference: As to

Liability of officers, directors, and stockholders of corporations, see section 4b, *supra*, p. 495.

Construction of section 16.—Section 16, if intended to be in derogation of common-law rights and of the express statutory provision of the state where the question arises, should have a strict rather than a liberal construction; so that its effect will be limited rather closely to its terms. *Matter of Benedict*, (N. D. N. Y. 1907) 18 Am. Bankr. Rep. 604.

Statute refers to codebtors for original debt.—The Bankrupt Act manifestly refers to codebtors, guarantors, or sureties for the bankrupt on the same or original debt—the debt on which the release is given by the discharge. *Klipstein v. Allen-Miles Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 385, 14 Am. Bankr. Rep. 15.

A guarantor for the payment of rent is not relieved from liability by the discharge of the tenant in bankruptcy proceedings; and this is true even though the tenant's adjudication as a bankrupt so far terminated the relationship of landlord and tenant as to relieve the tenant from further liability for rent. *Witthaus v. Zimmermann*, (1904) 11 Am. Bankr. Rep. 314, 91 App. Div. 202, 86 N. Y. S. 315.

Surety on appeal bond.—If one is bound as surety for another to pay any judgment that may be rendered in a specified action, and the judgment is defeated by the bankruptcy of the person for whom the obligation

is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like. *Goyer Co. v. Jones*, (Miss. 1901) 8 Am. Bankr. Rep. 437; *House v. Schnadig*, (1908) 235 Ill. 301, 85 N. E. 395, *affirming* 138 Ill. App. 498.

Garnishment bonds.—The liability of the surety on a dissolving garnishment bond is not altered by the discharge of the bankrupt defendant; but the discharge generally prevents the happening of the contingency on which that liability depends. *Klipstein v. Allen-Miles Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 385, 14 Am. Bankr. Rep. 15. See also *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

Fidelity bond.—Sureties on the fidelity bond of an insurance agent are not discharged by the discharge of their principal after judgment on the bond and pending writ of error. *Boyd v. Agricultural Ins. Co.*, (1904) 20 Colo. App. 28, 76 Pac. 986.

Release by act of parties remains unaffected.—Section 16 only applies to the "discharge" in bankruptcy, and cannot be held to refer to, and have in view, any act of the parties effecting a release of liability at common law or in equity. *Matter of Benedict*, (N. D. N. Y. 1907) 18 Am. Bankr. Rep. 604; *Wilkes-Barre First Nat. Bank v. Barnum*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 439.

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as [(1898) 30 Stat. L. 550.]

Cross-references: As to

Discharge of liability of officers, directors, or stockholders of corporation, see section 4b, *supra*, p. 501.

Discharge of liability of codebtors, see section 16, *supra*, p. 569.

What constitute provable debts, see the several subdivisions of section 63.

The right to a discharge, and its effect, are wholly distinct questions. *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re McCarty*, (N. D. Ill. 1901) 111 Fed. 151, 7 Am. Bankr. Rep. 40; *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634.

Sections 14 and 17 should be construed together. Each bears upon a different subject; the one relating to the discharge, the other to the debts from which such discharge will relieve the debtor. The matters and things which will prevent a discharge in bankruptcy are different from those which cause a debt to remain effective against the person discharged. Thus the bankrupt may be discharged and still be held liable for the classes of debts mentioned in section 17, subdivisions (1), (2), (3), and (4); and in seeking to hold a party liable, who has been discharged

in bankruptcy, the ground for such liability must be found in section 17, and not in section 14, which enumerates grounds upon which a discharge shall be refused. *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740. See also *In re Tinker*, (S. D. N. Y. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580.

All provable debts released.—A discharge in bankruptcy, under the provisions of the statute, discharges the bankrupt from all such debts as were, under section 63, provable against his estate in bankruptcy, excepting such as fall within subdivisions (1), (2), (3), and (4) of section 17. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, 666; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 238; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Bates*, (D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 50; *In re Herrman*, (S. D. N. Y. 1900) 102 Fed. 753, 4 Am. Bankr. Rep. 139, *affirmed* (C. C. A. 2d Cir. 1901) 106 Fed. 987; *Bracken v. Milner*, (W. D. Mo. 1900) 104 Fed. 522, 5 Am. Bankr. Rep. 23; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; *Knott v. Putnam*, (D. C. Vt. 1901) 107

Fed. 907, 6 Am. Bankr. Rep. 80; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re Claff*, (D. C. Mass. 1901) 111 Fed. 506, 7 Am. Bankr. Rep. 128; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225, *affirming* (E. D. Mo. 1901) 6 Am. Bankr. Rep. 657; *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re Kuffler*, (2d Cir. 1907) 151 Fed. 12, 80 C. C. A. 508; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *Mathieu v. Goldberg*, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; *Pollet v. Cosel*, (C. C. A. 1st Cir. 1910) 179 Fed. 488, relying on *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *Dean v. Justices*, (Mass.) 2 Am. Bankr. Rep. 163; *In re McCauley*, (E. D. N. Y. 1900) 4 Am. Bankr. Rep. 122; *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007; *Bryant v. Kinyon*, (Mich. 1901) 6 Am. Bankr. Rep. 237; *Finnegan v. Hall*, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 347; *Disler v. McCauley*, (1901) 7 Am. Bankr. Rep. 138, 66 App. Div. 42, 73 N. Y. S. 270, *reversing* 6 Am. Bankr. Rep. 491; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Watertown Carriage Co. v. Hall*, (1901) 7 Am. Bankr. Rep. 716, 66 App. Div. 84, 72 N. Y. S. 466; *In re Benedict*, (1902) 8 Am. Bankr. Rep. 463, 37 Misc. 230, 75 N. Y. S. 165; *Granham v. Richerson*, (Ga. 1902) 8 Am. Bankr. Rep. 700; *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577; *Zimmerman v. Ketchum*, (1903) 11 Am. Bankr. Rep. 190, 66 Kan. 98, 71 Pac. 264; *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585; *Howe v. Noyes*, (1905) 15 Am. Bankr. Rep. 103, 47 Misc. 338, 93 N. Y. S. 476; *New York Inst., etc., v. Crockett*, (1907) 17 Am. Bankr. Rep. 233, 117 App. Div. 269, 102 N. Y. S. 412; *Fechter v. Postal*, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Ruhl-Koblegard Co. v. Gillespie*, (1907) 22 Am. Bankr. Rep. 643, 61 W. Va. 584, 56 S. E. 898; *Matter of Arkell*, (1901) 65 App. Div. 130, 72 N. Y. S. 555.

What constitute provable debts has been fully considered under the several subdivisions of section 63.

A discharge thus means, subject to qualification with respect to demands due or owing to the United States, the release of the bankrupt from all of the debts, demands and claims against him which are provable in bankruptcy except such of them as are by the Act excepted. The exception necessarily relates to provable demands, and, to indulge in

tautology, is equivalent to the phraseology, "except such provable debts, demands and claims against the bankrupt as are by the Act excepted." *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

Discharge not limited to any particular territory.—A discharge in bankruptcy which discharges the debts of the bankrupt in one state discharges them in all the states. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225.

Debt need not have been allowed.—The fact that a claim against the bankrupt estate was disallowed does not render it a nonprovable debt; and such claim will be barred by a discharge, notwithstanding its allowance, if it was capable of having been proved, as, for instance, where its disallowance results from a valid defense thereto. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225.

Assignment of future wages.—It has been held that the right to earn wages is not property that passes to the trustee or receiver, and in fact is not property at all, in the sense that the bankruptcy statute uses the term, but a mere right to create property; and therefore an assignment of such wages does not create a lien upon any existing property. Hence a discharge in bankruptcy, which discharges the consideration for the assignment, discharges the assignment also. *In re West*, (D. C. Ore. 1904) 128 Fed. 205; *In re Home Discount Co.*, (D. C. Ala. 1906) 147 Fed. 538; *Leitch v. Northern Pac. R. Co.*, (1905) 95 Minn. 35, 5 Ann. Cas. 63, 103 N. W. 704.

But it has also been held that a duly recorded assignment of wages, to be earned in the future in an existing employment, executed to secure a valid subsisting debt, may be enforced by the creditor notwithstanding the subsequent discharge of the assignor in bankruptcy. *Citizens' Loan Assoc. v. Boston, etc., R. Co.*, (1907) 196 Mass. 528, 13 Ann. Cas. 365, 82 N. E. 696.

The bankruptcy law supersedes the ordinances and fire regulations of a city, requiring members of the city's fire department to pay promptly all necessary personal and household expenses, and making the failure to do so ground for discharge, in so far as it affects debts of a fireman dischargeable in a bankruptcy proceeding pending against him. *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654.

Judgments.—When it is necessary to consider whether a judgment is released by a discharge in bankruptcy the fact must be determined by the record, and not by any allegation or proof outside of it. *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007.

The New York Code of Civil Procedure (§ 1268) which provided that "if it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which said judgment was recovered, an order must be made directing said

judgment be canceled and discharged of record," was held to apply only to judgments entered before a discharge in bankruptcy, for the reason that any other holding would conflict with the doctrine of *res judicata*. *Howe v. Noyes*, (1905) 15 Am. Bankr. Rep. 103, 47 Misc. 338, 93 N. Y. S. 476.

One who has been twice adjudged a bankrupt cannot, in the second proceeding, be discharged from debts which were provable in a first proceeding wherein the bankrupt failed to obtain his discharge; and it is immaterial whether, in the first proceeding, the discharge was formally refused or whether the petition therefor was dismissed for want of prosecution. *Pollet v. Cosel*, (C. C. A. 1st Cir. 1910) 179 Fed. 488, relying on *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409; *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Kuffler*, (2d Cir. 1907) 151 Fed. 12, 80 C. C. A. 508.

An unliquidated claim, which might have been liquidated and proved against a bankrupt under the provisions of section 63b, but which was voluntarily withheld until after the expiration of the time for proving claims, should be treated as a provable debt, from which the bankrupt will be released by a discharge, under section 17. *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774. And see the annotation under section 63b.

Discharge of partnership debts. — Where a partnership has been discharged in bankruptcy, it will be released from its provable debts as effectually as individuals are released therefrom; so also where the individual members of a partnership have petitioned for, and have received, a discharge from their obligation for partnership indebtedness, such discharge will be effective as against such debts. *In re Meyers*, (S. D. N. Y. 1899) 96 Fed. 408, 2 Am. Bankr. Rep. 707; *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re McFaun*, (N. D. Ia. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; *In re Morrison*, (W. D. Tex. 1904) 127 Fed. 186, 11 Am. Bankr. Rep. 498; *In re Kaufman*, (E. D. N. Y. 1905) 136 Fed. 262, 14 Am. Bankr. Rep. 393; *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331; *In re Bertenshaw*, (C. C. A. 8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 19 Am. Bankr. Rep. 577; *Matter of Fretund*, (N. D. Ia. 1899) 1 Am. Bankr. Rep. 25; *Jarecki Mfg. Co. v. McElwaine*, (C. C. Ind. 1901) 5 Am. Bankr. Rep. 751; *Matter of Feigenbaum*, (S. D. N. Y. 1902) 7 Am. Bankr. Rep. 339; *Loomis v. Wallblom*, (1905) 13 Am. Bankr. Rep. 687, 94 Minn. 392, 102 N. W. 1114; *Dodge v. Kaufman*, (1905) 15 Am. Bankr. Rep. 542, 46 Misc. 248, 91 N. Y. S. 727; *New York Inst., etc., v. Crockett*, (1907) 17 Am. Bankr. Rep. 233, 117 App. Div. 269, 102 N. Y. S. 412; *Berry v. Sheehan*, (1906) 17 Am. Bankr. Rep. 322, 115 App. Div. 488, 101 N. Y. S. 371.

The discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors. *In re Bertenshaw*, (C. C. A. 8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 19 Am. Bankr. Rep. 577; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925.

Nonprovable debts are not released. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *In re Marcus*, (D. C. Mass. 1900) 104 Fed. 331, 5 Am. Bankr. Rep. 19, affirmed (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *Stevens v. Meyers*, (1902) 8 Am. Bankr. Rep. 496, 72 App. Div. 128, 76 N. Y. S. 332; *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391; *Phenix Nat. Bank v. Waterbury*, (1910) 23 Am. Bankr. Rep. 250, 197 N. Y. 161, 90 N. E. 435.

Valid and existing liens, being protected by the statute, are not discharged. See section 67d, and the annotation thereunder.

The proper time and place to test the effect of a discharge, as a release of any particular debt, is when such discharge is properly pleaded as a defense in an action brought for the enforcement of such debt. *In re Thomas*, (S. D. Ia. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *In re Rhutassel*, (N. D. Ia. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re Musey*, (D. C. Mass. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592; *In re Tinker*, (S. D. N. Y. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580; *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *Matter of White*, (N. D. Ala. 1901) 10 Am. Bankr. Rep. 794. See also *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *Bank of Commerce v. Elliott*, (Wis. 1901) 9 Am. Bankr. Rep. 409; *Stevens v. Meyers*, (N. Y. 1902) 8 Am. Bankr. Rep. 496; *Reed v. Dippel*, (Pa. 1906) 17 Am. Bankr. Rep. 371; *Walker v. Muir*, (1908) 21 Am. Bankr. Rep. 278, 127 App. Div. 163, 111 N. Y. S. 465.

The burden is on the plaintiff to attack a discharge in bankruptcy, and show cause why he should not be bound by it. *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 95 N. Y. S. 93.

Revival of discharged debt. — A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay are at an end. The obligation itself is not canceled. *Gruenberg v. Trainor*, (N. Y. 1903) 11 Am. Bankr. Rep. 776; *Citizens' Loan Assoc. v. Boston, etc., R. Co.*, (Mass. 1907) 19 Am. Bankr. Rep. 650.

Oral promise sufficient. — To revive a debt which has been paid by judgment in bankruptcy, an oral promise is sufficient, but it

must be clear and unequivocal. If such promise is based upon a condition, then it must be shown that such a condition has been complied with. *Smith v. Stanchfield*, (Minn. 1901) 7 Am. Bankr. Rep. 498. See also *Mutual Reserve Fund L. Assoc. v. Beatty*, (C. C. A. 9th Cir. 1899) 93 Fed. 747, 2 Am. Bankr. Rep. 244; *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

But a written promise, if required by a local statute, seems to be necessary to revive a debt which has been discharged in bankruptcy. *Mandell v. Levy*, (N. Y. 1905) 14 Am. Bankr. Rep. 549.

Promise must have been accepted.—To revive a debt which has been discharged in

bankruptcy, a conditional promise thereafter to pay the original obligation in instalments must be accepted by the creditor. *Smith v. Stanchfield*, (Minn. 1901) 7 Am. Bankr. Rep. 498; *International Harvester Co. v. Lyman*, (Minn. 1903) 10 Am. Bankr. Rep. 450.

Time of making promise to pay.—In an action brought upon an account, where the plaintiff seeks to avoid the effect of the defense of a discharge in bankruptcy by setting up a promise to pay since the discharge was granted, it is incumbent upon him to show that the promise was made both after the discharge was granted and before the suit on the account was brought. *Thornton v. Nichols*, (Ga. 1903) 11 Am. Bankr. Rep. 304.

(1) [*Taxes.*] are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; [(1898) 30 Stat. L. 550.]

Taxes are considered under section 64a.

(2) [*Liabilities for tort, fraud, etc.*] are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; [(amended 1908) 32 Stat. L. 798.]

- I. FALSE PRETENSES OR REPRESENTATIONS, 573.
- II. WILFUL AND MALICIOUS INJURIES, 575.
- III. MISCELLANEOUS, 576.

I. FALSE PRETENSES OR REPRESENTATIONS.

Liability for obtaining property by false pretenses or false representations.—As the bankruptcy law was originally enacted it provided for an exception from the discharge of "judgments" in an action for obtaining property by false pretenses or false representations. The amendment of 1903 substituted the word "liabilities" for the word "judgments," so that now a discharge in bankruptcy does not relieve the person discharged as to such "liabilities" as are created by obtaining property by false pretenses or false representations. *Forsyth v. Vehmeyer*, (1900) 177 U. S. 177, 20 S. Ct. 623, 44 U. S. (L. ed.) 723; *Bullis v. O'Beirne*, (1904) 195 U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340, 13 Am. Bankr. Rep. 108; *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *Hargadine-McKittick Dry Goods Co. v. Hudson*, (E. D. Mo. 1901) 111 Fed. 361, 6 Am. Bankr. Rep. 657; *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633; *In re Wollook*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *Machel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 17 Am. Bankr. Rep. 565; *Mathieu v. Goldberg*, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep.

711; *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851, following *In re Hall*, (S. D. N. Y. 1909) 170 Fed. 721, 22 Am. Bankr. Rep. 498; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776; *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345; *Matter of Arkell*, (1901) 6 Am. Bankr. Rep. 650, 65 App. Div. 130, 72 N. Y. S. 555; *In re Bullis*, (1902) 7 Am. Bankr. Rep. 238, 68 App. Div. 508, 73 N. Y. S. 1047; *Colwell v. Tinker*, (1902) 7 Am. Bankr. Rep. 334, 169 N. Y. 531, 537, 62 N. E. 668; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Morse v. Kaufman*, (Va. 1902) 7 Am. Bankr. Rep. 549; *Barnes Mfg. Co. v. Norden*, (N. J. 1902) 7 Am. Bankr. Rep. 553; *Frey v. Torrey*, (1902) 8 Am. Bankr. Rep. 196, 70 App. Div. 166, 75 N. Y. S. 40, affirmed (1903) 175 N. Y. 501, 67 N. E. 1082; *Berry v. Jackson*, (Ga. 1902) 8 Am. Bankr. Rep. 485; *Stevens v. Meyers*, (1902) 8 Am. Bankr. Rep. 496, 72 App. Div. 128, 76 N. Y. S. 332; *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740; *Powell v. Ricker*, (Vt. 1907) 18 Am. Bankr. Rep. 651; *Shepard v. Morgan*, (1908) 19 Am. Bankr. Rep. 866, 123 App. Div. 128, 108 N. Y. S. 379; *Matter of Benoit*, (1908) 20 Am. Bankr. Rep. 270, 124 App. Div. 142, 108 N. Y. S. 889; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349; *Standard Sewing Mach. Co. v. Kattell*, (1909) 22 Am. Bankr. Rep. 376, 132 App. Div. 539, 117 N. Y. S. 32; *Nichols v. Doak*, (1908) 22 Am. Bankr. Rep. 737, 48 Wash. 457, 93 Pac. 919; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 24 Am. Bankr. Rep. 261; *O'Beirne v. Allegheny, etc., R. Co.*, (1897) 151 N. Y. 384, 45 N. E. 873.

Question for court.—The amendment of 1903, by substituting the word "liabilities" for the word "judgments," has imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted is, or is not, a liability for obtaining property by false pretenses or false representations. *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345.

False representations need not be in writing.—There is no requirement in section 17 as to the manner in which the false pretenses or false representations shall be conveyed to the defrauded party; and it was not intended that such pretenses or representations should be in writing, or that such intention should be read from section 14b (3) into section 17a (2). *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740.

Statute refers to property, not to services.—The language used in section 17a (2), by which liabilities for obtaining property by false pretenses are excepted from the provable debts discharged in bankruptcy, is the usual and most general language for describing a specific crime. It refers to substantive things—to a *res*—and not to services rendered. *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345.

Reduction of liability to judgment immaterial.—The character of the "liability," as that word is used in section 17a (2), is not changed by the fact that the liability has been reduced to judgment. *Boynton v. Ball*, (1887) 121 U. S. 457, 466, 7 S. Ct. 981, 30 U. S. (L. ed.) 985; *Tinker v. Colwell*, (1904) 193 U. S. 473, 24 S. Ct. 505, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568; *Peters v. U. S.*, (C. C. A. 7th Cir. 1910) 24 Am. Bankr. Rep. 206.

A false representation by one partner, by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability for such debt. *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261.

Fraud.—A private banker who accepts deposits with full knowledge of his insolvency, concealing the fact from the depositor, is guilty of fraud; and his discharge in bankruptcy is no defense to an action to recover the amount deposited. *Frey v. Torrey*, (1902) 8 Am. Bankr. Rep. 196, 70 App. Div. 166, 75 N. Y. S. 40, affirmed (1903) 175 N. Y. 501, 67 N. E. 1082.

Judgment for fraud.—The record of a judgment, which is claimed to be an exception from discharge under section 17a (2) as a debt recovered for fraud, should show that the action was for the cause therein specified. *Matter of Benoit*, (1908) 20 Am. Bankr. Rep. 270, 124 App. Div. 142, 108 N. Y. S. 889.

The real question is, was the relief granted in the judgment based upon actual, as distinguished from constructive, fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bank-

rupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankruptcy law is concerned. *Bullis v. O'Beirne*, (1904) 195 U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340, 13 Am. Bankr. Rep. 108.

Liability under section 70e.—The liability of a bankrupt to the trustee of another bankrupt, under section 70e, for the value of property transferred to him by the latter while insolvent, in fraud of his creditors, is one based upon his own fraud, from which he is not released by a discharge. *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429.

Constructive fraud.—The debts excepted from the operation of a discharge, under section 17a (2), because of having accrued by the procurement of property by false pretenses or representations, do not include debts based upon a constructive or implied fraud. The statute extends only to positive fraud, or fraud in fact, which involves moral turpitude or intentional wrong. *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345; *Matter of Arkell*, (1901) 6 Am. Bankr. Rep. 650, 65 App. Div. 130, 72 N. Y. S. 555; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Matter of Floyd*, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; *Johnson v. Bruckheimer*, (N. Y. 1909) 22 Am. Bankr. Rep. 242.

Effect of waiving the tort.—Where a claimant waives the tort growing out of a false pretense or representation and proceeds on the implied contract, his claim is one that is provable in bankruptcy, under section 63; and, consequently, is not within the exception provided for by section 17a (2). *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, affirming (1902) 15 Am. Bankr. Rep. 179, 171 N. Y. 520, 64 N. E. 210; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (E. D. Mo. 1901) 111 Fed. 361, 6 Am. Bankr. Rep. 657; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Talcott v. Friend*, (C. C. A. 7th Cir. 1910) 179 Fed. 676; *Fechter v. Postel*, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; *Strauch v. Flynn*, (Minn. 1909) 22 Am. Bankr. Rep. 246.

Claims for damages arising out of false and fraudulent representations, inducing sales of merchandise, may be proved under the Bankruptcy Act, as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers see fit to waive the tort and take their places with the other creditors of the bankrupt estate; and are, therefore, barred by a discharge in bankruptcy. *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, affirming (1902) 15 Am. Bankr. Rep. 179, 171 N. Y. 520, 64 N. E. 210.

Creditor bound by his election to waive

tort.—Where brokers, by fraud, induced a customer to authorize them to purchase stocks for him and to deposit margins therefor, and afterwards converted such stocks and became bankrupt, it was held that the customer had his option either to sue for a rescission of the contract on the ground of fraud, or for the conversion; and that when he did the latter he waived the fraud and affirmed the contract, and had no standing to claim that the bankrupt's liability was one for obtaining property by false pretenses. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

Inducing the rendition of legal services by false representations is not the obtaining of "property" by false representations within the meaning of section 17a (2). *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345.

A fine imposed by a state court for contempt, committed by wilfully presenting to the court false affidavits, is not released by a discharge in bankruptcy. *In re Koronaky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851; *In re Hall*, (S. D. N. Y. 1909) 170 Fed. 721, 22 Am. Bankr. Rep. 498.

A judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold, and misappropriated to his own use, is not one for a debt which is a liability for obtaining property by false pretenses or false representations. *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

A debt arising from an overpayment, made to the bankrupt through mistake, which he refused to refund, is not created by his fraud, within the meaning of the act, and is released by his discharge; although his denial of liability, when advised of the mistake, may have been a mere pretense. *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633.

II. WILFUL AND MALICIOUS INJURIES.

Wilful and malicious injuries.—Liability for wilful and malicious injuries to the person or property of another is not released by a discharge in bankruptcy. *Tinker v. Colwell*, (1904) 193 U. S. 473, 485, 24 S. Ct. 505, 508, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568; *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292; *Thompson v. Judy*, (C. C. A. 6th Cir. 1909) 169 Fed. 553, 22 Am. Bankr. Rep. 154; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Leicester v. Hoadley*, (Kan. 1903) 9 Am. Bankr. Rep. 318; *McDonald v. Brown*, (1902) 10 Am. Bankr. Rep. 58, 23 K. I. 546, 51 Atl. 213; *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 5 Ann. Cas. 769, 76 N. E. 511; *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774; *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 66 Atl. 789; *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Tompkins v. Williams*, (N. Y. 1910) 23 Am. Bankr. Rep. 886; *Peters v. U.*

S., (C. C. A. 7th Cir. 1910) 24 Am. Bankr. Rep. 206; *Bever v. Swecker*, (1908) 138 Ia. 721, 116 N. W. 704.

Wilful and malicious injury defined.—Wilful and malicious injury, in the Bankruptcy Act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act, done intentionally, without just cause or excuse. In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained. *Tinker v. Colwell*, (1904) 193 U. S. 473, 485, 24 S. Ct. 505, 508, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568.

The phrase "wilful and malicious injuries to the person or property of another" must be held to cover all cases in which the facts of intent and malice are judicially ascertained by direction of the law, however the act may be characterized by the allegation. *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 66 Atl. 789.

The wrong must be both "wilful and malicious," in order that an action founded thereon shall survive the discharge in bankruptcy of the wrongdoer. *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 12 Ann. Cas. 1010, 66 Atl. 789; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987.

Injury to person and property means causing damage to the subject-matter of the rights, not depriving the owner of them. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

Statute relates to torts.—It is evident that the statutory exception relates to torts, and not to breaches of contract. *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774.

Not restricted to physical injury.—The injuries contemplated in section 17a (2) are not restricted to those which are inflicted upon the physical person of the party, but extend to those inherent rights of the person which stand in the same class as his right to security from violence done to his body. *Thompson v. Judy*, (C. C. A. 6th Cir. 1909) 169 Fed. 553, 22 Am. Bankr. Rep. 154.

Injury caused by dog bite.—In *In re Lorde*, (E. D. N. Y. 1906) 144 Fed. 320, it was held that a judgment against the landlord of an apartment house for damages for injuries caused by the bite of a vicious dog kept by a tenant was dischargeable in bankruptcy.

False imprisonment and malicious prosecution are wilful and malicious injuries; and liabilities therefor are not affected by a discharge in bankruptcy. *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 5 Ann. Cas. 769, 76 N. E. 511.

But where, in an action for false imprisonment, it appears that the defendant honestly believed that the person arrested had committed the crime, and promptly withdrew the charge upon the discovery that such person was innocent, the action is not so obviously against good morals, and does not involve such moral turpitude, as to compel the court

to disregard the fundamental characteristics of such an action for the purpose of bringing it within the exception of section 17a (2), especially where malice has neither been alleged nor proved. *Johnson v. Bruckheimer*, (N. Y. 1909) 22 Am. Bankr. Rep. 242.

Assault and battery.—A judgment for injury occasioned by an assault and battery is not released by a discharge in bankruptcy proceedings. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292; *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 5 Ann. Cas. 769, 76 N. E. 511.

Effect of giving bond for discharge as poor person.—Where a defendant against whom a judgment has been obtained for an assault, on being arrested on execution makes application to take the poor debtor's oath, and gives a recognizance therefor, such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered thereon constitutes a liability for a wilful and malicious injury to the person which is not released by a discharge in bankruptcy. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292.

A conversion of property is not a "wilful and malicious injury to person or property," within the meaning of section 17a (2); consequently a liability therefor is released by a discharge in bankruptcy proceedings. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659; *Tindle v. Birkett*, (1907) 205 U. S. 185, 27 S. Ct. 430, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *In re Wenham*, (S. D. N. Y. 1906) 163 Fed. 910, 16 Am. Bankr. Rep. 690; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Burnham v. Pidecock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007; *Fechter v. Postel*, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 96, 106 N. Y. S. 1012; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349.

See *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987, wherein it was said that a conversion which shows a design or willingness to inflict a wrong upon another, or a reckless disregard of the rights of another, rests on a different basis from the ordinary mere conversion of property.

A liability on account of a libel is not released by a discharge in bankruptcy. *McDonald v. Brown*, (1902) 10 Am. Bankr. Rep. 58, 23 R. I. 546, 51 Atl. 213; *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

A judgment for slander is not a liability from which a bankrupt is discharged; such judgment being within the exceptions provided for by section 17a (2) *Sanderson v. Hunt*, (1903) 116 Ky. 435, 3 Ann. Cas. 168, 76 S. W. 179,

III. MISCELLANEOUS.

Liabilities for alimony, due or to become due, are not released by a discharge of the debtor in bankruptcy proceedings. *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009, 5 Am. Bankr. Rep. 829; *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 13 Am. Bankr. Rep. 1; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187, 5 Am. Bankr. Rep. 837; *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *Turner v. Turner*, (D. C. Ind. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1909) 3 Am. Bankr. Rep. 67; *Deen v. Bloomer*, (1901) 191 Ill. 416, 61 N. E. 131; *Welty v. Welty*, (1902) 195 Ill. 335, 63 N. E. 161; *People v. Grell*, (1900) 65 N. Y. S. 522.

Judgment on decree of another state.—It has been held that where a divorce has been decreed in one state, and alimony has been allowed therein, a judgment procured in another state, based upon such right to alimony, is merely a money judgment which is released by a discharge in bankruptcy proceedings. *In re Williams*, (1909) 23 Am. Bankr. Rep. 394, 118 N. Y. S. 562.

Support of wife or child.—Liabilities due for the maintenance or support of the bankrupt's wife or children are not affected by his discharge. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187; *In re Hubbard*, (N. D. Ill. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528; *McKittrick v. Cahoon*, (1903) 10 Am. Bankr. Rep. 139 note, 89 Minn. 383, 95 N. W. 223.

The phrase "for maintenance or support of wife or child" refers only to the involuntary liability under the common law for support of wife and children, and to any one who relieves their want; and to liabilities accruing under bonds or the like, given for such support by requirement of courts and magistrates. *Schellenberg v. Mullaney*, (1906) 16 Am. Bankr. Rep. 542, 112 App. Div. 384, 98 N. Y. S. 432.

An agreement by a man to pay to his divorced wife an annuity so long as she remains unmarried, for her support and that of their children, is not dischargeable in bankruptcy. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139.

Medical attendances furnished to wife or child.—The exception as to liabilities "for maintenance or support of wife or child" does not apply to a debt for medical attendance furnished to the wife or child of the bankrupt at his request, and while the normal family relations subsist between him and the recipient of the services. *In re Ostrander*, (E. D. N. Y. 1905) 139 Fed. 592, 15 Am. Bankr. Rep. 96.

A liability for goods purchased by a husband, or parent, and used by the wife and children, is not within the meaning of section 17a (2). *Schellenberg v. Mullaney*, (1906)

16 Am. Bankr. Rep. 542, 112 App. Div. 384, 98 N. Y. S. 432.

Liability for seduction.—Under the express provision of the statute a liability accruing, or a judgment recovered, for the seduction of an unmarried female is not released by a discharge in bankruptcy. *In re Maples*, (D. C. Mont. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426; *In re Freche*, (D. C. N. J. 1901) 109 Fed. 620, 6 Am. Bankr. Rep. 479; *Distler v. McCauley*, (N. Y. 1901) 6 Am. Bankr. Rep. 491. See also *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774.

Criminal conversation.—Even prior to the enactment of the amendment of 1903, which specifically excepts liabilities for criminal conversation, it was held that a judgment for damages for criminal conversation is one recovered in an action "for wilful and malicious injuries to the person or property of another" within the meaning of section 17a (2). *Tinker v. Colwell*, (1904) 193 U. S. 473, 24 S. Ct. 505, 49 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568, *affirming* (1902) 7 Am. Bankr. Rep. 334, 189 N. Y. 531, 62 N. E. 668, which *affirmed* (N. Y. 1901) 6 Am. Bankr. Rep. 434.

Judgment for alienation of affections.—A judgment obtained by a wife, against another woman, for damages sustained by the wife by reason of the alienation of the affection of her husband, is not released by the dis-

charge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support, and impairment of health, to the wife. *Leicester v. Hoadley*, (Kan. 1903) 9 Am. Bankr. Rep. 318.

Breach of promise to marry.—A liability accruing, or a judgment recovered, for the breach of a contract to marry, is released by a discharge in bankruptcy; and is not within the exceptions specified in section 17a (2). *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *Finnegan v. Hall*, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 347; *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774; *Biela v. Urbanczyk*, (1905) 38 Tex. Civ. App. 213, 85 S. W. 461. See also *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971.

Thus it has been held that where, in an action for breach of promise to marry, there is no proof of the seduction of the plaintiff or of malice tending to show an attempted injury to character, a judgment is released by the defendant's discharge in bankruptcy, even though he went into bankruptcy for the sole purpose of evading the payment of such judgment. *Finnegan v. Hall*, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 377.

(3) [*Debts not scheduled.*] have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or [(1898) 30 Stat. L. 550.]

Debts not duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, are not released by the bankrupt's discharge, unless such creditor has notice or actual knowledge of the proceedings in bankruptcy. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691, *affirming* (1903) 9 Am. Bankr. Rep. 481, 174 N. Y. 112, 66 N. E. 652; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662, 7 Am. Bankr. Rep. 431; *In re Monroe*, (D. C. Wash. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706; *Tyrrel v. Hammerstein*, (1900) 6 Am. Bankr. Rep. 430, 33 Misc. 505, 67 N. Y. S. 717; *Hayer v. Comstock*, (Ia. 1901) 7 Am. Bankr. Rep. 493; *Columbia Bank v. Birkett*, (1903) 9 Am. Bankr. Rep. 481, 174 N. Y. 112, 66 N. E. 652, *affirming* (1901) 7 Am. Bankr. Rep. 222; *Zimmerman v. Ketchum*, (1903) 11 Am. Bankr. Rep. 190, 66 Kan. 98, 71 Pac. 264; *Sutherland v. Lasher*, (1903) 11 Am. Bankr. Rep. 780, 41 Misc. 249, 84 N. Y. S. 56; *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 419, 95 N. Y. S. 93; *Longfield v. Minnesota Sav. Bank*, (1906) 14 Am. Bankr. Rep. 413, 95 Minn. 54, 103 N. W. 706; *Westheimer v. Howard*,

(1905) 14 Am. Bankr. Rep. 547, 47 Misc. 145, 93 N. Y. S. 518; *Schiller v. Weinstein*, (1906) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; *Haack v. These*, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905; *Custard v. Wiggerson*, (Wis. 1907) 17 Am. Bankr. Rep. 337; *Reed v. Dippel*, (1906) 17 Am. Bankr. Rep. 371, 16 Pa. Dist. Ct. 126; *Cagliostro v. Indelli*, (1907) 17 Am. Bankr. Rep. 685, 53 Misc. 44, 102 N. Y. S. 918; *Weidenfeld v. Tillinghast*, (N. Y. 1907) 18 Am. Bankr. Rep. 531; *Murphy v. Blumenreich*, (1908) 19 Am. Bankr. Rep. 910, 123 App. Div. 645, 108 N. Y. S. 175; *Fider v. Mannheim*, (1899) 78 Minn. 309, 81 N. W. 2; *Collins v. McWalters*, (1901) 35 Misc. 648, 72 N. Y. S. 203; *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Feldmark v. Weinstein*, (1904) 45 Misc. 329, 90 N. Y. S. 478; *Bernheim v. Bloch*, (1904) 45 Misc. 581, 91 N. Y. S. 40.

What constitutes due scheduling has been considered under section 7a (8), *supra*, p. 520.

Knowledge of bankruptcy proceedings.—Even though a debt has not been duly scheduled, as required by section 7a (8), it will be none the less discharged if the creditor has such knowledge of the proceedings in bankruptcy as will permit of his participation therein in time to prove his claim against the estate. *Claster v. Soble*, (1903) 10 Am.

Bankr. Rep. 446, 22 Pa. Super. Ct. 631; Dight v. Chapman, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585; Kaufman v. Schreier, (1905) 17 Am. Bankr. Rep. 314, 108 App. Div. 298, 95 N. Y. S. 729; Morrison v. Vaughan, (1907) 18 Am. Bankr. Rep. 704, 119 App. Div. 184, 104 N. Y. S. 169. And see also the same effect *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662; *Santa Rosa Bank v. White*, (1903) 139 Cal. 703, 73 Pac. 577; *Alling v. Straka*, (1905) 118 Ill. App. 184; *Zimmerman v. Ketchum*, (1903) 66 Kan. 98, 71 Pac. 264; *Jones v. Walter*, (1903) 115 Ky. 556, 74 S. W. 249; *Reynolds v. Whittemore*, (1904) 99 Me. 108, 58 Atl. 415; *Wine-man v. Fisher*, (1904) 135 Mich. 604, 98 N. W. 404; *Atkinson v. Elmore*, (1903) 103 Mo. App. 403, 77 S. W. 492.

Time of acquiring knowledge. — In *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691 (affirming (1903) 9 Am. Bankr. Rep. 481), it was said: "Actual

knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law, in time to give him an equal opportunity with other creditors; not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."

Knowledge acquired after discharge, but in time to apply for revocation, insufficient.

— Knowledge of bankruptcy proceedings on the part of a creditor of the bankrupt, which is not acquired until after discharge, though in time to prove his claim, and to move, under section 15, to revoke his discharge, is not the "actual knowledge of the proceedings in bankruptcy" which, under section 17, is essential to the release, by the discharge, of provable debts which have not been duly scheduled in time for proof and allowance. *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691.

(4) [*Fraud, etc., in fiduciary capacity.*] were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. [(1898) 30 Stat. L. 550.]

A debt created by fraud, embezzlement, misappropriation, or defalcation, while acting as an officer, or in any fiduciary capacity, will not be released by the discharge of the debtor in bankruptcy. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 668; *In re Butts*, (N. D. N. Y. 1903) 120 Fed. 960, 10 Am. Bankr. Rep. 15; *Harper v. Rankin*, (4th Cir. 1905) 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608; *Mathieu v. Goldberg*, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350; *Clafin Dry Goods Co. v. Eason*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 263; *Morse v. Kaufman*, (Va. 1902) 7 Am. Bankr. Rep. 549; *Watertown Carriage Co. v. Hall*, (1903) 11 Am. Bankr. Rep. 15, 176 N. Y. 313, 68 N. E. 629; *Haggerty v. Badkin*, (N. J. 1907) 18 Am. Bankr. Rep. 302.

Embezzlement by bank officer. — An indebtedness created by the embezzlement and misappropriation of the funds of a bank, by the debtor while acting in the capacity of vice-president thereof, and having full control of its affairs, is one created by his fraud, embezzlement, and misappropriation, while acting in a fiduciary capacity, within the meaning of section 17a (4). *Harper v. Rankin*, (4th Cir. 1905) 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608.

Officers of a corporation, where they get control, with an attendant fiduciary obligation, of the property of the corporation, are "officers" within section 17a (4). *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350.

The words "while acting as an officer or in any fiduciary capacity," as used in section 17a (4), extend to fraud, embezzlement, and misappropriation, as well as to defalcation. *Chapman v. Forsyth*, (1844) 2 How. 202, 11 U. S. (L. ed.) 236; *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Bullis v. O'Beirne*, (1904) 195

U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, affirming (1905) 15 Am. Bankr. Rep. 179, 183 N. Y. 267, 76 N. E. 25; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *In re Butts*, (N. D. N. Y. 1903) 120 Fed. 966, 10 Am. Bankr. Rep. 16; *In re Harper*, (W. D. Va. 1904) 133 Fed. 970, 13 Am. Bankr. Rep. 430; *Barrett v. Prince*, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416; *In re Wenham*, (S. D. N. Y. 1906) 163 Fed. 910, 16 Am. Bankr. Rep. 690; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Bryant v. Kinyon*, (Mich. 1901) 6 Am. Bankr. Rep. 237; *Matter of Bullis*, (1902) 7 Am. Bankr. Rep. 238, 68 App. Div. 508, 73 N. Y. S. 1047; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Morse v. Kaufman*, (Va. 1902) 7 Am. Bankr. Rep. 549; *Reeves v. McCracken*, (N. J. 1905) 13 Am. Bankr. Rep. 680; *Matter of Floyd*, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 96, 106 N. Y. S. 1012.

In enacting section 17, cl. 4, Congress must be presumed to have known the construction placed by the courts on the words "fiduciary capacity" as used in former Bankrupt Acts. *In re Harper*, (W. D. Va. 1904) 133 Fed. 970, 13 Am. Bankr. Rep. 430.

It has been held that the fiduciary relation, specified in the statute, is one which existed previously to, and independently of, the particular transaction from which the debt arises. *Bryant v. Kinyon*, (1901) 6 Am. Bankr. Rep. 237, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801.

All the elements of the language of the statute are necessary in order to come with-

in its terms as a debt which is not released by a discharge in bankruptcy. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Woods*, (S. D. Ga. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615; *Barrett v. Prince*, (7th Cir. 1906) 143 Fed. 302, 74 C. C. A. 440; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350; *Reeves v. McCracken*, (N. J. 1905) 13 Am. Bankr. Rep. 680; *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 99, 106 N. Y. S. 1012.

Debt due by factor.—It is well settled that a debt due by a factor, to his principal, for money collected and which he refuses to pay over, is not a debt accruing in a fiduciary capacity, so as to prevent its release by a discharge in bankruptcy. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *In re Woods*, (S. D. Ga. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615; *Barrett v. Prince*, (7th Cir. 1906) 143 Fed. 302, 74 C. C. A. 440; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350.

Debt due by commission merchant.—A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity," and therefore will be released by his discharge in bankruptcy. *In re Basch*,

(S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235.

A naked bailee of money, under an express contract to keep the same safely and pay it over on request, is not acting in a fiduciary capacity within the meaning of section 17a (4). *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 99, 106 N. Y. S. 1012.

Conversion by pledgee.—An action at law for the conversion by brokers of stocks owned by plaintiff, but held by defendants as pledgees, although it is alleged that they induced the plaintiff to purchase such stocks by fraud, is not one to recover a debt created by defendants' "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity." *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

Misappropriation by railroad ticket agent.—A judgment obtained by a railroad company, against a ticket agent, for money collected by him for tickets sold and misappropriated to his own use, is not one for a debt created by his fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in a fiduciary capacity within the meaning of section 17a (4). *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

Debt arising from implied understanding on conveyance of property.—The words "fiduciary capacity" having reference only to technical trusts, a debt arising out of an implied understanding, had on a conveyance in the ordinary form of an absolute deed from R. to M. of certain parts of R.'s real estate, no trust being expressly declared, is not excepted from the operation of a discharge. *Reeves v. McCracken*, (N. J. 1905) 13 Am. Bankr. Rep. 680.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—a [*Service of petition—return—publication.*] Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time. [(Amended 1903) 32 Stat. L. 798.]

Cross-references: As to
Averments, amendment, etc., of petition,
see section 59b.
Who may file petitions, see section 59
a and b.

Commencement of proceedings.—The filing of a petition in bankruptcy is the commencement of bankruptcy proceedings, and it operates as a *lis pendens* and notice to all the world. *Mueller v. Nugent*, (1902) 184 U. S.

1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, 7 Am. Bankr. Rep. 224; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782, 15 Am. Bankr. Rep. 638; *In re Lewis*, (S. D. N. Y. 1899) 91 Fed. 632, 1 Am. Bankr. Rep. 458; *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Appel*, (D. C. Neb. 1900) 103 Fed. 931, 4 Am. Bankr. Rep. 722; *In re Stein*, (C. C. A. 2d Cir. 1901) 105 Fed. 749, 5 Am. Bankr. Rep. 288; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *In re Krinsky*, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; *In re Fraizer*, (W. D. Mo. 1902) 117 Fed. 746, 9 Am. Bankr. Rep. 21; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Breslau*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Reynolds*, (D. C. Mont. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758, 760; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Tweed*, (N. D. Ia. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698; *In re Smith*, (N. D. Ia. 1904) 132 Fed. 301, 13 Am. Bankr. Rep. 103; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404; *Illinois State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362, 369; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *Lovell v. Wentz*, (N. D. Ala. 1910) 181 Fed. 555; *In re Lewis*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 458; *Matter of Frischberg*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 607.

An action for malicious prosecution will lie for the institution and prosecution of a proceeding in bankruptcy without probable cause and with a malicious intent, although not accompanied by any actual seizure of the alleged bankrupt's property. *Wilkinson v. Goodfellow-Brooks Shoe Co.*, (E. D. Mo. 1905) 141 Fed. 218, 15 Am. Bankr. Rep. 554.

All process, summons, and subpoenas should issue out of the court, under the seal thereof, and be tested by the clerk. *In re Pierce*, (D. C. Colo. 1901) 111 Fed. 516, 6 Am. Bankr. Rep. 747; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

Alias writ may issue.—The fact that the subpoena, issued for the defendant in involuntary proceedings in bankruptcy, was not served before the return day, does not terminate the proceedings; but the court has power to grant an alias subpoena. *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602.

The return day should be fixed by the issuance of the subpoena. *In re L. Humbert Co.*,

(N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

The official forms should be used when their use is possible. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241.

Section 18a refers only to the manner of the service of the subpoena, and not to its form. It does not require that the writ of subpoena shall contain the memorandum provided for by equity rule 12. *Matter of Wing Yick*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 360.

Application of rules of practice generally.—General order 37 provides for the use of the equity rules, and the practice and procedure in cases at law, as nearly as may be; and authorizes the modification thereof, and a change in the time allowed for the return of process, for appearance, pleadings, etc. *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

Service — Personal service on bankrupt unnecessary.—The personal service referred to in section 18 is not personal service upon the alleged bankrupt himself. *In re Norton*, (N. D. N. Y. 1906) 148 Fed. 301, 17 Am. Bankr. Rep. 504. See also *In re Magid-Hope Silk Mfg. Co.*, (D. C. Mass. 1901) 110 Fed. 352, 6 Am. Bankr. Rep. 610.

Thus it has been held that service by leaving a copy of the petition in involuntary proceedings, with the subpoena, with the clerk of a hotel, of which the bankrupt was proprietor, and where he usually resided, was sufficient, although the bankrupt was absent in another town, sick and unconscious, and died two days later without regaining consciousness. *In re Risteen*, (D. C. Mass. 1903) 122 Fed. 732, 10 Am. Bankr. Rep. 494.

So also service may be made either personally or by leaving the petition and subpoena at the bankrupt's dwelling house or usual place of abode, with some adult person who is a member of or resident in the family, if at the time of the service he has such place of abode or dwelling house, and such adult person is there found. *In re Norton*, (N. D. N. Y. 1906) 148 Fed. 301, 17 Am. Bankr. Rep. 504.

Service outside district.—Where service of the order on a petition in involuntary bankruptcy is made upon the defendant outside the district, without an appearance on his part, no order can be made which will apply to him in person, but the proceeding will affect only property within the district which can come into possession of the trustee. *In re Appel*, (D. C. Neb. 1900) 103 Fed. 931, 4 Am. Bankr. Rep. 722.

Service by publication.—If the bankrupt cannot be found and cannot be served within the district, the court will, on a proper showing, make an order for service by publication. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601.

Objection to service.—An objection to an involuntary bankruptcy petition, that the court had no jurisdiction because the sub-

poena was improperly served, can be raised only by motion or by defense at the trial, and not by demurrer. *In re Seaboard Fire Underwriters*, (S. D. N. Y. 1905) 137 Fed. 987, 13 Am. Bankr. Rep. 722.

b [Time to plead to petition.] The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. [(Amended 1903) 32 Stat. L. 798.]

Right to appear and plead.—A bankrupt, or any of his creditors, may appear and plead to a petition in involuntary bankruptcy proceedings at any time within five days after the return day, or within such further time as the court may allow. *In re Simonson*, (D. C. Ky. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *Day v. Beck, etc.*, Hardware Co., (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *In re Ewing*, (C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1, 11 Am. Bankr. Rep. 597; *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 18 Am. Bankr. Rep. 265; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392; *Matter of Gorman*, (D. C. Hawaii 1906) 15 Am. Bankr. Rep. 587.

Thus where a petition in involuntary bankruptcy alleges the giving of an unlawful preference to a particular creditor of the bankrupt, that creditor may, on his own petition, intervene and be made a party defendant, with leave to plead to the petition. *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266.

Whether a creditor who resists the adjudication has a provable debt is not determined *in limine*. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590.

Tort claimants, whose claims are not provable in bankruptcy, have no standing to contest the adjudication. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

Receivers appointed by a Circuit Court for the property of corporations, who are in possession of the property and conducting the business under orders of the court, have the right to contest the proceedings in bankruptcy against such corporations. *In re Hud-*

Waiver.—An appearance by the bankrupt will, as a general rule, cure defects or irregularities in the service, and even an entire want of service. *In re Smith*, (D. C. Conn. 1902) 117 Fed. 961, 9 Am. Bankr. Rep. 98.

son River Electric Power Co., (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915.

The time to plead is fixed by the statute and will only be extended for good cause. *In re Simonson*, (D. C. Ky. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392.

Answer—Generally.—The bankrupt, or any creditor, may answer the petition, and set up any defense or counterclaim which may be available as a good and sufficient reason why an adjudication of bankruptcy should not be made. As in the case of an answer in other equitable proceedings, the facts relied upon must be stated with as much clearness and certainty as they will permit of, for the purpose of affording the petitioners an opportunity of meeting them, and giving the court the information necessary to judge of their sufficiency. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 383; *Hill v. Levy*, (E. D. Va. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374; *In re Paige*, (N. D. Ohio 1899) 99 Fed. 538, 3 Am. Bankr. Rep. 679; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329, *affirming* (S. D. Ala. 1902) 9 Am. Bankr. Rep. 441; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297; *In re Harris*, (N. D. Ala. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 635; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, (1907) 19 Am. Bankr. Rep. 862, 121 App. Div. 764, 106 N. Y. S. 599.

Form of answer.—An answer to a petition in involuntary bankruptcy should follow the simple form of denial prescribed by form No. 6. If responsive to multifarious matter in the petition, or unnecessarily defensive, it

must be prepared in proper form, and refiled as of the original date; the original answer, however, remaining on file. *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329.

Formal amendments to an answer filed by a creditor to a petition in involuntary bankruptcy against his debtor may be made at any time before adjudication. *In re Harris*, (N. D. Ala. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 635; *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355.

The answer will be taken as true in the absence of a replication. *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500.

Failure to deny matter alleged in petition equivalent to admission.—The averment in a petition for an adjudication of bankruptcy that the respondent is not a wage-earner, not being denied in the answer, may be taken as admitted. *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

An issue as to the sufficiency of an answer to a petition in involuntary bankruptcy cannot be raised by demurrer. *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266.

Reservation of right to move for dismissal.—It has been held that where an alleged involuntary bankrupt admitted his insolvency in the answer, a reservation of a right to move to dismiss the proceedings for irregularities and want of notice is too indefinite to be considered. *Brinkley v. Smithwick*, (E.

D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500.

Creditors cannot answer voluntary petition.—The statute does not authorize the creditors of a proposed voluntary bankrupt to file answers in opposition to his petition for adjudication. *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270.

Withdrawal of answer.—A debtor who contests an involuntary proceeding in bankruptcy against him does so in his own behalf and not in the interest of his creditors, and is at liberty to withdraw his opposition at any time, when done in good faith, without notice to his creditors. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

Demurrer.—The petition when insufficient may be met by a demurrer. *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

A demurrer, however, will be deemed to have been waived by answering to the merits. *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101, 9 Am. Bankr. Rep. 90.

And although a demurrer to a petition in involuntary bankruptcy proceedings is sustained, the petition will not, as a rule, be dismissed without first giving the petitioners an opportunity to apply for leave to amend. *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

c [Verification of pleadings.] All pleadings setting up matters of fact shall be verified under oath. [(1898) 30 Stat. L. 551.]

Verification—By petitioners.—Where the truth of the matters of fact alleged in a petition in involuntary bankruptcy is within the knowledge of the petitioning creditors, the petition should be verified by them in person. *In re Nelson*, (W. D. Wis. 1899) 98 Fed. 76, 2 Am. Bankr. Rep. 556. See also *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418.

But a petition in bankruptcy is not subject to a motion to dismiss for want of jurisdiction, because of the failure of one of the petitioners to verify it. *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

An authorized agent is qualified to verify such a petition when his principals are at a distance and he is acquainted with the facts. *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

Verification by attorney.—But the statute does not require a petition in involuntary bankruptcy to be verified by the creditor personally, and such verification may be made by his attorney if he has knowledge of the facts. *In re Chequasset Lumber Co.*, (S. D. N. Y. 1901) 112 Fed. 56, 7 Am. Bankr. Rep.

87; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101, 9 Am. Bankr. Rep. 90; *In re Hunt*, (M. D. Ia. 1902) 118 Fed. 282, 9 Am. Bankr. Rep. 251; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *Rogers v. De Soto Placer Min. Co.*, (C. C. A. 9th Cir. 1905) 136 Fed. 407, 14 Am. Bankr. Rep. 252; *In re Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

But where an attorney in fact for the petitioning creditors swore that the statements made in the petition were true to the best of his knowledge and belief, without distinguishing the facts based on knowledge from those based on information only, the verification was held to be insufficient. *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

Verification by corporation.—A corporation can act only through its officers or agents, and where its name is subscribed by an individual to a petition in involuntary bankruptcy, and the petition purports to be verified by the same person, it is necessary that such person should set forth under oath or affirmation that he was authorized to sign and verify the petition on behalf of the cor-

poration. The omission of such an averment, unless remedied, is fatal, but is not an incurable defect jurisdictional or otherwise. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310.

Verification by corporation and partnership.—A petition in involuntary bankruptcy, in which a corporation and a partnership join, may be verified for the corporation by its president, and for the partnership by one of its members. *Walker v. Woodside*, (C. C.

A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

Amendment.—Defects or irregularities in the verification of a petition may be amended. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118. See also *In re Chequasset Lumber Co.*, (S. D. N. Y. 1901) 112 Fed. 56, 7 Am. Bankr. Rep. 87.

d [Determining issues of fact — jury trial.] If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes [*sic*] the adjudication or dismiss the petition. [(1898) 30 Stat. L. 551.]

Cross-reference: As to

Necessity of notice to creditors prior to dismissal of petition, see section 59g.

Determination of issues — By judge.—The statute requires that the testimony be weighed and considered by a district judge, and that his personal judgment be exercised in the determination of each issue, leaving no authority for delegation of either duty to a ministerial officer. *Ex p. Steele*, (N. D. Ala. 1908) 162 Fed. 694, 20 Am. Bankr. Rep. 446; *In re King*, (C. C. A. 7th Cir. 1910) 179 Fed. 694.

But reference to a special master, or like ministerial officer, may be ordered, to hear and report the testimony (with or without advisory findings thereupon), when an issue triable by the judge alone involves extended testimony, and its hearing in open court appears to be impracticable. The court, however, can confer no authority upon the referee (as master or otherwise) to decide these issues, nor to rule thereon either finally or temporarily. *Clark v. American Mfg., etc., Co.*, (C. C. A. 4th Cir. 1900) 101 Fed. 962, 4 Am. Bankr. Rep. 361; *In re Lacov*, (C. C. A. 2d Cir. 1904) 134 Fed. 237, 13 Am. Bankr. Rep. 400; *In re King*, (C. C. A. 7th Cir. 1910) 179 Fed. 694.

As to jury trials see generally the annotation under section 19, *infra*, p. 586.

Evidence — Burden of proof.—On the hearing to determine whether or not the debtor shall be adjudged bankrupt, the burden of proof rests with the petitioners, and in order to warrant an adjudication it is necessary to establish every essential allegation made in the petition. *In re West*, (C. C. A. 2d Cir. 1901) 108 Fed. 940, 5 Am. Bankr. Rep. 734; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Pilger*, (E. D. Wis. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244; *Philpot v. O'Brien*, (C. C. A. 1st Cir. 1903) 126 Fed. 167, 11 Am. Bankr. Rep. 205; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *McGowan v. Knittel*, (3d Cir. 1905) 137 Fed. 453, 69 C. C. A. 595; *Jones v. Burnham*, (C. C. A. 3d Cir. 1905) 138 Fed. 986, 15 Am. Bankr. Rep. 85; *In re Kehler*, (C. C. A. 2d

Cir. 1908) 159 Fed. 55, 19 Am. Bankr. Rep. 513; *Birmingham Coal, etc., Co. v. Southern Steel Co.*, (N. D. Ala. 1908) 160 Fed. 212, 20 Am. Bankr. Rep. 151; *In re Hudson River Electric Power Co.*, (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Ceballos*, (D. C. N. J. 1908) 20 Am. Bankr. Rep. 467.

As to the matter which it is necessary to allege in the petition, and consequently to prove on the determination of the issue, see the annotation under section 59b.

Adjudication on pleadings.—Where, after the filing of answers to a petition in involuntary bankruptcy presenting issues of fact, the petitioners move for an adjudication on the pleadings, they thereby admit the facts properly pleaded in the answers, in accordance with the general rules of equity practice; and the only question presented is as to the legal sufficiency of the answers. If the motion is denied, the defendants are entitled to a final decree dismissing the petition. *In re Waugh*, (C. C. A. 9th Cir. 1904) 133 Fed. 281, 13 Am. Bankr. Rep. 187.

Adjudication where two petitions are filed.—Under general orders in bankruptcy No. 7, which provides that "in case two or more petitions shall be filed against the same individual in different districts the first hearing shall be had in the district in which the debtor has his domicile," it has been held that the first hearing should be had in the district in which he has had his domicile during the greater part of the preceding six months, and which has jurisdiction on the ground of such domicile, rather than in a district to which he subsequently removed and in which he was domiciled at the time of the filing of the petitions. *In re Isaacson*, (S. D. N. Y. 1908) 161 Fed. 777, 20 Am. Bankr. Rep. 430.

Where two petitions are filed alleging different acts of bankruptcy, and the defendant answers but one, which charges the earlier act, general order No. 7 has no application; and the case will proceed upon the petition which is confessed, the other remaining in abeyance. *In re Harris*, (N. D. Ala. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 635.

Effect of adjudication — Places debtor's property in custodia legis. — An adjudication in bankruptcy operates *in rem* and places the bankrupt's entire estate, including property previously transferred in fraud of creditors, in the custody of the law, and under the jurisdiction of the court of bankruptcy, in which court alone all persons claiming rights in the estate, or seeking to participate in it, must assert their claims. *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385. And see the annotation under section 70 a and a (5).

An adjudication gives complete jurisdiction to the court of bankruptcy in rem as well as in personam. *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

A corporation is not dissolved by an adjudication that it is bankrupt. *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

Adjudication as res judicata. — An adjudication in bankruptcy is entitled to the same verity as other judgments or decrees of courts of competent jurisdiction; and it cannot be collaterally attacked as to such matters as were necessarily decided therein. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172; *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re Henry Ulfelder Clothing Co.*, (N. D. Cal. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425; *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123, 11 Am. Bankr. Rep. 466; *In re Hintze*, (D. C. Mass. 1905) 134 Fed. 141, 13 Am. Bankr. Rep. 721; *In re Virginia Hardwood Mfg. Co.*, (W. D. Ark. 1905) 139 Fed. 209, 15 Am. Bankr. Rep. 135; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *Manson v. Williams*, (C. C. A. 1st Cir. 1907) 153 Fed. 525, 18 Am. Bankr. Rep. 674; *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32; *In re Dempster*, (C. C. A. 8th Cir. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385; *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *In re V. & M. Lumber Co.*, (N.

D. Ala. 1910) 182 Fed. 231; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358; *Bear v. Chase*, (C. C. A. 4th Cir. 1899) 2 Am. Bankr. Rep. 746; *In re Clisdell*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 95, reversing (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424; *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5; *Pepperdine v. Seymour Bank*, (Mo. 1903) 10 Am. Bankr. Rep. 573; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *In re Harper*, (W. D. Va. 1904) 13 Am. Bankr. Rep. 430; *Matter of Continental Corp.*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 538.

But as to matters which were not in issue the rule is otherwise; thus an adjudication in involuntary bankruptcy is not *res judicata* as to the validity or amount of the petitioning creditors' claims when offered for allowance, or to share in dividends. *Matter of Continental Corp.*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 538. See also *In re Henry Ulfelder Clothing Co.*, (N. D. Cal. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425.

Want of jurisdiction is a sufficient reason for the dismissal of a petition in bankruptcy. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 395; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Plotke*, (C. C. A. 7th Cir. 1900) 104 Fed. 964, 5 Am. Bankr. Rep. 171; *In re Garneau*, (C. C. A. 7th Cir. 1904) 127 Fed. 677, 11 Am. Bankr. Rep. 679; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643.

Objection must be made promptly. — Creditors desiring to object to the jurisdiction of the court over the person of a voluntary bankrupt must present their objection promptly, by motion to dismiss the petition or to vacate the adjudication; otherwise the objection will be taken to have been waived. *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599.

Vacating adjudication. — An application to vacate an adjudication may be made to the court which granted it, either by the bankrupt or a creditor; such application is a proceeding in the nature of a motion for a new trial, or of a bill to review and vacate a judgment. *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Salaberry*, (N. D. Cal. 1901) 107 Fed. 95, 5 Am. Bankr. Rep. 847; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Ives*, (E. D. Mich. 1901) 111 Fed. 495, 6 Am. Bankr. Rep. 653; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123, 11 Am. Bankr. Rep. 466; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Urban, etc., Realty Title Co.*, (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 637; *In re Imperial Corp.*, (S. D. N. Y. 1904) 133 Fed. 73, 13 Am. Bankr. Rep. 199; *In re Hintze*, (D. C. Mass. 1905) 134 Fed. 141, 13 Am. Bankr. Rep. 721; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Billing*, (M. D.

Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *In re Tully*, (E. D. N. Y. 1907) 156 Fed. 634, 19 Am. Bankr. Rep. 604; *Altonwood Park Co. v. Gwynne*, (C. C. A. 2d Cir. 1908) 160 Fed. 448, 20 Am. Bankr. Rep. 31; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *In re New England Breeders' Club*, (C. C. A. 1st Cir. 1909) 169 Fed. 586, 22 Am. Bankr. Rep. 124, *reversing* (D. C. N. H. 1908) 165 Fed. 517, 21 Am. Bankr. Rep. 349.

An objection to the jurisdiction of the court to adjudge a corporation a bankrupt may be taken after the adjudication has been made, by an application to set it aside, where the want of jurisdiction did not appear from the pleadings; but it should be done promptly after the facts appear from the evidence taken. *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643.

Prompt action is necessary on an application for vacation; and one who fails to act within a reasonable time after he acquires knowledge of the causes on which he intends to rely for vacation will be deemed guilty of laches. *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Urban, etc., Realty Title Co.*, (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Belle Fourche First Nat. Bank*, (C. C.

A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *Altonwood Park Co. v. Gwynne*, (C. C. A. 2d Cir. 1908) 160 Fed. 448, 20 Am. Bankr. Rep. 31; *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

One who has actual knowledge of the institution of bankruptcy proceedings is not entitled to have the adjudication set aside, after a composition has been confirmed, merely because her testator was not named as a partner in the proceeding. *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618.

Voluntary proceedings. — A creditor cannot maintain a petition to vacate an adjudication on a petition in voluntary bankruptcy proceedings. *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692.

Costs. — On the dismissal of a petition in involuntary bankruptcy, the court will make such order as to the costs and expenses as the facts warrant. *In re Salaberry*, (N. D. Cal. 1901) 107 Fed. 95, 5 Am. Bankr. Rep. 847; *In re Morris*, (E. D. Pa. 1902) 115 Fed. 591; *In re Haeseler-Kohlhoff Carbon Co.*, (E. D. Pa. 1905) 135 Fed. 867; *In re Charles W. Aschenbach Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 305.

Costs will be allowed to an alleged bankrupt, on the dismissal of an involuntary petition against him, only after the filing of his bill of costs with the clerk and notice to the petitioning creditors. *In re Haeseler-Kohlhoff Carbon Co.*, (E. D. Pa. 1905) 135 Fed. 867, 14 Am. Bankr. Rep. 381.

e [Where no pleadings filed.] If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. [(1898) 30 Stat. L. 551.]

Adjudication by default. — If neither the bankrupt nor any of his creditors appears and pleads in opposition to the petition, it becomes the duty of the judge, on the day following the last day for appearing and pleading or as soon thereafter as practicable, to make an adjudication or dismiss the petition. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re American Brewing Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 752, 7 Am. Bankr. Rep. 463; *Day v. Beck, etc., Hardware Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

If the petition contains the proper allegations and is not contested, or the parties contesting withdraw their contest, an adjudication follows as of course, and is binding on all parties in interest. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

Creditors may not be deprived of their right to an adjudication on the ground that it will not benefit them. *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8.

Effect of adjudication. — An adjudication of involuntary bankruptcy, duly entered on default for want of an answer to the petition, is as binding on the bankrupt and creditors as one entered upon a hearing, and is conclusive of the commission of the acts of bankruptcy charged in the petition. *In re American Brewing Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 752, 7 Am. Bankr. Rep. 463.

Default does not change nature of proceeding. — The default of the defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 615.

Court cannot adjudicate on admissions and waiver of defendant. — On a petition in involuntary bankruptcy there can be no adjudication, or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged, and a waiver of service of the subpoena and of the time for appearance. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

f [Judge absent — reference to referee.] If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee. [(1898) 30 Stat. L. 551.]

Reference on absence of judge.—If the judge of the court of bankruptcy is absent from the district, or the division of the district, in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601. See also *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

When petition may be referred.—The clerk cannot refer a petition in involuntary bankruptcy to the referee for adjudication, except in cases where no issue is made by the bankrupt or any creditor upon the facts averred in the petition, and where the judge is absent from the district or from the division of the district where the petition is filed, on the

next day after the last day on which pleadings may be filed. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

Reference by deputy clerk.—Under R. S. sec. 558, 4 Fed. Stat. Annot. 74, authorizing the appointment of a deputy district court clerk, such clerk has power to perform all the ministerial acts of the clerk, including the power to make an order of reference on the filing of a bankruptcy petition. *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

But see *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153, wherein it was held that a deputy clerk of a court of bankruptcy has no authority to refer a petition in bankruptcy to the referee.

g [Hearing on voluntary petition — absence of judge.] Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee. [(1898) 30 Stat. L. 551.]

Dismissal before adjudication.—Upon the filing of a voluntary petition in bankruptcy, and before an adjudication thereon, creditors may move to set the petition aside or dismiss it, on the ground that the court has no jurisdiction, the residence or domicile of the debtor being in another district; and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition, according to the result. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

Dismissal after adjudication.—An adjudication of bankruptcy made *ex parte* on a voluntary petition is not conclusive on creditors although not appealed from; and they may, by petition, ask a dismissal of the proceedings upon facts appearing on the bankrupt's examination, and a showing that the court is without jurisdiction. *In re Garneau*, (C. C. A. 7th Cir. 1904) 127 Fed. 677, 11 Am. Bankr. Rep. 679.

When proceedings will not be dismissed.—Where an order of adjudication has been entered, without objection, on a voluntary petition alleging the petitioner's residence within

the district, and the court has proceeded to administer the estate, the proceeding will not be dismissed, on motion of a judgment creditor, on the ground that at the time of the application the bankrupt had not resided in the district for the required period, if it appears that the petition was filed in good faith and the bankrupt is still a resident of the district, but in such case the order of adjudication will be set aside and a new one entered as of a later date. *In re Tully*, (E. D. N. Y. 1907) 156 Fed. 634, 19 Am. Bankr. Rep. 604.

Effect of pendency of involuntary petition.—Where a bankrupt, against whom an involuntary petition is pending, files a voluntary petition, notice should be given the creditors who filed the involuntary petition before proceeding on the voluntary one, and such steps should then be taken with respect to the two petitions as appears to be for the best interest of the estate. *In re Dwyer*, (D. C. N. D. 1902) 112 Fed. 777, 7 Am. Bankr. Rep. 532. See also *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

SEC. 19. JURY TRIALS.—*a* [When demandable — waiver.] A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within

such time, a trial by jury shall be deemed to have been waived. [(1898) 30 Stat. L. 551.]

Right to trial by jury.—The only issues on which a person against whom an involuntary petition in bankruptcy has been filed is entitled to right to a jury trial are with respect to his insolvency, and the commission of the acts of bankruptcy with which he is charged. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 50; *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 99; *Day v. Beck*, etc., Hardware Co., (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *Morss v. Franklin Coal Co.*, (M. D. Pa. 1903) 125 Fed. 998, 11 Am. Bankr. Rep. 423; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560; *Bernard v. Abel*, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 19 Am. Bankr. Rep. 383; *Schloss v. Strellow*, (C. C. A. 3d Cir. 1907) 156 Fed. 662, 19 Am. Bankr. Rep. 359; *In re Harris*, (S. D. Ala. 1907) 156 Fed. 875, 19 Am. Bankr. Rep. 204; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *Carpenter v. Cudd*, (C. C. A. 4th Cir. 1909) 174 Fed. 603.

Right to jury trial absolute where it exists.—The right to a jury trial, on written application therefor, for the purposes specified in section 19a, is absolute, and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict; but the verdict may be set aside, or the judgment may be reversed for error of law, as in common-law cases. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 54.

Who may demand jury trial.—The right to a jury trial of the question of an involuntary bankrupt's insolvency, and of alleged acts of bankruptcy, is limited to the bankrupt; and it cannot be extended to intervening creditors contesting such issues. *In re Herzikopf*, (C. C. A. 9th Cir. 1903) 121 Fed. 544, 9 Am. Bankr. Rep. 745.

Time to make demand.—In a case of involuntary bankruptcy a demand for a trial by jury, as to the commission of the acts of bankruptcy alleged, and the fact of solvency, must be made by the debtor at or before the expiration of the time allowed for an answer, unless the time is extended by the court. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

Submission of questions incidental to insolvency—Question as to partnership.—The respondent in proceedings in involuntary

bankruptcy is entitled to go to the jury upon everything affecting the question of his solvency; and where a determination of an issue as to whether he was a partner, as charged, decides the question of his solvency, such issue must be submitted to a jury. *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279.

But in *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128, it was held that on an involuntary bankruptcy petition against the members of an insolvent partnership, the question whether one of the alleged partners was in fact a member of the firm is not a question which should be submitted to a jury.

Amount of indebtedness and valuation of property.—An issue as to the insolvency of an alleged bankrupt involves, as elements, the questions of the amount of his indebtedness, and the fair valuation of his property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury upon the trial of such issue. *Schloss v. Strellow*, (C. C. A. 3d Cir. 1907) 156 Fed. 662, 19 Am. Bankr. Rep. 359.

Trial according to common law.—When, on an issue of fact as to the existence of ground for adjudication, a jury trial is demanded as of right, the trial proceeds according to the course of common law. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 54; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 108 Fed. 839, 5 Am. Bankr. Rep. 649; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

Burden of proof.—On a trial by jury the burden of proving insolvency was on the petitioners. *McGowan v. Knittel*, (C. C. A. 3d Cir. 1905) 137 Fed. 453, 15 Am. Bankr. Rep. 1.

A motion by both parties for a peremptory instruction is equivalent to a request for a finding of the facts by the court, and, if the court directs a verdict for one of the parties, both are concluded by the facts thereby found. *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329.

Waiver of right to jury trial—Failure to demand.—The failure of an alleged involuntary bankrupt to formally apply for a jury, in writing, at or before the time when an answer is required, operates as a waiver of the statutory right to a trial by jury. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875, 11 Am. Bankr. Rep. 738; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128.

Waiver by admissions made in answer.—The statute does not entitle an alleged bankrupt to a jury trial where by his answer he admits his insolvency and the commission of

the alleged acts of bankruptcy, but alleges that he is not amenable to bankruptcy proceedings because chiefly engaged in farming. *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560.

Failure to deny commission of act of bankruptcy. — In the case of a petition in involuntary bankruptcy alleging the making of a

general assignment for creditors, where the defense set up by the debtor is that the petitioning creditors are estopped, by their conduct, with reference to the assignment, to maintain a petition based thereon, he is not entitled to a trial by jury. *Simonson v. Simsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824.

b [Attendance of jury — certifying case to other court.] If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. [(1898) 30 Stat. L. 551.]

c [Laws as to jury trials applicable.] The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury. [(1898) 30 Stat. L. 551.]

Submission of matters in controversy to jury. — The submission of issues of fact to a jury in an involuntary bankruptcy proceeding, under section 19c, is within the discretion of the judge of the bankruptcy court, and the verdict returned is wholly advisory. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *Moras v. Franklin Coal Co.*, (M. D. Pa. 1903) 125 Fed. 998, 11 Am.

Bankr. Rep. 423; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875, 11 Am. Bankr. Rep. 738; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128; *Carpenter v. Cudd*, (4th Cir. 1909) 174 Fed. 603, 98 C. C. A. 449; *In re Wakefield*, (N. D. Cal. 1910) 182 Fed. 247.

SEC. 20. OATHS, AFFIRMATIONS. — *a [Who may administer.]* Oaths required by this Act, except upon hearings in court, may be administered by

(1) referees; [(1898) 30 Stat. L. 551.]

(2) *[Authorized officers.]* officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and [(1898) 30 Stat. L. 551.]

A notary public is an officer authorized to administer oaths in proceedings in the courts of the United States by Act of Aug. 15, 1876, c. 304, 19 Stat. L. 206, 5 Fed. Stat. Annot. 379; and an oath taken before him is sufficiently authenticated, *prima facie*, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the state statutes. *In re Pancoast*, (E. D. Pa. 1904) 129 Fed. 643, 12 Am. Bankr. Rep. 275. See also *In re Kindt*, (S. D. Ia. 1900) 98 Fed. 403, 3 Am. Bankr. Rep. 443; *In re Kimball*, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144.

A notary's certificate of acknowledgment to the power of attorney to a proxy of the bankrupt's creditor is sufficient, though having no venue, where it complies with form No. 21. *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, reversing (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

Verification before attorney for affiant. — It has been held that it is not a valid objection to the proof of a claim against the estate of a bankrupt, that the officer taking the verification thereof is the creditor's attorney. *In re Kimball*, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144.

But see *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318, wherein it was held that the verification of the petition and schedules were defective in that they were made before a notary public who was the attorney of the bankrupt.

But the fact that the notary, before whom the oath was taken, subsequently becomes the affiant's attorney, does not invalidate the verification. *In re Kindt*, (S. D. Ia. 1900) 98 Fed. 403, 3 Am. Bankr. Rep. 443.

A justice of the peace, if authorized by the state law to take acknowledgments, may take the acknowledgment of a creditor to a letter of attorney to be used in the selection of a trustee. *In re Roy*, (W. D. N. Y. 1910) 185 Fed. 551, 26 Am. Bankr. Rep. 4.

(3) [*Diplomatic or consular officers.*] diplomatic or consular officers of the United States in any foreign country. [(1898) 30 Stat. L. 552.]

Diplomatic and consular officers.—An acknowledgment of a power of attorney before a diplomatic or consular officer in a foreign country is sufficient to authorize the proof

of a creditor's claim before the referee. *In re Sugenheimer*, (S. D. N. Y. 1899) 91 Fed. 744, 1 Am. Bankr. Rep. 425.

b [*Affirmations.*] Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath. [(1898) 30 Stat. L. 552.]

SEC. 21. EVIDENCE. — *a* [*Compulsory attendance of witnesses.*] A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: [(Amended 1903) 32 Stat. L. 798.]

Cross-reference: As to

Examination of bankrupt, see section 7a (9), *supra*, p. 524.

Purpose of examination.—*For trustee's information.*—The examination of a witness by the trustee, under section 21a, is taken solely for his information to enable him to act intelligently in the premises, and to take such steps as may be necessary for the protection and preservation of the estate. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Cobb*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104.

For discovery.—The provisions of the Bankruptcy Act authorizing the examination of third persons as witnesses in bankruptcy proceedings, and requiring them to produce books and documents when called for, are intended to enable creditors to find grounds of opposition to the bankrupt's discharge, if any exist, and to enable the trustee to discover assets of the estate which may be applied to the payment of the bankrupt's debts. *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253. *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

The examination is not intended as a means of producing testimony, pertinent to issues on trial, and is not directed to a defined issue between parties. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 755, 2 Am. Bankr. Rep. 822; *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *Matter of Adler*, (E. D. La. 1908) 21 Am. Bankr. Rep. 302.

Who may be examined.—In accordance with the provisions of section 21a, any competent witness, including the bankrupt and his wife, may be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration. *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5

Am. Bankr. Rep. 554; *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Pursell*, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96; *In re Hemstreet*, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383, 12 Am. Bankr. Rep. 267; *In re Sutter*, (S. D. N. Y. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; *In re Marcus*, (D. C. Vt. 1908) 160 Fed. 229, 20 Am. Bankr. Rep. 397; *In re Alper*, (S. D. N. Y. 1907) 162 Fed. 207, 19 Am. Bankr. Rep. 612.

The examination of the bankrupt has been considered under section 7a (9); therefore the annotation following is confined to the examination of third persons.

Right to have examination discretionary.—While the statute authorizes the court, on a creditor's application, to summon a third person for examination regarding the affairs or estate of a bankrupt, it does not give a creditor an unqualified right to demand the issuance of such a summons, the awarding of which is in all cases discretionary. *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383.

Examination of claimant against estate.—A party in interest, objecting to the allowance of a claim proved against the estate of a bankrupt, is entitled, in support of his objection, to examine the claimant and other witnesses, if their attendance can be secured without embarrassing delay. *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123.

Adverse claimant may be examined irrespective of where he may be sued.—The provisions of the Bankruptcy Act determining the forum in which suits by a trustee in

bankruptcy against an adverse claimant may be brought, do not in any way limit the right of the trustee to examine any competent witness concerning the acts, conduct, or property of the bankrupt; and he may examine a creditor, whose claim he disputes, concerning the extent and nature of the bankrupt's alleged indebtedness to him, without regard to the question as to what court, federal or state, would have jurisdiction of the trustee's suit against such creditor if he should decide to sue. *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257.

Examination of secured creditor.—Where a bankruptcy proceeding has been referred generally to the referee, he has jurisdiction to order a secured creditor to appear before him for examination. *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

Trustee in insolvency proceedings.—A trustee in bankruptcy may require the examination of a trustee in insolvency appointed under the state laws more than four months before the commencement of the bankruptcy proceedings, concerning the disposition made by him of the bankrupt's assets. *In re Pursell*, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96.

A bankrupt's husband cannot be compelled to testify without payment to him of his lawful fees. *In re Marcus*, (D. C. Vt. 1908) 160 Fed. 229, 20 Am. Bankr. Rep. 397.

Waiver of objection to subpoena.—Where a witness appeared for examination before a referee in bankruptcy, without objection on the ground that the subpoena was not sealed, it was held that the defect was waived. *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

Need not be a suit pending.—It is not necessary to the ordering of such an examination that there should be a suit pending by or against the bankrupt or his estate. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

Examination of books and papers.—The right to examine witnesses, under section 21a, includes the right to examine such books and written instruments as relate to the acts, conduct, or property of the bankrupt, and are under the control or in the possession of the witness. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re Hess*, (E. D. Pa. 1905) 136 Fed. 988, 14 Am. Bankr. Rep. 826; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Davis Tailoring Co.*, (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re Wheeler*, (C. C. A. 2d Cir. 1907) 158 Fed. 603, 19 Am. Bankr. Rep. 461, reversing (D. C. Conn. 1907) 18 Am. Bankr. Rep. 421; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 280.

Relevancy for court to determine.—A witness cannot refuse to produce the books and papers called for, or to answer questions relating thereto, on the ground that they contain nothing relating to the bankrupt's property, as this matter is not left to the opinion

of the witness, but must be determined by the court. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

Examination asked in bad faith will be denied.—An application by a creditor for leave to examine the books of a bankrupt, in the hands of his trustee, should be denied where it fairly appears that it is not made in good faith in his own interest, but in the interest of one who is not a creditor and who has no right to such examination. *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304.

Application for examination—Who may apply.—The application for the examination of a witness, under section 21a, may be made by any officer, the bankrupt, or a creditor. *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253; *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383, 12 Am. Bankr. Rep. 267; *In re Alphin, etc., Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194; *In re Kuffler*, (E. D. N. Y. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 280; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724; *In re Thompson*, (W. D. Pa. 1910) 179 Fed. 874.

Any creditor may apply for examination.—At the first meeting of creditors, in a proceeding in bankruptcy, any person who is actually a creditor of the bankrupt, and whose debt is provable under the Act, is entitled to examine the bankrupt, although he has not made formal proof of his claim; and the fact that his name is included in the bankrupt's list of creditors will be *prima facie* sufficient evidence of his having a provable debt. *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35.

Formal application unnecessary.—An order made by a referee in bankruptcy, at the instance of the trustee, requiring a designated person to appear and be examined as a witness concerning the acts, conduct, and property of the bankrupt, is valid without a formal application showing what questions are to be asked upon the examination, or as to what particular facts the witness is to be interrogated. The simple application or demand of the trustee for such an order is all that is required to support it. *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582.

Ancillary jurisdiction.—A United States District Court has ancillary jurisdiction to order the examination of witnesses, under section 21a, in aid of a proceeding pending in another district. *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377 (relying on *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372); *In re Sutter*, (S. D. N. Y.

1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724. And see also, as to the right to take depositions of witnesses residing out of the district, the annotation under subdivision b of this section, *infra*, p. 592. As to the right to exercise ancillary jurisdiction generally, see section 2 (20) and the annotation thereunder, *supra*, p. 480.

Where it is sought to examine a resident of another state, in support of a creditor's specifications of objection to a bankrupt's discharge, an application for an order requiring the witness to appear before a referee in bankruptcy and submit to examination should be made to the federal District Court of the district wherein the witness resides. *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724.

Notice of examination.—No notice need be given to the bankrupt of the examination of a witness by the trustee, under section 21a. *In re Cobb*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104.

Where a claimant against the bankrupt estate had no notice, at the time of the examination of the bankrupt and other witnesses, that the evidence taken thereon would be used against him on the hearing of his claim, it was held that such evidence was inadmissible against him. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863. See also the annotation under section 57d.

Conduct of examination.—As a general rule the examination must be confined to an inquiry as to the acts, conduct, and property of the bankrupt; and while the scope of such examination is necessarily broad, and considerable latitude must be allowed, matter which is clearly immaterial and irrelevant should be excluded. *In re Foerst*, (S. D. N. Y. 1899) 93 Fed. 190, 1 Am. Bankr. Rep. 259; *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Hayden*, (S. D. Fla. 1899) 96 Fed. 199, 1 Am. Bankr. Rep. 670; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253; *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554; *In re Pursell*, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477; *In re Wheeler*, (C. C. A. 2d Cir. 1907) 158 Fed. 603, 19 Am. Bankr. Rep. 461; *In re Ruos*, (E. D. Pa. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281; *U. S. v. Wechsler*, (S. D. N. Y. 1905) 16 Am. Bankr. Rep. 1; *In re Walton*, 1 Nat. Bankr. N. 533; *In re Pittner*, 2 Nat. Bankr. N. 915.

Ordinarily the examination is made by the trustee, and after his appointment a creditor should apply to him. If the trustee refuses to undertake the examination, the creditor may apply to the court for an order directing him to do so. To order the trustee to examine is manifestly a matter of discretion.

Doubtless the creditor may apply to the court in order to carry on the examination himself, but the court is not wholly without discretion to refuse the application. The examination of third persons concerning the bankrupt estate is anomalous; and, if wholly beyond the control of the court's discretion, it would be oppressive. *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383.

Determining competency of witness.—Where, in a proceeding before a referee in bankruptcy, a question arises concerning the competency of a witness, the referee should decide it in the first instance, and should not certify the question to the court until requested to do so in a proper manner. *In re Ruos*, (E. D. Pa. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281.

Competency of witness as to transactions with deceased person.—In a proceeding in a federal court, the competency of a witness to testify to a transaction with a deceased person is covered by R. S. sec. 858, 7 Fed. Stat. Annot. 1116, and is to be governed by that section, and not by the statutes of the state. *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

Determining relevancy and materiality of questions.—The witness cannot refuse to answer questions relating to the bankrupt's property on the ground that the inquiry is irrelevant and immaterial; the question of relevancy and materiality being one for the court. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Ruos*, (E. D. Pa. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281.

Full and frank answers required.—Section 21a should be liberally construed, so as to enforce full and frank answers by a witness in aid of the bankruptcy proceedings. *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554.

Disclosure of personal affairs.—A question should not be excluded, or the witness be excused from replying to it, because of his assertion that his answer, if made, would disclose the personal affairs of himself or of others, not material to the subject of the inquiry. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475.

But the statute does not authorize an inquiry as to the private affairs of a witness, which have no relation to the "acts, conduct, or property" of the bankrupt. *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554.

Objection that testimony may be subsequently used against witness.—A creditor of the bankrupt, being examined as a witness in the proceedings, cannot refuse to answer questions concerning the nature, extent, or evidences of his claims against the bankrupt, on the ground that his answers may furnish evidence which may be used against him in a civil suit thereafter to be brought by the trustee in bankruptcy. *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257.

A state statute which provides a rule of

evidence will be enforced in the court of bankruptcy. *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477.

Examination before masters and commissioners.—The bankruptcy law gives the court power to appoint special masters, or commissioners, to hold hearings under section 21a. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

Privileged communications.—The question whether certain communications are privileged is to be determined by the court and not by the witness. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477.

But testimony, although privileged, may be used for all purposes, when once it is brought out. *In re Bendheim*, (S. D. N. Y. 1910) 180 Fed. 918.

Incriminating evidence.—A witness called under the provisions of section 21a will not be obliged to give incriminating evidence against himself; and this rule also applies to documentary evidence, although the court may order the production of the writing to ascertain, by inspection, whether the objection

thereto is well founded. *In re Feldstein*, (S. D. N. Y. 1900) 103 Fed. 269, 4 Am. Bankr. Rep. 321; *In re Smith*, (S. D. N. Y. 1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213; *In re Kanter*, (S. D. N. Y. 1902) 117 Fed. 356, 9 Am. Bankr. Rep. 104; *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559; *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83; *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663, 16 Am. Bankr. Rep. 306.

Right of witness to have aid of counsel.—The right of a witness, other than the bankrupt, to have the aid of counsel at a hearing under section 21a, is discretionary with the court, but will usually be permitted where the examination is of such a nature as to warrant it. *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re Cobb*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104; *Matter of Adler*, (E. D. La. 1908) 21 Am. Bankr. Rep. 302.

[*Examination of bankrupt's wife.*] *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt. [(*Inserted 1903*) 32 Stat. L. 798.]

Examination of bankrupt's wife.—A certain latitude must be permitted in the examination of the bankrupt's wife, and, where there is reasonable ground therefor, she may be examined to determine whether a business conducted in her name is in fact hers or the bankrupt's; and she may also be asked such questions as are pertinent to that inquiry. *In re Worrell*, (E. D. Pa. 1903) 125 Fed. 159, 10 Am. Bankr. Rep. 744.

The wife of a bankrupt, under examination as a witness at the instance of the trustee or the creditors, may be questioned as to money or other property in her possession, and as to how and when the same was received or acquired; provided only that the testimony shows such questions to be reasonably pertinent to the subject of inquiry. *In re Foerst*, (S. D. N. Y. 1899) 93 Fed. 190.

b [*Depositions — right to take.*] The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. [(*1898*) 30 Stat. L. 552.]

Right to take depositions.—A court having charge of the administration of a bankrupt's estate has power to order that any person having knowledge "concerning the acts, conduct, or property" of the bankrupt, but who resides without the district or state, and more than one hundred miles from the court, shall be examined before a commissioner in accordance with the provisions of the general statutes or practice in equity cases; and persons so ordered to be examined may be compelled

by proper process, as in other cases, to appear and testify. *In re Hemstreet*, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re Cole*, (D. C. Me. 1904) 133 Fed. 414, 13 Am. Bankr. Rep. 300; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724. And see the cases cited *supra*, p. 590, under the heading *Ancillary Jurisdiction*.

c [*Notice of taking depositions.*] Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt. [(*1898*) 30 Stat. L. 552.]

d [Certified copies as evidence.] Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence. [(1898) 30 Stat. L. 552.]

e [Certified copy of order approving trustee's bond.] A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. [(1898) 30 Stat. L. 552.]

f [Certified copy of orders.] A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. [(1898) 30 Stat. L. 552.]

Copy of order granting discharge.—Section 21f provides, in effect, that a certified copy of the order granting a discharge shall be evidence of the jurisdiction of the court,

the regularity of the proceedings, and the fact that the order was made. *Custard v. Wiggerson*, (Wis. 1907) 17 Am. Bankr. Rep. 337.

g [Evidence of revesting title in bankrupt.] A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. [(1898) 30 Stat. L. 552.]

SEC. 22. REFERENCE OF CASES AFTER ADJUDICATION.—*a* [Judge may refer case.] After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it [(1898) 30 Stat. L. 552.]

Necessity of adjudication.—Section 22a, providing for reference of bankruptcy proceedings, permits no such reference until after adjudication. *In re Back Bay Automobile*

Co., (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

(1) [General or special reference.] generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or [(1898) 30 Stat. L. 552.]

A general reference, made under section 22a (1), authorizes the referee "to take such further proceedings as are required" by the Act. Presumably, therefore, it continues in force until no such proceedings are any longer required. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

Special reference.—A bankruptcy proceeding may be referred to the referee by a special order or on special issues, his power depending on the order of reference. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866.

Special reference superseded by general reference.—The powers of a special referee, appointed on petition of a receiver for the property of an alleged bankrupt pending a hearing on the petition, with authority to examine the bankrupt and other witnesses in relation to the property and assets of the bankrupt generally, are superseded on the making of an adjudication and an order of general reference. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

(2) [To any referee within territorial jurisdiction.] to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest

will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district. [(1898) 30 Stat. L. 552.]

Reference discretionary.—The reference of a case under section 22a (2) is a matter within the discretion of the court, guided by what appears to be the convenience of the parties in interest. *In re Western Invest. Co.*, (E. D. Okla. 1908) 21 Am. Bankr. Rep. 367.

Referee must reside in district.—Section

22a (2) refers to referees in bankruptcy appointed within the district where the case is pending; and the court has no jurisdiction to refer a case to a referee appointed and residing in another district for any purpose. *In re Schenectady Engineering, etc., Co.*, (N. D. N. Y. 1906) 147 Fed. 868, 17 Am. Bankr. Rep. 279.

b [Transfer of case to different referee.] The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another. [(1898) 30 Stat. L. 552.]

Cross-reference: As to

Absence or disability of referee as cause for transfer, see section 43, *infra*, p. 677.

Relationship between the bankrupt and the deputy clerk of the District Court, in whose

office a petition was filed, will be cause for transferring the case to another seat of the court in the same district and division, and ordering the record to be filed and docketed in the office of the clerk of the court at the latter place. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—*a* [Circuit courts.] The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. [(1898) 30 Stat. L. 552.]

The Circuit Court of the United States has been abolished by section 289 of the Judicial Code, which also provides, by section 291 thereof, that "wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." The code went into effect Jan. 1, 1912. See *ante*, title JUDICIARY, p. 249, this Supplement.

Jurisdiction of Circuit Court.—*Adverse claimants* in bankruptcy proceedings may, in a proper case, sue or be sued in the Circuit Court of the United States, when the bankrupt might have sued there on the same cause of action, viz., where there is a diversity of citizenship and the requisite amount is involved. *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762.

If a party contesting the right of a trustee in bankruptcy to property is claiming in the right of the bankrupt, the case is one for summary proceeding in the District Court, as a court of bankruptcy; but if claiming adversely, by title paramount, then it is a case for the Circuit Court, or the state court, as the facts may warrant. *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244.

Cause of action arising under laws of United States.—A Circuit Court of the

United States has jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, in violation of R. S. secs. 5197, 5198, 5 Fed. Stat. Annot. 130, 196; such action being one arising under the laws of the United States, which might have been brought in such court by the bankrupt, regardless of the citizenship of the parties. *Reed v. American-German Nat. Bank*, (W. D. Ky. 1907) 155 Fed. 233, 19 Am. Bankr. Rep. 140.

To establish validity of lien.—A Circuit Court, or other court of equity, has jurisdiction of a suit against a trustee in bankruptcy to establish the validity and lien of a pledge, made by the bankrupt, of property which has come into the hands of the trustee. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1899) 99 Fed. 82, 3 Am. Bankr. Rep. 582.

Jurisdiction over bankrupt essential.—The jurisdiction of a Circuit Court of a suit by an adverse claimant of property against a trustee in bankruptcy is expressly excluded by section 23a, where it would not have had jurisdiction if the suit had been against the bankrupt. *Hatch v. Curtin*, (C. C. Mass. 1906) 146 Fed. 200, 16 Am. Bankr. Rep. 622. See also *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798.

Diversity of citizenship between the trustees in bankruptcy and the defendant is not necessary to the exercise by a federal Circuit Court of its jurisdiction, under section 23a,

of a suit brought by such trustees upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where the citizenship of the bankrupt and the defendant is such that the former might have sued in the federal court but for the bankruptcy proceedings. *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1115, 15 Am. Bankr. Rep. 656.

But a Circuit Court of the United States has no jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of property by the bankrupt, when the bankrupt, the trustee, and the defendant are all citizens of the same state. *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798, 2 Am. Bankr. Rep. 328.

The words "acquired or claimed" are synonymous, both alluding to property adversely held by third parties, but which by the terms of the Bankruptcy Act become vested in the trustee upon his qualification as such. *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep. 632.

The removal from a state court to a federal Circuit Court for diverse citizenship, of a suit by a trustee in bankruptcy for the conversion of property, the title to which vested in him by the adjudication in bankruptcy, places such suit in the federal court as if it had been commenced there on that ground of jurisdiction, within the rule making the judgment of the Circuit Court of Appeals final when the jurisdiction of the Circuit Court depends entirely on diverse citizenship, and not as if it had been commenced there by consent of defendant. *Spencer v. Duplan Silk Co.*, (1903) 191 U. S. 526, 24 S. Ct. 174, 46 U. S. (L. ed.) 287, 11 Am. Bankr. Rep. 563.

Jurisdictional amount essential.—A trustee or receiver in bankruptcy cannot remove

a cause into a federal court, on the ground that it is one arising under the laws of the United States, unless it clearly appears that the jurisdictional amount of \$2,000 is involved. *Swofford v. Cornucopia Mines*, (C. C. Ore. 1905) 140 Fed. 957, 15 Am. Bankr. Rep. 564.

Matters pertaining to administration of bankrupt estate—Determination of validity and priority liens.—A Circuit Court of the United States is without jurisdiction of a suit the object of which is to determine liens upon, and priorities in the distribution of, a bankrupt's estate in process of administration by a District Court, the jurisdiction of the latter court in such matter being original and exclusive; and it is immaterial that the property, which is in the custody of the bankruptcy court, is within the territorial jurisdiction of the Circuit Court, or that the suit was instituted by leave of the bankruptcy court. *Bray v. U. S. Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1909) 170 Fed. 689, 22 Am. Bankr. Rep. 363.

Suit to compel trustee to pay over assets.—A Circuit Court is without jurisdiction of a suit in equity against trustees in bankruptcy to require them to pay over the proceeds of property claimed by complainant, but which was sold by defendants under an order of the bankruptcy court as assets of a bankrupt estate. *Treat v. Wooden*, (C. C. Mass. 1905) 138 Fed. 934, 14 Am. Bankr. Rep. 736.

Bill by creditor.—Section 23a does not authorize the maintenance of a bill, by a simple-contract creditor, to set aside alleged fraudulent conveyances in aid of a bankruptcy proceeding against the grantor. *Viquesney v. Allen*, (C. C. A. 4th Cir. 1904) 131 Fed. 21, 12 Am. Bankr. Rep. 402.

b [Suits by trustee—where brought.] Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. [(Amended 1903 and 1910) 32 Stat. L. 798, 36 Stat. L. 840.]

I. JURISDICTION OF ADVERSE CLAIMS, 595.

II. JURISDICTION AS AFFECTED BY POSSESSION, 597.

III. JURISDICTION BY CONSENT, 599.

IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS, 600.

V. SUMMARY AND PLENARY JURISDICTION, 601.

VI. JURISDICTION OF STATE COURTS, 602.

I. JURISDICTION OF ADVERSE CLAIMS.

Bona fide adverse claims.—A suit brought by a trustee in bankruptcy, for the recovery of property alleged to be a part of the assets of the estate, against a *bona fide* adverse claimant thereof, must, excepting as to those cases which fall within the provisions of sections 60b, 67e, or 70c, be brought and prose-

cuted in a court wherein it might have been brought and prosecuted if proceedings in bankruptcy had not been instituted; in such cases the bankruptcy court has no jurisdiction unless it is given or acquired by the consent, express or implied, of such adverse claimant; or unless the property, which forms the subject-matter of the claim, is in the possession of the court of bankruptcy. *Bardees v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 46 U. S. (L. ed.) 413, 9 Am. Bankr. Rep. 47; *Chicago First Nat. Bank v.*

Chicago Title, etc., Co., (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1115, 15 Am. Bankr. Rep. 656; *Harris v. Mt. Pleasant First Nat. Bank*, (1910) 216 U. S. 382, 30 S. Ct. 296, 23 Am. Bankr. Rep. 632; *In re Ward*, (D. C. Mass. 1900) 104 Fed. 885, 5 Am. Bankr. Rep. 215; *In re San Gabriel Sanatorium Co.*, (C. C. A. 9th Cir. 1901) 111 Fed. 892, *reversing on rehearing* (C. C. A. 9th Cir. 1900) 102 Fed. 310, 4 Am. Bankr. Rep. 197; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751; *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624; *Havens, etc., Co. v. Pierek*, (C. C. A. 7th Cir. 1903) 120 Fed. 244, 9 Am. Bankr. Rep. 569; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *Beach v. Macon Grocery Co.*, (5th Cir. 1903) 125 Fed. 513, 60 C. C. A. 557, 11 Am. Bankr. Rep. 104; *In re Flynn*, (E. D. N. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318; *In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Scherber*, (D. C. Mass. 1904) 131 Fed. 121, 12 Am. Bankr. Rep. 618; *In re New York Car Wheel Works*, (W. D. N. Y. 1904) 132 Fed. 203, 13 Am. Bankr. Rep. 61; *Hinds v. Moore*, (C. C. A. 6th Cir. 1905) 134 Fed. 221, 14 Am. Bankr. Rep. 1, *reversing* (W. D. Tenn. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136; *In re Andre*, (C. C. A. 2d Cir. 1905) 135 Fed. 736, 13 Am. Bankr. Rep. 132; *In re Hadden Rodee Co.*, (E. D. Wis. 1904) 135 Fed. 886, 13 Am. Bankr. Rep. 604; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680; *In re Gilroy*, (S. D. N. Y. 1905) 140 Fed. 733, 14 Am. Bankr. Rep. 627; *Brumby v. Jones*, (C. C. A. 5th Cir. 1905) 141 Fed. 318, 15 Am. Bankr. Rep. 578; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251; *In re Davis Tailoring Co.*, (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *In re Adamo*, (E. D. N. Y. 1907) 151 Fed. 716, 18 Am. Bankr. Rep. 181; *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470; *In re Edwards*, (S. D. Ala. 1907) 166 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Haley*, (C. C. A. 6th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313; *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Horgan*, (C. C. A. 1st Cir. 1908) 164 Fed. 415, 21 Am. Bankr. Rep. 31; *In re Squier*, (E. D. N. Y. 1908) 165 Fed. 515, 21 Am. Bankr. Rep. 346; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr.

Rep. 621; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 863; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *Cooney v. Collins*, (C. C. A. 9th Cir. 1910) 176 Fed. 189, 23 Am. Bankr. Rep. 840; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *Copeland v. Martin*, (C. C. A. 5th Cir. 1910) 182 Fed. 805; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *In re Pickens*, (N. D. Ga. 1911) 184 Fed. 954; *In re Glenn*, (E. D. Pa. 1911) 185 Fed. 554; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985.

Scheduling of property by bankrupt immaterial.—A federal District Court, sitting in bankruptcy, has no jurisdiction to try title to personalty scheduled by the bankrupt as a part of his assets, as against a buyer claiming under an alleged executed sale thereof. *In re Flynn*, (E. D. N. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318.

Independent suits against strangers.—United States District Courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant; such jurisdiction being denied to them by section 23 of the Bankruptcy Act of 1898. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7.

Absolute ownership unnecessary.—In *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525, it was held that it is not necessary, in order to be an adverse claimant, that one should claim to be the absolute owner of the property in question.

Pledgee.—The surety on a bankrupt's bail bond, in whose hands property was deposited by the bankrupt to indemnify him for his liability, is an adverse claimant within the meaning of section 23b. *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857.

Recipient of property in payment of debt.—A claim by one who acquired possession of the property of a bankrupt before the filing of the petition in bankruptcy, that such property was delivered to him in part payment of a debt, and that he had no reasonable cause to believe that a preference was thereby intended, is clearly an adverse claim, of which a referee has not jurisdiction to summarily determine on its merits, except by the claimant's consent. *In re Adams*, (D. C. R. I. 1904) 130 Fed. 788, 12 Am. Bankr. Rep. 368.

Claim of assignee for creditors for services and disbursements.—A court of bankruptcy has no jurisdiction to adjudicate the merits of the claim of a general assignee of the bankrupt, to retain out of the bankrupt's estate money disbursed by him, or claimed on account of his commission as such assignee,

before the bankruptcy proceedings were begun, unless such assignee consents to the exercise of such jurisdiction. *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421; *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

Controversy between trustee and mortgagee.—The Act does not confer upon a District Court of the United States, as a court of bankruptcy, jurisdiction of a controversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage, unless with the consent of such mortgagee. *In re San Gabriel Sanatorium Co.*, (C. C. A. 9th Cir. 1901) 111 Fed. 892, 7 Am. Bankr. Rep. 206, reversing (C. C. A. 9th Cir. 1900) 102 Fed. 310, 4 Am. Bankr. Rep. 197.

Attaching creditors of a bankrupt, whose levies constitute the preference on which the adjudication in bankruptcy is based, do not occupy the position of third persons in possession of property claimed to belong to the bankrupt, or adverse claimants dealing therewith, so as to render it necessary that proceedings against them should be by bill in equity or other plenary process. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *Staunton v. Wooden*, (C. C. A. 9th Cir. 1910) 179 Fed. 61.

Where property is held by the agent or bailee of the bankrupt, the possession thereof cannot be adverse to the trustee. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381.

As to who are adverse claimants under a will, see *In re Baudouine*, (C. C. A. 2d Cir. 1900) 101 Fed. 574, 3 Am. Bankr. Rep. 651, reversing (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Colorable adverse claims.—The court of bankruptcy has, however, the right to determine whether a claim adverse to that of the trustee is real or merely colorable; and such determination may be had by a summary proceeding. If it is decided that the claim is *bona fide*, the parties will be relegated to a plenary suit in the proper court; but if the court decides that the alleged adverse claim is fictitious, or merely colorable, or that the claimant is simply the *alter ego* of the bankrupt, it will proceed summarily to dispose of it. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Michie*, (D. C. Mass. 1902) 116 Fed. 749, 8 Am. Bankr. Rep. 734; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Kane*, (N. D. N. Y. 1904) 131 Fed. 386, 12 Am. Bankr. Rep. 444; *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr.

Rep. 132; *In re Ellis Bros. Printing Co.*, (W. D. N. Y. 1907) 156 Fed. 430, 19 Am. Bankr. Rep. 472; *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260, 20 Am. Bankr. Rep. 37; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511; *In re Hayden*, (D. C. Mass. 1908) 172 Fed. 623, 22 Am. Bankr. Rep. 764; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985; *Ommen v. Talcott*, (C. C. A. 2d Cir. 1911) 188 Fed. 401.

Duty to determine validity of adverse claim.—On adverse claims being made to property, it is the duty of the referee to hear the testimony in order to determine whether the claim is real or merely colorable. *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

The mere assertion of a claim of title to property adverse to a trustee in bankruptcy, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily; but it is only when the evidence indicates that the asserted claim is not false or fraudulent that such court is deprived of jurisdiction. *In re Ellis Bros. Printing Co.*, (W. D. N. Y. 1907) 156 Fed. 430, 19 Am. Bankr. Rep. 472; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015.

Property held under process from state court.—Where property of a bankrupt is held adversely to his estate, under a claim of seizure on process from a state court, the court of bankruptcy has jurisdiction to summarily inquire and determine whether the adverse claim has an actual basis or is merely colorable. *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424.

Possession without claim of title.—Where the property of a bankrupt was alleged to be in the possession of a third person, who, though not admitting possession, claimed no title to any of the property, he could not object to the bankruptcy court's jurisdiction to order him to surrender the property to the trustee. *In re Fogelman*, (E. D. N. Y. 1911) 188 Fed. 755.

The trustee cannot enlarge the referee's jurisdiction merely by alleging that the claim under which the property is held has no merit, or is fraudulent, or by calling it "merely colorable," when no other reasons appear for so describing it. *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985.

II. JURISDICTION AS AFFECTED BY POSSESSION.

Possession of property gives jurisdiction thereover.—When a court of bankruptcy has acquired possession of the *res*, either actual or constructive, that is, where the property was in the possession of the bankrupt at the time the petition in bankruptcy was filed against him, or where such property has been taken possession of by the officers of the court, such as the referee, receiver, marshal.

or trustee, it is then *in custodia legis*, and the court has, by virtue of such possession, jurisdiction to hear and determine all adverse claims asserted thereto. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Murphy v. John Hofman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 17 Ann. Cas. 969, 30 S. Ct. 372; *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Russell*, (2d Cir. 1900) 101 Fed. 248, 41 C. C. A. 323; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Briskman*, (W. D. N. Y. 1904) 132 Fed. 201, 13 Am. Bankr. Rep. 57; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Henderson*, (N. D. W. Va. 1905) 142 Fed. 568, 16 Am. Bankr. Rep. 91; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244; *Cleminshaw v. International Shirt, etc., Co.*, (N. D. N. Y. 1908) 165 Fed. 797, 21 Am. Bankr. Rep. 616; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5; *Crosby v. Spear*, (1904) 11 Am. Bankr. Rep. 613, 98 Me. 542, 57 Atl. 881; *Matter of Cameron*, (E. D. Mich. 1908) 20 Am. Bankr. Rep. 790.

Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt, of which he claims the ownership, passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of lien; and that court may, by the process of injunction, protect its jurisdiction against interference. *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, 14 Am. Bankr. Rep. 45; *Murphy v. John Hofman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487; *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

Goods in actual possession of a bankrupt at the time of his adjudication as such, and

at the time of the reference of the case to a referee, who directs them to be locked in a store, are in custody of the United States court, from which they cannot be taken upon any process from a state court. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178. See also *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

Possession by act of officers.—When the court of bankruptcy through the act of its officers, such as referees, receivers, marshals, or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and its possession cannot be disturbed by the process of another court. *Murphy v. John Hofman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487.

An uncertain or fleeting occupancy by the officers of the bankruptcy court, however, is not sufficient to change the ordinary rule which gives the state courts jurisdiction over property which is in its possession; nor will the mere constructive possession of the bankruptcy court be effective as against the possession of the state court in every case. See *Frank v. Vollkommer*, (1907) 205 U. S. 521, 523, 529, 27 S. Ct. 596, 599, 51 U. S. (L. ed.) 911; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913. And see the annotation, *infra*, p. 602, under VI. *Jurisdiction of State Courts*.

Possession acquired for preservation of estate.—The District Court has jurisdiction of a controversy in a case in which it finds it absolutely necessary, for the preservation of the estate, to take the possession of the property from an adverse claimant by means of its receiver or the marshal, under section 2 (3), and the determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the true interpretation of section 23. *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608. And see the annotation under section 2 (3), *supra*, p. 472.

Controversies between estates in bankruptcy.—A court of bankruptcy has jurisdiction to determine a controversy as to the ownership of property between the trustees of two different estates, both of which are being administered by such court. *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624.

Property which has been unlawfully taken from the custody of the bankruptcy court, or its officers, may be recovered, and restored to the trustee or other proper officer, by a summary or other proceeding instituted for that purpose. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178; *In re Reynolds*, (D. C. Mont. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758; *In re Briskman*, (W. D. N. Y. 1904) 132 Fed. 201, 13 Am. Bankr. Rep. 57; *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39, 21 Am.

Bankr. Rep. 725; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

Surrender of possession.—Where the possession of property has been relinquished by the court of bankruptcy, or its duly authorized officer, the jurisdiction of the court thereover, as a general rule, ceases. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *Hinds v. Moore*, (C. C. A. 6th Cir. 1905) 134 Fed. 221, 14 Am. Bankr. Rep. 1, reversing (W. D. Tenn. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251.

Order of surrender improvidently granted.—Where an *ex parte* order permitting a claimant of property in the possession of a bankrupt to sue the trustee in a state court to determine the claimant's right thereto was improvidently granted, the court, on being advised of all the facts, had power to vacate such order, and enjoin the claimant from proceeding further in the state court. *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507.

Surrender as affected by subsequent possession.—The vacation by a court of bankruptcy of its order enjoining any interference under process from a state court with certain property then in the possession of the receiver in bankruptcy, cannot be deemed an abandonment by the court of bankruptcy of its possession of the property to be dealt with by the state court, where, in the meantime, there had been various dealings with the property by the bankruptcy court, including a sale by the trustee in bankruptcy. *Murphy v. John Hofman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487.

Unauthorized surrender by officer.—The bankruptcy court may draw to itself the determination of all controversies over the property in its possession, and when it once lawfully attaches its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or through a seizure thereof by an adverse claimant. *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, 14 Am. Bankr. Rep. 45; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507.

Possession of, or under, assignee for creditors.—A court of bankruptcy has jurisdiction of a proceeding by a trustee to recover property from an assignee to whom it was conveyed by the bankrupt, for the benefit of creditors, within four months prior to the bankruptcy. *In re Stokes*, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *O'Dell v. Boyden*, (C. C. A. 6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 17 Am. Bankr. Rep. 757; *In re Stewart*, (C. C. A. 6th Cir. 1910) 179 Fed. 222.

A purchaser from an assignee in insolvency who holds the property under a general assignment, when the sale is made before a trustee has been appointed, but after and with knowledge of the filing of a petition in

bankruptcy, has no title superior to that of the bankrupt's estate; but his equities in respect to the goods, or to the money that he has paid for them, may depend upon many circumstances, and can be settled in the District Court as a court of bankruptcy. *Bryan v. Bernheimer*, (1900) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623.

Court may require assignee to account.—A court of bankruptcy has jurisdiction to require an accounting from an assignee for creditors of a bankrupt, under an assignment which constitutes an act of bankruptcy; and where he appears and submits his account and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over property to the trustee because he asserts title to a part of such property in himself. *In re Thompson*, (C. C. A. 2d Cir. 1904) 128 Fed. 575, 11 Am. Bankr. Rep. 719.

III. JURISDICTION BY CONSENT.

Effect of consent.—A court of bankruptcy may, under section 23b, acquire jurisdiction, by the consent of the defendant, for the purpose of suits brought by a trustee in bankruptcy in the performance of the duties imposed upon him under the statute. The necessary consent may be given by such acts or conduct of the parties as will give jurisdiction in other cases; and where jurisdiction has been obtained in this manner the court will proceed to determine all of the rights of the parties to the subject-matter in controversy. *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 631; *In re Connolly*, (E. D. Pa. 1900) 100 Fed. 620, 3 Am. Bankr. Rep. 842; *In re Emrich*, (W. D. Pa. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89; *In re Steuer*, (D. C. Mass. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209; *In re Riker*, (S. D. N. Y. 1901) 107 Fed. 96, 5 Am. Bankr. Rep. 720; *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *Phillips v. Turner*, (C. C. A. 5th Cir. 1902) 114 Fed. 726, 8 Am. Bankr. Rep. 171; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A. 7th Cir. 1902) 116 Fed. 261, 8 Am. Bankr. Rep. 521; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 3, 9 Am. Bankr. Rep. 444, modifying *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *Havens, etc., Co. v. Pierek*, (C. C. A. 7th Cir. 1903) 120 Fed. 244, 9 Am. Bankr. Rep. 569; *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249, 10 Am. Bankr. Rep. 359; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Hadden Roddee Co.*, (E. D. Wis. 1904) 135 Fed. 886, 13 Am. Bankr. Rep. 604; *In re Noel*, (D. C. Md.

1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530; *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231; *Sheppard v. Lincoln*, (S. D. N. Y. 1910) 184 Fed. 182.

A general appearance of a defendant, and the filing of a demurrer on grounds going to the merits, as well as to the jurisdiction of the court, waives an objection that the court is without jurisdiction of the defendant's person. *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *Sheppard v. Lincoln*, (S. D. N. Y. 1910) 184 Fed. 182.

When an adverse claimant voluntarily comes into a court of bankruptcy and claims property in the possession of the trustee, wherever situated, or asserts a lien thereon and seeks to have it established, enforced, or protected, the proceeding becomes a "proceeding in bankruptcy" in the course of collecting the estate, reducing the same to money, and distributing the same, and a "controversy" in relation to the estate within the jurisdiction of the bankruptcy court. *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762.

Presenting claims.—Where a bank, claiming security under a deed of trust executed more than four months before the institution of bankruptcy proceedings, voluntarily submitted to the jurisdiction of the bankruptcy court by presenting its claim for adjudication, and the bankrupt's estate was wholly in the possession of the court, the referee has jurisdiction to adjudicate the validity of the deed in a summary proceeding. *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530.

Consent does not validate unlawful procedure.—Section 23b refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure; and where that is unlawful, the appearance of the defendant, and his contesting the proceedings, do not confer jurisdiction. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

Matters disconnected with bankruptcy proceedings.—A claimed indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends. *In re Girard Glazed Kid Co.*, (E. D. Pa. 1906) 136 Fed. 511, 14 Am. Bankr. Rep. 485.

Effect of objection to jurisdiction.—The failure of adverse claimants to abandon their claims to property not in the possession of the receiver in bankruptcy, after their ob-

jections to the jurisdiction of a court of bankruptcy to act on the receiver's petition for directions respecting a sale have been overruled, does not amount to a waiver of their objections or a consent to an exercise of jurisdiction. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102.

An adverse claimant brought into a court of bankruptcy by citation and ordered to turn over property, and who before entry of final decree against him specially objects on the ground that the court is without jurisdiction, cannot be held to have consented to such jurisdiction. *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857.

An assignee of a bankrupt cannot be deemed to have consented to the jurisdiction of the bankruptcy court because he participated in the proceedings before the referee, where he made formal protest to the exercise of such jurisdiction before the final order was entered. *Louisville Trust Co. v. Comingor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421.

IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS.

Jurisdiction to recover property fraudulently or preferentially transferred.—Prior to the amendment of 1903, suits for the recovery of property fraudulently or preferentially transferred, in violation of the provisions of sections 60b, 67e, or 70e, in the absence of consent, could only be brought in the court wherein such action might have been prosecuted if bankruptcy proceedings had not been instituted; this was definitely decided in the case of *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175. For the purpose of remedying this, the bankruptcy law was amended in 1903 so as to permit suits for the recovery of fraudulent and preferential transfers, under sections 60b and 67e, in the court of bankruptcy, concurrently with the state court, without the consent of the defendant. *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183, 11 Am. Bankr. Rep. 495; *Johnston v. Forsyth Mercantile Co.*, (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Horskins v. Sanderson*, (D. C. Vt. 1904) 132 Fed. 415, 13 Am. Bankr. Rep. 102; *Delta Nat. Bank v. Easterbrook*, (C. C. A. 5th Cir. 1904) 133 Fed. 521, 13 Am. Bankr. Rep. 338; *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; *Horner-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; *Bowman v. Alpha Farms*, (N. D. N. Y. 1907) 153 Fed. 380, 18 Am. Bankr. Rep. 700; *Lynch v. Bronson*, (D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 15 Am. Bankr. Rep. 700. And see the cases cited to this effect under sections 60b and 67e.

By the amendment of 1910, section 70e was included; so that proceedings thereunder, for the recovery of property transferred in fraud of creditors, may now be had in the bankruptcy court, concurrently with the state court, without the consent of the adverse party. The amendment of 1903, however, did not specifically mention recovery under section 70e, and there was a conflict of authority as to whether recoveries under that section could be had in the bankruptcy court without the consent of the adverse party. The following cases sustain the view that consent was unnecessary: *Johnston v. Forsyth Mercantile Co.*, (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 793. And see the annotation to this effect under section 70e.

But in many cases it was held that the amendment of 1903, because of the fact that section 70e was not specified therein, did not permit a recovery thereunder in the bankruptcy court without consent. *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183, 185; *Skewis v. Barthell*, (N. D. Ia. 1907) 152 Fed. 534; *Hull v. Burr*, (5th Cir. 1907) 153 Fed. 945, 948, 950, 83 C. C. A. 61; *Palmer v. Roginsky*, (S. D. N. Y. 1910) 175 Fed. 883; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913. See also the annotation under section 70e.

Pleading and practice.—A proceeding by a trustee in bankruptcy to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but while ancillary to such proceedings and authorized by the Bankruptcy Act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted, and, where that is a federal court, such suits are in equity and are governed by the rules of pleading and practice in equity which obtain in such court independently of the state court. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

V. SUMMARY AND PLENARY JURISDICTION.

Necessity of plenary action.—The rights of adverse claimants cannot be determined by summary proceedings; and where it appears that such a claimant has lawfully obtained possession of property prior to the bankruptcy proceeding, or where his claim otherwise appears to be founded in good faith, and not merely frivolous or fictitious, and the property is not in possession of the bankruptcy court, either actually or constructively, it is well settled that a plenary suit is necessary in order to litigate such claimant's right. *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Scherber*, (D. C. Mass. 1904) 131 Fed. 121, 12 Am. Bankr. Rep. 616; *In re Kane*, (N. D. N. Y. 1904) 131 Fed. 386, 12 Am. Bankr. Rep. 444; *In re New York Car Wheel Works*,

(W. D. N. Y. 1904) 132 Fed. 203, 13 Am. Bankr. Rep. 61; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680; *In re Davis Tailoring Co.*, (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470; *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Haley*, (C. C. A. 6th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 993, 22 Am. Bankr. Rep. 863; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 892, 23 Am. Bankr. Rep. 242; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Pickens*, (N. D. Ga. 1911) 184 Fed. 954; *In re Glenn*, (E. D. Pa. 1911) 185 Fed. 554; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985.

The mere fact that a person has been adjudged a bankrupt does not deprive other persons, owning or claiming purely legal rights to property claimed by the trustee, of having such rights adjudicated in the courts and by the procedure guaranteed to them by the Constitution. *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

Property in possession of bankrupt as agent.—Where property in possession of a bankrupt, which passed into the hands of his receiver, is claimed by a third person, who alleges title by virtue of a bill of sale, and that the bankrupt was in possession as his agent, both of which allegations are denied by the receiver, the court will not determine such issues of fact summarily on affidavits, but will retain the property in the hands of its receiver until the claimant has established his right in a plenary suit. *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680.

Suit against stockholder.—A suit by the trustee of a bankrupt corporation to compel a stockholder to pay corporate debts because of her alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock, is not a case of a preferential or fraudulent transfer, but is a suit of a plenary nature, of which the bankruptcy court has no jurisdiction except by defendant's consent. *In re Haley*, (C. C. A. 6th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313.

Determination of title to land.—The provisions of the bankruptcy law give no jurisdiction for the determination of a dispute as to a question of title to land on affidavits in the bankruptcy proceeding, unless the court in bankruptcy considers the transaction to have been so clearly the occasion of such fraudulent or dishonest action upon the part of the claimant, or his grantor, that no title could have passed or been acquired. *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470.

Nonresidents.—The statute confers no power on a court of bankruptcy to summon before it, by a rule to show cause, third per-

sons who are not parties to the record and who reside without the district and state, and are there served with the order; and under the general rules of law governing the federal courts, in the absence of express authority, such service is ineffectual to confer jurisdiction *in personam*. *In re Waukeasha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715.

Summary jurisdiction.—Where an adverse claim is made and it has been determined to be without merit, or where the property claimed is in the actual possession of the court, the claim may be disposed of by summary proceedings. *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 17 Ann. Cas. 969, 30 S. Ct. 372; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Muncie Pulp Co.*, (C. C. A. 2d Cir. 1905) 139 Fed. 546, 14 Am. Bankr. Rep. 70; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 21 Am. Bankr. Rep. 14; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

Thus it has been held that the District Court, sitting in bankruptcy, has jurisdiction to determine by summary proceedings, after a reasonable notice to claimants to present their claims to it, controversies between the trustee and adverse claimants over liens upon, and the title and possession of, (1) property in the possession of the bankrupt when the petition in bankruptcy is filed, (2) property held by third parties for him, (3) property lawfully seized by an officer, as the bankrupt's, under clause 3 of section 2 of the bankruptcy law, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. Such controversies are controversies in proceedings in bankruptcy under section 2; and they are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of section 23. *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

And in *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285, it was said that the collection and distribution of the assets of the bankrupt estate in a sense involves the administration of a trust. The court to which the administration is confided has the inherent power, apart from the special jurisdiction conferred by the bankrupt law, if need be, on its own motion, to punish mere intermeddlers by summary process. It can make no difference that the jurisdiction is invoked by the trustee, the receiver, or the bankrupt himself, so long as the person against whom the power of the court is invoked is a mere intermeddler, or one who claims to hold or take possession under a claim which in law is purely colorable. Such proceedings are not "suits" in the ordinary meaning of the term, nor in the sense in which the word is used in subdivision b of section 23. They come, rather, under subdivision 15 of section 2, which empowers the court to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be

necessary for the enforcement of the provisions of the Act. Each case of this kind, of course, must depend upon its own facts.

Where the claimant has acquired possession of the property prior to the bankruptcy, and claims the right to hold it as against the bankrupt or the trustee, then the authority of the referee, and of the court of bankruptcy in summary proceedings, is limited to determining whether the claim made is colorable merely, or is in fact adverse to the bankrupt, and according as it determines that question will it deny or retain jurisdiction of the controversy. *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 21 Am. Bankr. Rep. 14, *relying on* *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 406; *Louisville Trust Co. v. Comings*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413.

Practice.—The court may adjudicate controversies arising in bankruptcy proceedings, summarily, without subpoena, summons, pleadings, or evidence, according to the principles, rules, and practice in actions at law and suits in equity. *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913.

VI. JURISDICTION OF STATE COURTS.

Jurisdiction of state courts.—In all controversies between the trustee of the bankrupt's estate, and a stranger or third parties, as to the title and ownership of property alleged to belong to the estate of the bankrupt, the jurisdiction of the state courts is expressly preserved; and the trustee is relegated to such courts for the determination of his rights when the bankrupt himself should or could have litigated them therein, excepting as to proceedings under sections 60b, 67e, and 70e, unless the consent of the defendant has been obtained as required by the statute. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *Robinson v. White*, (D. C. Ind. 1899) 97 Fed. 33, 3 Am. Bankr. Rep. 88; *In re Nixon*, (D. C. Mont. 1901) 110 Fed. 633, 6 Am. Bankr. Rep. 693; *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992, 10 Am. Bankr. Rep. 343; *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; *French v. R. P. Smith, etc., Co.*, (Minn. 1900) 4 Am. Bankr. Rep. 785; *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575. And see the annotation, *supra*, p. 531, under section 11a, as to stay of suits pending in state courts.

Property in lawful possession of state court.—If the property claimed was in the lawful possession of the state court at the time the petition in bankruptcy was filed, and its possession has not been affected by the provisions of sections 60b, 67e, or 70e, pertaining to preferential and fraudulent transfers, such possession will draw to the state court jurisdiction over the *res*. *Frank v. Vollkommer*, (1907) 205 U. S. 521, 27 S. Ct. 596, 51 U. S. (L. ed.) 911, 17 Am. Bankr.

Rep. 806; *In re Heckman*, (9th Cir. 1905) 140 Fed. 859, 72 C. C. A. 8, 15 Am. Bankr. Rep. 500; *In re Kane*, (E. D. Pa. 1907) 152 Fed. 587, 18 Am. Bankr. Rep. 654; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913.

Conflict of jurisdiction. — In *Hooks v. Aldridge*, (C. C. A. 5th Cir. 1906) 145 Fed. 865, 16 Am. Bankr. Rep. 658, it was said that while it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the state courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the Supreme Court. Whether the bankruptcy court should make such orders as will preserve the estate, and await the final result of the litigation in the state court, or should act on its own opinion of the want of jurisdiction of the state court, and enforce its order to secure the possession of the property, is one of the questions left unsettled. At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the Constitution and laws of the United States, for it is an incontrovertible principle

that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. (*Ex p. Siebold*, (1879) 100 U. S. 371, 395, 25 U. S. (L. ed.) 717.) But it is, without doubt, the duty of both the state and federal courts to exercise the greatest caution to avoid this necessity where it is possible.

Formal proceedings necessary to oust possession of officer of state court. — A court of the United States will not dispossess the receiver or other officers of a state court by any summary order or process, or otherwise than by formal proceedings taken by its own receiver or trustee for that purpose. *Ross-Meeham Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624.

Trustee should apply to state court for order. — Where property belonging to the estate of a bankrupt is in the custody and possession of a receiver appointed by a state court, the trustee in bankruptcy should apply to the state court for an order directing the receiver to turn over the property to him. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 758.

c [Concurrent jurisdiction.] The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act. [(1898) 30 Stat. L. 553.]

Cross-reference: As to

Offenses generally, see the several subdivisions of section 29, *infra*, p. 646.

The Circuit Court has been abolished by section 289 of the Judicial Code, which became effective Jan. 1, 1912. See the annotation, *supra*, p. 594, under subdivision *a* of

this section; and see the title JUDICIARY, *ante*, p. 249.

Not applicable to civil actions. — Section 23c has no application to civil actions; the words "offenses enumerated" meaning the crimes described in section 29. *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798, 2 Am. Bankr. Rep. 328.

SEC. 24. JURISDICTION OF APPELLATE COURTS. — *a [Supreme court — circuit courts of appeals — territorial courts.]* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia. [(1898) 30 Stat. L. 553.]

The provisions of this section, as far as they relate to the Supreme Court, are reenacted in Judicial Code, section 252, *ante*, title JUDICIARY, p. 237, of this Supplement; and the provisions as far as they relate to the Circuit Court of Appeals are recognized and confirmed in Judicial Code, section 130, *ante*, title JUDICIARY, p. 196.

I. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

II. REVIEW BY UNITED STATES SUPREME COURT DIRECT FROM UNITED STATES DISTRICT COURT.

III. REVIEW BY UNITED STATES SUPREME COURT OF DECISIONS OF CIRCUIT COURTS OF APPEALS.

I. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

In general. — This section "relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by section 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson v. Otis*, (1903)

190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179." *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986.

Appealable "controversies," etc., under section 24a "by judicial definition are limited to cases of the class referred to in section 23." *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611, 614.

Where a "controversy" is of such a character that, if it had arisen in a federal court when it was not sitting in bankruptcy, the final decision of it would have been reviewable in the Circuit Court of Appeals, by writ of error or appeal, it is consequently reviewable on appeal or writ of error under section 24a. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363.

Under this section the Circuit Court of Appeals has appellate jurisdiction over the District Courts, sitting in bankruptcy, wherever there is a controversy of a character justiciable in other courts; and where the subject-matter involved in a decision was not in any way peculiar to bankruptcy, and is governed entirely by the principles of the common law and the rules of equity, an appeal is allowable. *Burleigh v. Foreman*, (1st Cir. 1903) 125 Fed. 217, 60 C. C. A. 109; *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699.

"Surely what constitutes a 'controversy' within the meaning of section 24a must be determined by the nature of the right involved and the issue tried, and not by the accidental circumstance as to which party is actor and which defendant. . . . Most of the confusion on this subject has arisen out of a misunderstanding of the decision in *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051. . . . It is manifest that the Supreme Court, if the judgment in [that case] had properly involved a decision as to the merits, would have decided that appeal was the proper method of bringing the question before the appellate court, for it sustained an appeal on a petition by a trustee to determine the rights of adverse claimants to property in the custody of the court in a later case reported in the same volume, namely, *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157." *Per Amidon, J.*, in *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 589, 590.

Decisions held appealable.—In the following cases decisions were expressly or impliedly held to be appealable:

A decree on a bill in equity by a trustee in bankruptcy to set aside a fraudulent conveyance by the bankrupt. *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650.

A decree denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as the first claim on the property of a bankrupt and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

A decision upholding the right of an inter-

vener, as a conditional vendor of the bankrupt, to certain goods and proceeds of other goods in the hands of the trustee in bankruptcy. *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997.

A person's assertion of title to property in possession of the trustee in bankruptcy by an intervention raising a distinct and separable issue. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Manson v. Williams*, (1909) 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869.

A judgment that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, and that it entitled the mortgagee to no lien upon the property and no preference in payment out of its proceeds. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, where the court said: "The late decision of the Supreme Court in *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 691, 48 U. S. (L. ed.) 986, as we understand it, is an adjudication of this question in accord with these views."

In the course of proceedings to marshal assets in the hands of a trustee, as between partnership and individual creditors, if a distinct and separable issue is raised between parties intervening, involving substantial rights, and which might arise at common law or in equity, an order made therein is appealable. *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217.

A decision on the petition of an adverse claimant to reclaim property taken possession of by the trustee in bankruptcy. *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

A decree adverse to a petitioner who alleged that he was the owner of property which, prior to the adjudication, had been in the possession of the bankrupt, but was since held by the trustee, and praying that the latter be ordered to surrender possession. *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89.

An order on a petitioner's prayer to have turned over to him as mortgagee the proceeds of the sale of the mortgaged property. *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43.

A decree on a petition in the nature of a bill in equity to establish the right of the petitioner to the possession of certain property also claimed by the trustee in bankruptcy and to enjoin the latter from interfering with such possession. *Security Warehousing Co. v. Hand*, (C. C. A. 7th Cir. 1906) 143 Fed. 32, affirmed in (1907) 206 U. S. 415, 27 S. Ct. 720, 51 U. S. (L. ed.) 1117.

A decree in a suit by a trustee in bankruptcy to cancel a conveyance of real estate of the bankrupt and quiet the trustee's title to it. *McCarty v. Coffin*, (C. C. A. 5th Cir. 1907) 150 Fed. 307.

A decision on the petition of an adverse claimant to reclaim property taken possession of by the trustee in bankruptcy. *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

A decree in a proceeding instituted by peti-

tion of the trustee in bankruptcy to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 586.

A decree summarily adjudicating the right to property in the possession of the trustee in bankruptcy and an adverse claimant. *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882.

A judgment determining the priority of certain liens upon lands belonging to the bankrupt's estate and involving questions of fact. *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927.

A decree dismissing the petition of lessors of a bankrupt to forfeit the lease in the event of a sale by the trustee in bankruptcy under the court's order. *Gazlay v. Williams*, (1908) 210 U. S. 41, 28 S. Ct. 687, 52 U. S. (L. ed.) 950.

A judgment by the Circuit Court of Appeals holding that an intervening conditional vendor of property sold to the bankrupt had no lien thereon as against a general creditor, because of a failure to file the contract of sale. *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782.

A dispute between a receiver in bankruptcy and an outside person as to whether a contract was made between them for the sale and purchase of property of the estate, brought before the bankruptcy court for determination. *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

An order disallowing a mortgage lien on the ground that it was given and accepted in fraud of the Bankrupt Act. *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62.

An order disallowing a creditor's claim to priority by reason of a mortgage to secure his debt, but allowing the debt. *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

On a creditor's answer to the trustee's petition to sell certain chattels and claiming chattel mortgage liens thereon, an order holding the chattel mortgages void. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirming* (1910) 216 U. S. 545, 30 S. Ct. 412.

A judgment determining the claim of a chattel mortgagee to assets in the hands of a trustee in bankruptcy. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

A judgment that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, that it entitled the mortgagee to no lien upon the property and to no preference in payment out of its proceeds. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363.

An order directing the receiver in bankruptcy to pay to the trustee in bankruptcy the proceeds of a sale of the bankrupt's assets under an order of the court. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699.

An order allowing a debt but disallowing

the creditor's claim of priority by reason of a mortgage to secure the debt. *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

An order dismissing a petition in involuntary bankruptcy, if it presents questions of law only, is appealable, although it is also reviewable on a petition to revise under section 24b. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71. But see as to exclusiveness of the remedies by appeal or by petition to revise, the note to section 24b, *infra*, p. 611.

Judgment erroneous but not void.—A judgment on an appeal determining in favor of the appeal "that somewhat cloudy question" whether a petition for revision is or is not the sole appellate remedy, is not void even though it be erroneous, and it cannot be vacated as a nullity at a subsequent term of court. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

Decisions held not appealable.—"Nothing as it seems to us can be regarded as a controversy 'arising in bankruptcy proceedings' within the purview of subdivision a, section 24, where the subject-matter and object of the proceedings are within the power to make a summary order. Certainly this is true where plenary action is not sought. . . . In determining the question of remedy, then, as between review or appeal under the Bankruptcy Act, we are not to be governed by our ideas of whether the power invoked can be rightly exercised or not in the given instance, but by the object and character of the proceeding." *In re Farrell*, (C. C. A. 6th Cir. 1910) 176 Fed. 505, 509, *citing* *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

A receiver in bankruptcy having turned over to the petitioning creditor certain of the bankrupt's property on the creditor's claim that the bankrupt was a bailee thereof only, a special commissioner recommended that the receiver's action be not approved, which recommendation was affirmed by an order of the District Court. Another order was thereafter made, referring to the same commissioner the duty to ascertain the value of the property, and the sum the creditor should pay to the bankrupt's trustee, and, on the commissioner's finding being filed, an order was entered confirming his report and directing payment to the trustee or clerk of the court. It was held that none of such orders was appealable or reviewable otherwise than by a petition to revise. *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916.

An order made in a proceeding between the trustee in bankruptcy and a prior assignee to determine the right to property in the custody of the court or its proceeds is not appealable. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397.

The following were held not to be appealable: An order dismissing a petition to revoke a discharge. *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611; an order directing the turning over of property or money by a third person to the trustee in

bankruptcy, *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39; a decree relating to the distribution of the proceeds of a sale of real estate made by the trustee in bankruptcy, *In re Groetzinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124, holding that the remedy is by petition to revise; a decree reversing a referee's judgment requiring a trustee to account to the creditors in specific sums as the rental value of the property of which he permitted the bankrupt to retain use and possession. *Clinton Bank v. Kondert*, (C. C. A. 5th Cir. 1908) 159 Fed. 703.

Decrees in proceedings in bankruptcy, as distinguished from "controversies arising in bankruptcy proceedings," and not enumerated in section 25a, are not appealable to the Circuit Court of Appeals, but are reviewable only on petition to superintend and revise. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051. See the note to section 24b, *infra*, p. 611.

Administrative orders.—"The 'controversies arising in bankruptcy proceedings' referred to in this section [section 24a], as has been heretofore held by this court, are 'those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt, or his general creditors,' and do not include 'administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate,' which, under section 24b of the Bankrupt Act, are subject to revision by this court in matter of law upon petition for review." *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, citing the following cases: *In re Mueller*, (6th Cir. 1905) 135 Fed. 712, 68 C. C. A. 349; *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668; *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 80 C. C. A. 397.

Orders made by the bankruptcy court requiring members of a bankrupt partnership, who have not been individually adjudged bankrupt, to schedule and surrender their individual property are not appealable under section 24a. *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261, where the court said: "It is not necessary for us now to determine what the final disposition to be made by the District Court of the individual assets of these appellants should be."

"No appeal lies from an order rejecting a petition for rehearing under the bankrupt law. Sections 24 and 25 of the Bankruptcy Act prescribe in what cases appeals may be had, and these sections manifestly do not cover such a case as this." *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232.

Decree awarding interlocutory injunction.—Under section 7 of the Circuit Court of Appeals Act of March 3, 1891, as subse-

quently amended by Act of June 6, 1900, ch. 803, 31 Stat. L. 660, 4 Fed. Stat. Annot. 422, an appeal would lie to the Circuit Court of Appeals from a decree of the District Court awarding an interlocutory injunction in a bankruptcy case, even though the right to issue the injunction involved the jurisdiction of the District Court, provided, however, as declared in the Act above cited, that the Circuit Court of Appeals would have jurisdiction of an appeal from a final decree in the cause; if the injunction was allowed in a cause of a character subject only to review on petition for revision, no appeal would lie from the decree awarding the interlocutory injunction. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397, dismissing the appeal.

Time limit for appeal.—Appeals to the Circuit Court of Appeals from decisions of the District Court in "controversies arising," etc., under section 24a must be taken "within six months after the entry of the order, judgment, or decree sought to be reviewed," as provided in section 11 of the Circuit Court of Appeals Act of 1891, c. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579.

Parties to appeal.—"All the parties interested in the proceedings must be made parties to the appeal and must be given notice of its pendency and hearing." *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71.

Parties jointly interested in, and aggrieved by, a final decision, may jointly appeal therefrom. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71.

Where a single order or judgment is made by a District Court in a bankruptcy proceeding which determines a question affecting alike different claimants, they may unite in an appeal therefrom, although their interests are several and distinct. *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, sustaining a joint appeal from an order fixing certain priorities and liens.

"The practice and requirements upon appeals in bankruptcy cases are substantially the same as in other cases." *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475, 478. See also for various matters of appellate procedure, the first note, to section 25a, *infra*, p. 623.

An appeal was dismissed where citation was not issued nor the assignment of errors filed until after a term of the Circuit Court of Appeals had intervened, and the transcript was not filed until after a second term had passed, and no showing was made in excuse of the delay. *Nazima Trading Co. v. Martin*, (C. C. A. 9th Cir. 1908) 164 Fed. 838.

Presentation and reservation in lower court of ground of objection.—Where an order was made on the trustee's petition to sell chattels, if the trustee's official capacity was not challenged in the court below, it cannot be questioned on a creditor's appeal from the order. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, affirmed (1910) 216 U. S. 545, 30 S. Ct. 412.

Where a petition was filed by a married woman against her husband and his trustee in bankruptcy to enforce a resulting trust of certain land standing in his name, an objection that a judgment in her favor was erroneous because she, being a married woman, had no power to sue without the intervention of a trustee or a next friend, and that no decree *pro confesso* was taken against her husband on his failure to answer, could not be made for the first time on appeal. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

Assignment of errors.—Where, on appeal from an order confirming a master's report as to the amount of rents a bankrupt's wife was entitled to under a decree enforcing a resulting trust of land held by the bankrupt, none of the errors assigned raised any question as to the correctness of the decree in favor of the wife for rents and profits, but all of them related to the question of amount, the wife's right to recover rents could not be reviewed. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

Failure to incorporate evidence in the record, where there is nothing to show any evidence was taken, is not ground for dismissing the appeal. *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369.

Review in general.—"Upon an appeal from a final decision in equity, all the anterior rulings in the progress of the cause are reviewable." *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 73.

Where each party has laid the merits before the appellate court, regardless of the pleadings, the court may not feel called upon to depart from the issues actually shown by the proofs, or to raise any question of variance. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 704.

Review of facts.—"When the court has considered conflicting evidence and made a finding or decree, it is presumptively correct, and unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand." *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 946, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

As a rule the Supreme Court will not disturb concurrent findings of fact by two courts below, and this rule will be adhered to unless the lower courts clearly erred in their conception of the weight of the evidence. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332; *Manson v. Williams*, (1909) 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869, where the court said: "We do not say that we necessarily should have come to this conclusion if the case had been tried before us in the first instance, but, upon a pure question of fact, the error, if there was one, is not so plain as to call upon us to depart from our usual rule."

Upon reversing an order of the District Court, which reversed an order of the referee, it was observed that "the referee had the

opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts, which have before them nothing but the printed record." *Southern Pine Co. v. Savannah Trust Co.*, (C. C. A. 5th Cir. 1905) 141 Fed. 802. To the same point see numerous cases cited in *Moore on Facts*, sections 992, 1278, 1276.

Remand.—The rule that an appellate court will remand a cause with instructions to dismiss whenever it appears from the record that there was no jurisdiction in the court below, has no application except where such want of jurisdiction affirmatively appears upon the face of the record, in a case otherwise properly before the appellate court; and the appellate court has no jurisdiction to so remand where the alleged want of jurisdiction of the court below is predicated upon an issue of fact adjudicated in the court below in favor of the jurisdiction, and where the order of judgment in which such adjudication was involved is not properly brought before the appellate court for review. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576.

Scope and exigency of mandate.—Where an order made by a District Court, sustaining a claim of privilege of a witness examined by creditors in a bankruptcy proceeding, was reversed by the Circuit Court of Appeals, which remanded the cause for further proceedings, the court below properly vacated an order previously made by the referee discharging the trustee, and required the witness to appear again for further examination. *Brown v. Persons*, (C. C. A. 3d Cir. 1903) 122 Fed. 212.

II. REVIEW BY UNITED STATES SUPREME COURT DIRECT FROM UNITED STATES DISTRICT COURT.

"Appellate jurisdiction in other cases."—So far as this phrase in section 24a refers to the appellate jurisdiction of the Supreme Court direct from federal District Courts, it imports the jurisdiction conferred by section 5 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 827, 4 Fed. Stat. Annot. 398, which section is now embodied in Judicial Code, sec. 238, *ante*, title JUDICIARY, p. 231, of this Supplement. It is to be observed, however, that cases not "controversies arising in bankruptcy proceedings" within the meaning which that phrase in section 24a of the Bankruptcy Act has acquired in bankruptcy cases are nevertheless appealable direct to the Supreme Court if they are of the character described in section 5 of the Circuit Court of Appeals Act of 1891 (now Judicial Code, sec. 238) above mentioned. Thus a judgment adjudging a defendant a bankrupt is enumerated in section 25a of the Bankruptcy Act (1 Fed. Stat. Annot. 602, and see *infra*, p. 623) among the judgments appealable to the Circuit Court of Appeals. Nevertheless, if the jurisdiction of the District Court was in issue in the case the judgment is appealable on that issue direct to the Supreme Court, as in the case of *FredERIC L. Grant Shoe Co. v. W. M. Laird Co.*,

(1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591. In other words, appeals under section 5 above mentioned, now Judicial Code, sec. 238, although in bankruptcy cases, are taken independently of section 24a of the Bankruptcy Act. See *infra*, this note, *Time for appeal and error*, p. 609.

Jurisdiction of District Court in issue.—Cases taken on appeal or error direct to the Supreme Court from the District Court in bankruptcy cases are usually those in which the jurisdiction of the court was in issue (or claimed to have been in issue) under the first specification in section 5 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 398, now Judicial Code, sec. 238, *ante*, title JUDICIARY, p. 231, of this Supplement. In fact, all of the cases cited in this division II. of this note (pp. 607–610) were brought up under that section.

Section 5 of the Circuit Court of Appeals Act, above referred to, is copiously annotated in 4 Fed. Stat. Annot. 399 *et seq.*, and in the corresponding place in title JUDICIARY, *post*, vol. 2, of this Supplement.

In the following bankruptcy cases the Supreme Court determined questions of jurisdiction certified by the District Court on appeal or error: *Harris v. Mt. Pleasant First Nat. Bank*, (1910) 216 U. S. 382, 30 S. Ct. 296, as to jurisdiction to entertain a suit brought by a trustee in bankruptcy against a bank to require it to surrender notes pledged by the bankrupt as collateral security; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, as to ancillary jurisdiction to entertain a summary proceeding by a trustee in bankruptcy appointed in a bankruptcy proceeding in another district to compel officers of the bankrupt corporation to deliver to such trustee the documents in their possession relating to the business of the bankrupt; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, as to jurisdiction to adjudicate bankruptcy in an involuntary proceeding by a creditor on a claim for unliquidated damages, the judgment appealed from being an adjudication of bankruptcy; *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, as to jurisdiction of a plenary suit in equity to determine the extent and character of liens upon, rights in, and disposition of property which became subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him; *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, as to jurisdiction of a summary application by a trustee in bankruptcy to grant an order the result of which would be to take immediately from the bankrupt's surety on a bail bond in a state court moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, as indemnity against liability, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money obtained by him; *Bardes v. Hewarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175,

as to jurisdiction of a suit in equity by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of goods by the bankrupt and to compel defendants to account for the goods or their proceeds; *Mitchell v. McClure*, (1900) 178 U. S. 539, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1182, as to jurisdiction of an action of replevin by a trustee in bankruptcy to recover goods alleged to have been conveyed by the bankrupt in fraud of the Bankruptcy Act and of creditors; also in the two cases cited in the next two paragraphs, *infra*.

When property of the bankrupt has come into possession of the trustee in bankruptcy, and the bankrupt has asserted in the federal District Court in bankruptcy a claim to be entitled to a part or the whole of such property, as exempt property, the bankruptcy court necessarily is vested with jurisdiction to determine, upon the facts before it, the validity of the claimed exemption. In such a case, therefore, an erroneous decision against an exemption, and a consequently erroneous holding that the property forms assets of the estate in bankruptcy, to be administered under the direction of the court, while subject to correction on a petition for revision, does not create a question of jurisdiction proper to be passed upon by the Supreme Court on direct appeal from the District Court, even though a plea denying jurisdiction was filed in that court and its decree expressly asserted jurisdiction to hear and determine the matter. *Lucius v. Cawthon-Coleman Co.*, (1905) 196 U. S. 149, 25 S. Ct. 214, 49 U. S. (L. ed.) 425, dismissing the appeal. See also *In re Riggs*, (1909) 214 U. S. 9, 29 S. Ct. 598, 53 U. S. (L. ed.) 887.

A judgment dismissing a petition in involuntary bankruptcy on the ground that the respondent is not in fact, as alleged, a person who may be lawfully adjudged an involuntary bankrupt does not raise the question of jurisdiction. *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, where an appeal was dismissed, the court saying: "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned."

Following the case last above cited, it was held in *Columbia Ironworks v. National Lead Co.*, (C. C. A. 6th Cir. 1904) 127 Fed. 99, that no question of jurisdiction was involved in a determination by the District Court that, on the proofs adduced, a corporation was engaged principally in manufacturing and mercantile pursuits and therefore subject to an adjudication of bankruptcy; and in *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 8th Cir. 1910) 177 Fed. 826, that the question whether a petition in involuntary bankruptcy alleges an act of bankruptcy does not go to the jurisdiction of the bankruptcy court.

Where the District Court's jurisdiction to enter a decree on petition of the trustee in bankruptcy was no more dependent upon the

rightful appointment of the trustee than a state court's would have been over a suit by that trustee, no appealable question of jurisdiction is presented. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 678, *affirmed* (1910) 216 U. S. 545, 30 S. Ct. 412.

O'Neal v. U. S., (1903) 190 U. S. 36, 23 S. Ct. 776, 47 U. S. (L. ed.) 945, was a writ of error to the District Court to review a judgment of imprisonment in contempt proceedings for an assault on a trustee in bankruptcy, the District Court certifying the question of jurisdiction. Dismissing the writ of error, the Supreme Court said: "The question here is asserted in the certificate to be whether the District Court had 'jurisdiction to try and punish the said defendant for contempt thereof, upon the facts and for the causes stated in said rule and affidavit.' Jurisdiction over the person and jurisdiction over the subject-matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court, for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out. In other words, the contention was addressed to the merits of the case, and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided."

What constitutes an appealable "question of jurisdiction" has been discussed in numerous cases not arising under the Bankruptcy Act. See 4 Fed. Stat. Annot. 399 *et seq.*, and the note in the corresponding place in title JUDICIARY, *post*, vol. 2, of this Supplement.

Where other questions are involved. See cases cited under this catch-line in 4 Fed. Stat. Annot. 400, and under the same catch-line in the corresponding place in title JUDICIARY, *post*, vol. 2, of this Supplement.

Speaking of section 5 of the Circuit Court of Appeals Act above cited in this note, the court said: "It is the settled construction of this statute that . . . the losing party in a Circuit Court or a District Court may take to the Supreme Court the question of jurisdiction, in accordance with this provision of statute, or . . . he may take the entire case, including the question of jurisdiction, to the Circuit Court of Appeals." *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217, 219.

Only after final judgment.—An appeal or writ of error in a case in which the jurisdiction of the court is in issue can be taken directly from the District Court to the Supreme Court only after final judgment. *Bardes v. Hawarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261, dismissing, therefore, a certificate presenting a question of jurisdiction in order to obtain instruction for the guidance of the District Court in a case which had not gone to judgment. But a subsequent judgment in the same case was reviewed by the Supreme Court on appeal with a certificate of the same question of jurisdiction. *Bardes v. Hawarden*

First Nat. Bank, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175.

Determination of a question of jurisdiction by the Circuit Court of Appeals on a petition for revision does not bar the petitioner from taking the same question direct to the Supreme Court from the District Court after final decision thereof in the latter court. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

Time for appeal and error.—The time limit for an appeal or writ of error direct to the Supreme Court from the District Court in a bankruptcy case is two years, as provided in R. S. sec. 1008, 4 Fed. Stat. Annot. 622; such cases are now governed by the time limit of thirty days which is prescribed in general orders in bankruptcy No. 36, subd. 2, 1 Fed. Stat. Annot. 612. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

Form of appellate remedy.—Where a judgment of the District Court is based upon the verdict of a jury on a jury trial demanded as of right, the record can be brought to the Supreme Court with a certified question of jurisdiction only by means of writ of error and not by appeal. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1906) 203 U. S. 502, 27 S. Ct. 161, 51 U. S. (L. ed.) 292, dismissing an appeal. But if an appeal is dismissed for that reason, the record may be again brought up on a writ of error sued out in proper time. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

A judgment dismissing a petition in involuntary bankruptcy pursuant to a directed advisory verdict that the respondent was not a person who could lawfully be adjudged an involuntary bankrupt is reviewable on appeal. Such was the case of *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, where the finding was that the respondent was "engaged chiefly in farming."

Mandamus will not lie from the Supreme Court to the District Court, as a substitute for an appeal or writ of error, to review an adjudication of bankruptcy for alleged want of jurisdiction, where, in making the adjudication, the court was called upon to decide, and did decide, a question of fact or of mixed law and fact. *In re Riggs*, (1909) 214 U. S. 9, 29 S. Ct. 598, 53 U. S. (L. ed.) 887.

Certificate of question of jurisdiction.—The absence of a separate certificate by the District Court of the question of jurisdiction, or the equivalent of such certificate, is fatal to the appellate jurisdiction of the Supreme Court, where the appeal is taken on the sole question of jurisdiction of the District Court. *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, dismissing an appeal.

A certificate reciting several questions is quoted in *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, and in *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 539, 20 S. Ct. 1000, 44 U.

S. (L. ed.) 1175. For numerous other cases quoting certificates see the note to section 5 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 398, in the corresponding place in title JUDICIARY, *post*, vol. 2, of this Supplement.

Bill of exceptions.—On a writ of error with a certified question of jurisdiction a bill of exceptions is not necessary if it would add nothing to what is patent on the face of the record. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, an adjudication on a jury trial, where the record showed when and how the question of jurisdiction was raised and decided, and the elements necessary to decide it.

Case advanced for hearing in Supreme Court.—Supreme Court Rule 32, (1892) 146 U. S., appendix p. 707, provides that cases brought to that court direct from a District Court where the jurisdiction of the latter court is the only question in issue will be advanced on motion and heard under the rules prescribed in regard to motions to dismiss writs of error and appeals.

Cases direct from District Court not sitting in bankruptcy.—Final judgments in suits brought in the District Court not sitting in bankruptcy, but exercising the jurisdiction conferred by section 23a of the Bankruptcy Act on the Circuit Court, Circuit Courts being abolished by Judicial Code, section 289 *ante*, title JUDICIARY, p. 249, of this Supplement, are reviewable directly by the Supreme Court on appeal or error under the same conditions and regulations that govern direct review of judgments of the District Court sitting in bankruptcy, considered *supra* in this note. Thus, *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114, was a case of direct review on a writ of error, presenting the question of jurisdiction of the then Circuit Court to entertain a suit by trustees in bankruptcy to recover upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where one of the trustees in bankruptcy is a citizen of the same state with the defendant and the bankrupt a citizen of another state. And *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, was a case of direct review on writ of error involving the constitutionality of the Bankruptcy Act in an action against a bankrupt on a judgment recovered against him prior to his discharge in bankruptcy.

III. REVIEW BY UNITED STATES SUPREME COURT OF DECISIONS OF CIRCUIT COURT OF APPEALS.

Source of appellate jurisdiction.—An appeal from a final decision of a Circuit Court of Appeals in the proper exercise of its "appellate jurisdiction of controversies arising in bankruptcy proceedings" under section 24a is taken under the authority of section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, now embodied in sections 128, 241 of the

Judicial Code, *ante*, title JUDICIARY, pp. 195, 232, of this Supplement. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

"This section [section 24a] has no relation to appeals from the Circuit Courts of Appeals. Aside from the express provision therein as to the relations of the Supreme Court to courts of bankruptcy not within any organized circuit, and to the Supreme Court of the District of Columbia, this section did not broaden its jurisdiction in any particular." *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 17. See also *Hutchinson v. Otis*, (1st Cir. 1902) 115 Fed. 937, 941, 53 C. C. A. 419, *affirmed* (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179.

Jurisdictional amount.—It is to be observed that if a decision is not appealable to the Supreme Court under section 25b *infra*, but only under section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, re-enacted in part in section 241 of the Judicial Code, *ante*, title JUDICIARY, p. 232, of this Supplement, the matter in controversy must exceed \$1,000 besides costs. See *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 19, 53 C. C. A. 94; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179.

Time for appeal.—Judgments or decrees of the Circuit Court of Appeals in "controversies arising in bankruptcy proceedings" are not governed by general order 36, subd. 3, 1 Fed. Stat. Annot. 612, limiting thirty days for appeals in certain cases, but are reviewable by the Supreme Court upon appeal taken or writ of error sued out "within one year after the entry of the order, judgment, or decree sought to be reviewed," as provided in the last paragraph of section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409. *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650.

The appellate procedure on appeals to the Supreme Court from the Circuit Court of Appeals in "controversies arising in bankruptcy proceedings" is the same that obtains in like cases of appeals to the Supreme Court under the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, 4 Fed. Stat. Annot. 395, and is not regulated by any provision in the Bankruptcy Act or the general orders. Neither section 25b of the Bankruptcy Act nor general order No. 36, 1 Fed. Stat. Annot. 612, applies to such appeals. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

Hence on appeals from decrees of the Circuit Court of Appeals determining "controversies," etc., under section 24a, no findings of fact and conclusions of law are required; general order No. 36, subd. 3, 1 Fed. Stat. Annot. 612, applying only to appeals under section 25b. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

Miscellaneous matter of appellate procedure, see first note to sec. 25a, *infra*, p. 623.

Review on certiorari to the Circuit Court of Appeals, see *infra*, p. 641, section 25d.

Mandate and proceedings thereon.—On determination of a case taken to the Supreme Court from the Circuit Court of Appeals, which was brought to the latter from a District Court, it is customary to issue but a single mandate; and although the mandate may be addressed to the Circuit Court of Appeals alone in point of form, the directions as to the further proceedings of the District Court are not an order to the Circuit Court of Appeals to issue an order to the District Court, but simply directions to be communicated to the District Court, which the latter is to follow on the authority of the Supreme Court, not of the Circuit Court of Appeals. Hence an application for mandamus to the District Court to compel it to conform to the mandate must be made to the Supreme Court and not to the Circuit Court of Appeals, the latter having no jurisdiction thereof. *Ex p. Chicago First Nat. Bank*, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, *reversing* (7th Cir. 1906) 146 Fed. 742, 77 C. C. A. 408.

A decree of a District Court for the trans-

fer to certain adverse claimants of a part of the proceeds of a sale of property not in possession of the trustee in bankruptcy, without prejudice to the rights of such trustee, "if this court shall so authorize," to litigate in any proper court the question of his right to recover such funds as a part of the bankrupt's general estate, is a sufficient compliance with the mandate of the Supreme Court, which had directed the remanding of the case for further proceedings in conformity with its opinion, in which it was stated that the District Court's original decree should have been "without prejudice to the right of respondents to litigate in a proper court." *Ex p. Chicago First Nat. Bank*, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, *reversing* (7th Cir. 1906) 146 Fed. 742, 77 C. C. A. 408.

Where an appeal is dismissed by the Supreme Court without opinion, and the mandate recites only that the appeal was dismissed "for the want of jurisdiction," it would be idle to speculate as to the precise grounds upon which this action was taken. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

b [Circuit Courts of Appeals.] The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. [(1898) 30 Stat. L. 553.]

The provisions in this subsection are recognized and confirmed in Judicial Code, section 130, *ante*, title, JUDICIARY, p. 196, of this Supplement.

Appeal or petition to revise as exclusive or optional right—*Supreme Court*.—If a decree of a bankruptcy court is a step in bankruptcy proceedings proper, and is not enumerated in section 25a, no appeal will lie to the Circuit Court of Appeals, the latter having power to review such a decree only on a petition for revision. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, *reversing* (7th Cir. 1903) 125 Fed. 169, 60 C. C. A. 567, and holding that a controversy in the bankruptcy court between a receiver appointed by that court and an adverse claimant to property which the receiver had been authorized by the court to sell was a proceeding in bankruptcy and not reviewable by appeal.

First circuit.—"It is not unreasonable to hold that a dissatisfied litigant may appeal as to both the law and facts, or may, where a question of law is concerned, take the less expensive and the more summary manner of raising that alone by a revisory petition. Certainly no detriment could come therefrom, because in the latter case the party aggrieved waives all questions of fact, which is for the advantage of the winning party in the court below. . . . Neither has the Supreme Court expressly ruled on the proposition before us. It has, without question, permitted cases to

come before it based on revisory petitions to the Circuit Courts of Appeals without comment on this topic [citing cases] . . . In these cases it has proceeded so indiscriminately on the foundation of a revised petition to a Circuit Court of Appeals as to give much color to our proposition that in many cases parties considering themselves aggrieved may proceed either by such a petition or by appeal." *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217. *Compare In re Pettingill*, (C. C. A. 1st Cir. 1905) 137 Fed. 840.

Second circuit.—See *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962; *obiter*, *In re Mertens*, (2d Cir. 1906) 144 Fed. 818, 75 C. C. A. 548, *affirmed*, but not mentioning this point, *sub nom.* *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *In re Kuffler*, (C. C. A. 2d Cir. 1903) 127 Fed. 125.

Third circuit.—See *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

Fourth circuit.—Appeal is the exclusive remedy for review of an order allowing or rejecting a debt or claim of \$500 or over. *Postlethwaite v. Hicks*, (C. C. A. 4th Cir. 1908) 165 Fed. 897, dismissing a petition for revision. See also *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593; *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475.

Fifth circuit.—See *Union Nat. Bank v. Neill*, (C. C. A. 5th Cir. 1906) 149 Fed. 720.

Sixth circuit.—"That which may come here by appeal cannot come here for review; otherwise the distinction which the act recognizes will be ignored. Neither is there any reason for supposing that an order or judgment may be appealed when questions of fact are to be considered and reviewed upon petition if only a question of law is involved. The distinction between cases appealable and cases reviewable lies deeper, and turns upon the character of case or question. . . . The consensus of opinion and reason seems to be that this revisory jurisdiction does not include any orders or decrees which are appealable"—whether under section 24a or under section 25a—"the provisions for appeal and for petition of review being mutually exclusive. . . . The 'proceedings' reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25a." *Per Lurton, J., in In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 712, 715, dismissing a petition to review an order allowing a claim, which was appealable under section 25a (3).

"It is also the settled rule of this court, in accordance with the great weight of authority in the federal courts, and in harmony with the case of *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, and earlier decisions of the Supreme Court, that the provisions for appeal under section 24a of the Bankrupt Act and those for review under section 25b are 'mutually exclusive,' and that where an appeal has been erroneously taken it cannot be treated and sustained as a petition for review." *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 580, citing the following cases: *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668; *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397. See also *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

Seventh circuit.—"The very fact that specific methods are provided for specific situations is conclusively indicative to our minds that Congress did not intend that an aggrieved party should be at liberty to disregard the course definitely opened for him, and to choose some other that might better suit his inclination or convenience. There is no evidence of an intent, for example, to jumble up writs of error with appeals. Why should an inference be entertained that original petitions to review and appeals were intended to be interchangeable at the election of the suitor? . . . If an inferior territorial court enters one of the judgments in bankruptcy proceedings on the equity side which are specifically named in section 25a, is it conceivable that Congress designed that the aggrieved party should have his choice, not merely between methods of review, but also between forums?" *In re Friend*, (C. C. A.

7th Cir. 1905) 134 Fed. 778, holding that a judgment granting a discharge, being appealable under section 25a (2), is not reviewable on petition to revise, even though it involves only matter of law.

Eighth circuit.—"For reasons stated in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 392, the decision in *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992, was construed as a ruling that orders appealable under section 25a may nevertheless be reviewed in matter of law on petition under section 24b. See also *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369; *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585.

"The grant of jurisdiction to the Circuit Court of Appeals to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which that court would have had appellate jurisdiction if it had arisen in any other case in a federal court under section 24a, and the grant of jurisdiction to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy under section 24b, are not exclusive of each other, but cumulative or concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law alone. An aggrieved party often has a choice of these methods." *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579, 581.

"The Act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked." *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, holding that the fact that a decision may be reviewable on petition under section 24b does not alone make it nonappealable as a "controversy" under section 24a.

In *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, where the order of the court below, which was brought upon a petition to revise, was "probably" not an order rejecting a claim within the meaning of section 25a (3), the court said that even "if it were," it could be revised in matter of law on petition for revision; that appeal and revision are "concurrent and cumulative remedies;" and that "in many cases parties aggrieved have the option to present questions of law by petition for revision or questions of law and fact by an appeal." *Compare Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913.

Ninth circuit.—"There is in the language of the act nothing to indicate that the revisory power so given to the Circuit Courts of Appeals is more extensive than that which was exercised by the Circuit Courts under Bankruptcy Act March 2, 1867, c. 176, 14 Stat. L. 517. In *Lathrop v. Drake*, (1875) 91 U.

S. 516, 23 U. S. (L. ed.) 414, it was held that the appellate jurisdiction conferred on the Circuit Courts by the Act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the Bankruptcy Act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error." *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337, citing the following cases: *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051; *Scott v. Wilson*, (7th Cir. 1902) 115 Fed. 284, 53 C. C. A. 76; *In re Rusch*, (7th Cir. 1902) 116 Fed. 270, 53 C. C. A. 631; *In re Friend*, (7th Cir. 1905) 134 Fed. 778, 67 C. C. A. 500; *In re Mueller*, (6th Cir. 1905) 135 Fed. 712, 68 C. C. A. 349; *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 80 C. C. A. 397.

"The general consensus of opinion is that section 25a having provided a means to review by appeal three kinds of judgments, every other means is excluded." *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A. 9th Cir. 1904) 131 Fed. 430, 433.

Appeal treated as petition to revise. — Unquestionably where "matter of law" is sufficiently presented in the record on an appeal, the Circuit Court of Appeals is at liberty to treat the appeal as a petition to revise if appeal is decided not to be the proper remedy. *Holden v. Stratton*, (1903) 191 U. S. 115, 119, 24 S. Ct. 45, 47, 48 U. S. (L. ed.) 116, 118; *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

In *In re Abraham*, (C. C. A. 5th Cir. 1899) 93 Fed. 767, 787, the court treated an appeal as a petition for revision, the record clearly embracing a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. See the same case on certiorari *sub nom. Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814.

In *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, an appeal presenting only a question of law was treated as a petition for revision, thereby avoiding the necessity of deciding whether the judgment complained of was one rejecting a claim and therefore appealable under section 25a (3).

Treating an appeal in an unappealable case as a petition for revision, where the appellee made no objection, and the record was fully adequate to present a matter of law. "we shall not consider our action a precedent in any case where objection is made," said the court in *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39.

But an appeal cannot be treated as a petition for revision if a consideration of the facts is essential to any review of the de-

cision complained of. *Francis v. McNeal*, (C. C. A. 3d Cir. 1909) 170 Fed. 445; *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311, where the court said: "That is only permissible where questions of law only are involved," citing *In re Williams*, (9th Cir. 1907) 156 Fed. 934, 84 C. C. A. 434; *In re Rouse*, (7th Cir. 1899) 91 Fed. 96, 98, 33 C. C. A. 356, and *Courier Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (6th Cir. 1900) 101 Fed. 699, 41 C. C. A. 614.

Petition for revision treated as appeal. — While an appeal may be treated as a petition for revision in a proper case, the converse proposition does not necessarily hold; a petition for revision opens only questions of law, and jurisdiction of the Circuit Court of Appeals thereon cannot be enlarged by treating it as an appeal opening both fact and law. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

A petition to superintend and revise could not be treated as an appeal unless it was filed within the time limited for an appeal, which would be ten days if the judgment was appealable under section 25a. So stated in *Postlethwaite v. Hicks*, (C. C. A. 4th Cir. 1908) 165 Fed. 897.

Appeal united with petition. — An appeal and also a petition to superintend and revise were filed in the following cases, the court usually dismissing the proceeding which it deemed inappropriate and determining the questions presented in the other proceeding, especially when the latter was declared to be the exclusive remedy: *In re Moore*, (C. C. A. 5th Cir. 1909) 166 Fed. 689; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857; *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, "a course of practice recognized in this jurisdiction," citing *In re McKenzie*, (8th Cir. 1905) 142 Fed. 383, 73 C. C. A. 483; *In re Holmes*, (8th Cir. 1905) 142 Fed. 391, 73 C. C. A. 491; *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927, dismissing the petition, "as we are asked to consider evidence in the record," and entertaining the appeal; *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675; *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913; *In re Groetzing*, (C. C. A. 3d Cir. 1902) 127 Fed. 124; *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445; *Union Nat. Bank v. Neill*, (C. C. A. 5th Cir. 1906) 149 Fed. 720; *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, affirmed (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100; *In re Louisville Nat. Banking Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 403.

Questions and orders reviewable on petition. — See cases cited under this catchline in 1 Fed. Stat. Annot. 595.

In general. — "It is conceivable that the line of demarcation between proceedings in bankruptcy and controversies at law and in equity, arising in the course of bankruptcy

proceedings, may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs." *Per* Gilbert, J., in *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337, 339.

An order setting aside an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction is reviewable in matter of law on petition of the trustee. *In re* New England Breeders' Club, (C. C. A. 1st Cir. 1909) 169 Fed. 586, regarding that point as decided in *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992.

An order refusing to set aside an order of adjudication of bankruptcy is reviewable on petition under this section. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, citing as in point *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992, which held that the Circuit Court of Appeals had jurisdiction of a petition to revise a refusal of the bankruptcy court to permit certain creditors to file a motion to set aside an order dismissing a petition in involuntary bankruptcy.

Creditor claiming a lien.—"A decision of a controversy arising in bankruptcy proceedings which involves the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds under administration in possession of the court, is a proceeding in bankruptcy within the meaning of section 24b of the bankruptcy law and reviewable in matter of law upon a petition to revise." *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579, 581, citing the following cases: *Dodge v. Norlin*, (8th Cir. 1904) 133 Fed. 363, 367, 66 C. C. A. 425, 429; *John Deere Plow Co. v. McDavid*, (8th Cir. 1905) 137 Fed. 802, 810, 70 C. C. A. 422, 430; *In re McKenzie*, (8th Cir. 1905) 142 Fed. 383, 385, 73 C. C. A. 483, 485; *In re Holmes*, (8th Cir. 1905) 142 Fed. 391, 393, 73 C. C. A. 491, 493; *Security Warehousing Co. v. Hand*, (7th Cir. 1906) 143 Fed. 32, 38, 74 C. C. A. 186, 192; *Franklin v. Stoughton Wagon Co.*, (8th Cir. 1909) 168 Fed. 857, 860, 94 C. C. A. 269, 272, and *Thomas v. Woods*, (8th Cir. 1909) 173 Fed. 585, 588, 97 C. C. A. 535, 538.

Where the validity of a trust deed given by a bankrupt more than four months prior to the institution of bankruptcy proceedings,

as against other creditors, arises in bankruptcy proceedings in determining the priority of claims, an order holding the trust deed invalid is reviewable under section 24b, and need not be taken up by appeal. *Ritchie County Bank v. McFarland*, (C. C. A. 4th Cir. 1910) 183 Fed. 715; *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 472, "for the reasons stated by this court in the case of *Morgan v. Mannington First Nat. Bank*, (4th Cir. 1906) 145 Fed. 466, 468, 469, 76 C. C. A. 236."

Allowance of counsel fees and expenses.—An order passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate, if a question of fact is not involved, is reviewable in petition. *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362. Likewise an order allowing expenses incurred by a bankrupt's trustee for counsel fees. *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553.

"Where the right to amend in bankruptcy proceedings is a valuable legal right, the action of the district judge in refusing the amendment may be revised" under section 24b. *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, reversing an order denying the bankrupt the right to amend his schedule to supply an omission through mistake to claim his exemptions, and citing *In re Carley*, (3d Cir. 1902) 117 Fed. 130, 55 C. C. A. 146, which reversed, on petition, an order denying a creditor's motion to amend his specifications in opposition to a discharge.

Orders in contempt proceedings.—An order not made with a view to obtain possession of property of the bankrupt or to enforce a prior order of the court, but made in a criminal proceeding to punish by fine or imprisonment for contempt in violating an injunction against the bankrupt and others, has nothing to do with the estate of the bankrupt, and is not reviewable on a petition to revise. *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337, distinguishing *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, and *In re Cole*, (1st Cir. 1906) 144 Fed. 392, 75 C. C. A. 330, (1st Cir. 1907) 163 Fed. 180, 90 C. C. A. 50, on the ground that "those were not proceedings to punish for contempt already committed, but orders, the purpose of which was to require the payment to the trustees of the money of the estate, and the commitments for contempt were alternative, and for the purpose of compelling obedience to the orders."

"It would seem" that an order to show cause in a proceeding for contempt is not reviewable on petition, for the reason that it is not an interlocutory order which determines any substantial right of the petitioners. *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337.

An order adjudging the petitioner guilty of contempt in disobeying an order to pay over a sum of money to the trustee in bankruptcy, and ordering that he be committed to jail unless he paid the money, was re-

viewed on petition in *In re Graessler*, (C. C. A. 9th Cir. 1907) 154 Fed. 478.

Disputed questions of fact.—An order confirming or setting aside a referee's order requiring the bankrupt to turn over property to the trustee, involving disputed questions of fact, is not reviewable on petition. *Ellis v. Krulewitch*, (C. C. A. 8th Cir. 1905) 141 Fed. 954.

Whether the lien claimed by a creditor under a trust deed constituted a valid preference, so far as the question depended on the correct determination of the facts relating to the particular transaction, was not reviewable on a petition to revise. *Kenova L. & T. Co. v. Graham*, (C. C. A. 4th Cir. 1905) 135 Fed. 717.

It seems that an order transferring a case to another court of bankruptcy under section 32 of the Bankruptcy Act is not reviewable on petition, since it determines a mixed question of law and fact. *Kyle Lumber Co. v. Bush*, (C. C. A. 5th Cir. 1905) 133 Fed. 688.

The question whether the court erred in ordering a sale of property free from incumbrances, on the ground that it was covered by a mortgage which left no equity of redemption of value to the estate, cannot be reviewed on petition where it involves questions of fact as well as of law. *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937.

An order allowing a claim as a general debt, but disallowing in part a claim of the creditor to priority as a lienholder, where it depends on controverted facts, is not reviewable on petition. *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311.

A finding by a court of bankruptcy on competent evidence that money deposited by a bankrupt in a bank in his own name as attorney, giving the bank where he opened the account a power of attorney from his wife to draw against it, was not his money and did not pass to his trustee is one of fact, which cannot be reviewed on a petition to revise. *In re Donnelly*, (C. C. A. 2d Cir. 1911) 187 Fed. 121.

Orders of a miscellaneous character, expressly or impliedly held reviewable on petition, are as follows:

A decree directing trustees in bankruptcy to turn over certificates of stock and proceeds of other certificates to certain claimants thereof. *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845.

A decree of the District Court in favor of a trustee in bankruptcy subrogating him to the rights of certain creditors and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors might have done had not the bankruptcy proceedings intervened. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967; *McHarg v. Staake*, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971.

A decree requiring payment to the trustee in bankruptcy of a sum of money as a part of the assets of the bankrupt's estate. See end of opinion in *Schweer v. Brown*, (1904)

195 U. S. 171, 25 S. Ct. 15, 49 U. S. (L. ed.) 144.

A decision that a petitioner in involuntary bankruptcy had a provable claim, denying the alleged bankrupt's motion to dismiss the petition, and directing that the claim of the petitioning creditor be liquidated at a jury trial demanded by the alleged bankrupt. *In re Frederic L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, as explained in *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

Denial of an application by an individual creditor of a bankrupt member of a firm for an allowance of interest out of the individual estate subsequent to the allowance of his claim. *In re Chandler*, (C. C. A. 7th Cir. 1911) 184 Fed. 887.

A decision denying a summary order to compel the bankrupt's assignee for the benefit of creditors to turn over to the trustee assets alleged to belong to the bankrupt. *In re Farrell*, (C. C. A. 6th Cir. 1910) 176 Fed. 505.

An order directing the trustee in bankruptcy to pay a certain sum of money to the petitioners. *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339.

An order directing the turning over of property or money by a third person to the trustee in bankruptcy. *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39.

A decision on objections by creditors of a bankrupt to an account rendered by the trustee, which seeks to charge him with property as having come into his possession which was not accounted for, being a summary proceeding and not a plenary suit. *In re Moore*, (C. C. A. 5th Cir. 1909) 166 Fed. 689.

An order dismissing a petition in the nature of a replevin suit seeking to have delivered to him certain property seized by the receiver in bankruptcy. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

Refusal, solely on a question of law, of the trustee's petition for a summary order on a receiver appointed by a state court to deliver property to the trustee. *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823.

An adjudication of bankruptcy against a corporation, the question being one of jurisdiction and presented in the court below and in the appellate court on an agreed statement of facts. *Hall, etc., Co. v. Friday*, (C. C. A. 3d Cir. 1907) 158 Fed. 593, reversed on certiorari, but impliedly affirmed on this point (1910) 216 U. S. 449, 30 S. Ct. 261.

Denial of a creditor's application to set aside a bankrupt's discharge on the ground that, if the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge. *In re Louisville Nat. Banking Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 403, the question being "one of administration."

An order setting aside an allowance of a secured claim and requiring the creditor to pay to the trustee a sum received through an unlawful preference. *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, dismissing an appeal united with the petition for review.

An order denying a claim to certain exemptions asserted by the wife of a bankrupt. *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 158 Fed. 98.

An order made in a proceeding between the trustee in bankruptcy and a prior assignee to determine the right to property in the custody of the court or its proceeds. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397.

An order denying to holders of debts against a partnership the right of participation in the individual assets of the bankrupt partner until the individual creditors of the bankrupt were paid. *Euclid Nat. Bank v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1906) 149 Fed. 975, certiorari denied (1907) 205 U. S. 547, 27 S. Ct. 793, 51 U. S. (L. ed.) 924.

A decree of the District Court asserting its jurisdiction, on petition by the trustee in bankruptcy for an order to sell real estate in his possession, to determine the validity of claims to it or liens against it, and ruling that if such adverse claimants did not choose to come in voluntarily and set up their claims they might be brought in by subpoena on the trustee's petition. *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668.

An order requiring the bankrupt to assign and turn over to his trustee certain life insurance policies as property of his estate. *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, affirmed in (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771.

An order requiring a bankrupt to pay over to the trustee a sum of money as assets of the estate or in the alternative to be committed to jail. *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, certiorari denied in (1906) 201 U. S. 646, 26 S. Ct. 761, 50 U. S. (L. ed.) 903.

Orders requiring members of a bankrupt partnership to schedule and surrender their individual property. *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261.

A decree relating to the distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy. *In re Groetzinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124.

An order, on petition of a creditor, directing the sale of property which had previously been set apart to the bankrupt as a homestead. *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913.

A decree denying a chattel mortgagee's right to a fund arising out of the mortgaged property, which by agreement he had turned over to the bankruptcy court reserving the right to pursue the fund. *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249.

Time for filing petition.—See cases cited under this catchline in 1 Fed. Stat. Annot. 599.

When no rule of court prescribes time.—The Bankruptcy Act does not prescribe a limit of time within which a petition to superintend and revise must be filed, and none has been fixed by the general orders in bankruptcy, nor by any rule of court in most of the Circuit Courts of Appeals. "It does

not, however, follow from this lack of limitation that the Courts of Appeals will entertain petitions to revise any of the proceedings of the inferior courts of bankruptcy which a disappointed litigant may seek to challenge without regard to the time which has elapsed between the date of the proceeding and the presentation of the petition. One of the main purposes of the law was to provide a speedy method whereby a bankrupt might be finally discharged from liability to his creditors and his property might be equitably distributed among them. This object would be entirely defeated if the orders and judgments in bankruptcy were forever open, or were open for an uncertain or unknown time, to revision and reversal upon petitions under section 24b, because in that case they would never become or be known to be either final or conclusive. An uncertainty relative to the time within which such petitions may be maintained necessarily leaves the conclusiveness of the orders of the bankruptcy courts in doubt and thus tends to defeat one of the main purposes of the law. There ought, therefore, to be a well-known and certain limit to the time within which such judgments and orders may be challenged in matter of law by petition as well as by appeal." *Per Sanborn, J.*, in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391. For similar sentiments see *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556.

The several Circuit Courts of Appeals have adopted, in their reported opinions, either a definite limitation or a limitation depending somewhat upon the circumstances of each case. By the express terms of section 24b the power there conferred is a "jurisdiction in equity," and "a petition for revision, like all proceedings in bankruptcy, is a proceeding in equity." *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 394. General Order No. 37, 1 Fed. Stat. Annot. 612, provides that "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court shall be followed as nearly as may be." By liberal construction of the order it would extend not only to what are denominated the equity rules, but to rules of practice in equity established alone by decisions of the Supreme Court. Now, it is well settled in that court that bills of review to correct errors apparent upon the face of the record may not be successfully maintained, unless they are filed within the times limited for the review by appeal of the decrees they question. Cases cited in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 393, 394. And petitions for superintendence and revision in matters of law under the Bankruptcy Act are available only to correct errors apparent upon the face of the record. Case last above cited, and cases cited, *supra*, p. 611, in this note to section 24b. Hence, the reason of the limitation for bills of review being even more persuasive and compelling in the case of petitions for superintendence and revision in

bankruptcy, it has been held in two circuits that such a petition cannot be maintained after expiration of the six months period for appeal to the Circuit Court of Appeals, which is prescribed in section 11 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428. (See *infra*, p. 635, note to last clause of sec. 25a (3). *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, dismissing a petition for revision in the case of what it regarded as an appealable order, because the six months period for appeal had elapsed three days before the petition was filed; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, sustaining a petition for revision of an order regarded as nonappealable, filed within six months, the court saying, however, "certainly" the limit of time "can be no shorter." In one of those circuits this time limit was applied to a petition to revise an order in bankruptcy by a District Court of a territory. *In re Tomlinson Co.*, (C. C. A. 8th Cir. 1907) 154 Fed. 834, dismissing a petition filed by a bankrupt more than sixteen months after an order was made in the District Court of Oklahoma territory denying his motion to quash service of the subpoena, and referring to the time limit as being six months. See also *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, a case from a territory.

In another circuit it was held, in a case of a petition for review of a nonappealable order, that the petition ought ordinarily to be filed within six months, but that in the absence of a standing rule on the subject, a longer delay would be tolerated where there was a reasonable excuse for it. *In re Groetinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124, where the court denied a motion to dismiss a petition for revision, not filed within six months, of an order relating to the distribution of the proceeds of the sale of real estate made by the trustee in bankruptcy, it appearing from the certificate of the clerk of the District Court, and otherwise, that important evidence, to wit, the books of the bankrupt, without fault on the part of the petitioners, had disappeared and could not be found, and that the judge below had made two orders enlarging the time for filing the record with reference to an appeal taken simultaneously with the petition for review.

In *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, where a petition for revision was dismissed because of a delay of more than three years without reasonable excuse, the court said: "An appeal from the adjudication of bankruptcy is required to be taken within ten days, and by analogy it would seem that a petition for revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months."

In *In re Good*, (C. C. A. 8th Cir. 1900) 99 Fed. 389, the court was evidently of opinion that if an adjudication of bankruptcy could be reviewed on a petition to revise, this could only be done on a petition filed within the

ten days limited for an appeal from the order. See also on that point the remarks of the court in *In re Friend*, (C. C. A. 7th Cir. 1905) 134 Fed. 778, 780; *In re Sweetser*, (C. C. Mass. 1907) 157 Fed. 567.

In *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98, a motion to dismiss a petition for revision was denied, "as the order sought to be revised is not one of those made specially appealable by section 25a, and as the petition was presented within the six months generally limited for invoking the appellate jurisdiction of a Circuit Court of Appeals."

In *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 106 Fed. 839, a motion to dismiss a petition, made on the ground that the same had not been taken within ten days, was denied, the court saying, "we do not think there has been any unreasonable delay in this case," but not stating any of the circumstances nor the length of the delay. Subsequently the court adopted the rule quoted *infra*, this page.

In *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396, more than three months after an order was made declaring a mortgage lien invalid a petition to revise the order was filed, and the court refused to dismiss it, there being "no suggestion that pending the delay the proceeds of the property mortgaged have been distributed, or that any party's rights have suffered."

A petition presented to a judge of the Circuit Court of Appeals five days after the judgment was rendered which it sought to have reviewed was held to be in ample time. *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910.

Where a party's appeal from an order, taken in due time, was dismissed by the Circuit Court of Appeals about a year afterward because the order was not appealable, but reviewable only on a petition for revision, the court noticed and refrained from deciding the question whether a petition for revision would then be too late. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 581.

Under a standing rule of court.—A limitation of ten days has been adopted by rule 38 of the Circuit Court of Appeals in the second circuit, which provides as follows: "Petitions to review orders in bankruptcy filed under the provisions of section 24b of the Bankruptcy Act must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively,"—in order "to conform the practice in review by petition to review by appeal," said the court in *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339.

An order denying a claim to certain exemptions asserted by the wife of a bankrupt. *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 159 Fed. 98.

An order made in a proceeding between the trustee in bankruptcy and a prior assignee to determine the right to property in the custody of the court or its proceeds. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397.

An order denying to holders of debts against a partnership the right of participation in the individual assets of the bankrupt partner until the individual creditors of the bankrupt were paid. *Euclid Nat. Bank v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1906) 149 Fed. 975, certiorari denied (1907) 205 U. S. 547, 27 S. Ct. 793, 51 U. S. (L. ed.) 924.

A decree of the District Court asserting its jurisdiction, on petition by the trustee in bankruptcy for an order to sell real estate in his possession, to determine the validity of claims to it or liens against it, and ruling that if such adverse claimants did not choose to come in voluntarily and set up their claims they might be brought in by subpoena on the trustee's petition. *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668.

An order requiring the bankrupt to assign and turn over to his trustee certain life insurance policies as property of his estate. *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, affirmed in (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771.

An order requiring a bankrupt to pay over to the trustee a sum of money as assets of the estate or in the alternative to be committed to jail. *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, certiorari denied in (1906) 201 U. S. 646, 26 S. Ct. 761, 50 U. S. (L. ed.) 903.

Orders requiring members of a bankrupt partnership to schedule and surrender their individual property. *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261.

A decree relating to the distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy. *In re Groetzing*, (C. C. A. 3d Cir. 1903) 127 Fed. 124.

An order, on petition of a creditor, directing the sale of property which had previously been set apart to the bankrupt as a home-stand. *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913.

A decree denying a chattel mortgagee's right to a fund arising out of the mortgaged property, which by agreement he had turned over to the bankruptcy court reserving the right to pursue the fund. *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249.

Time for filing petition.—See cases cited under this catchline in 1 Fed. Stat. Annot. 599.

When no rule of court prescribes time.—The Bankruptcy Act does not prescribe a limit of time within which a petition to superintend and revise must be filed, and none has been fixed by the general orders in bankruptcy, nor by any rule of court in most of the Circuit Courts of Appeals. "It does

not, however, follow from this lack of limitation that the Courts of Appeals will entertain petitions to revise any of the proceedings of the inferior courts of bankruptcy which a disappointed litigant may seek to challenge without regard to the time which has elapsed between the date of the proceeding and the presentation of the petition. One of the main purposes of the law was to provide a speedy method whereby a bankrupt might be finally discharged from liability to his creditors and his property might be equitably distributed among them. This object would be entirely defeated if the orders and judgments in bankruptcy were forever open, or were open for an uncertain or unknown time, to revision and reversal upon petitions under section 24b, because in that case they would never become or be known to be either final or conclusive. An uncertainty relative to the time within which such petitions may be maintained necessarily leaves the conclusiveness of the orders of the bankruptcy courts in doubt and thus tends to defeat one of the main purposes of the law. There ought, therefore, to be a well-known and certain limit to the time within which such judgments and orders may be challenged in matter of law by petition as well as by appeal." *Per Sanborn, J.*, in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391. For similar sentiments see *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556.

The several Circuit Courts of Appeals have adopted, in their reported opinions, either a definite limitation or a limitation depending somewhat upon the circumstances of each case. By the express terms of section 24b the power there conferred is a "jurisdiction in equity," and "a petition for revision, like all proceedings in bankruptcy, is a proceeding in equity." *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 394. General Order No. 37, 1 Fed. Stat. Annot. 612, provides that "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court shall be followed as nearly as may be." By liberal construction of the order it would extend not only to what are denominated the equity rules, but to rules of practice in equity established alone by decisions of the Supreme Court. Now, it is well settled in that court that bills of review to correct errors apparent upon the face of the record may not be successfully maintained, unless they are filed within the times limited for the review by appeal of the decrees they question. Cases cited in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 393, 394. And petitions for superintendence and revision in matters of law under the Bankruptcy Act are available only to correct errors apparent upon the face of the record. Case last above cited, and cases cited, *supra*, p. 611, in this note to section 24b. Hence, the reason of the limitation for bills of review being even more persuasive and compelling in the case of petitions for superintendence and revision in

bankruptcy, it has been held in two circuits that such a petition cannot be maintained after expiration of the six months period for appeal to the Circuit Court of Appeals, which is prescribed in section 11 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428. (See *infra*, p. 635, note to last clause of sec. 25a (3). *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, dismissing a petition for revision in the case of what it regarded as an appealable order, because the six months period for appeal had elapsed three days before the petition was filed; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, sustaining a petition for revision of an order regarded as nonappealable, filed within six months, the court saying, however, "certainly" the limit of time "can be no shorter." In one of those circuits this time limit was applied to a petition to revise an order in bankruptcy by a District Court of a territory. *In re Tomlinson Co.*, (C. C. A. 8th Cir. 1907) 154 Fed. 834, dismissing a petition filed by a bankrupt more than sixteen months after an order was made in the District Court of Oklahoma territory denying his motion to quash service of the subpoena, and referring to the time limit as being six months. See also *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, a case from a territory.

In another circuit it was held, in a case of a petition for review of a nonappealable order, that the petition ought ordinarily to be filed within six months, but that in the absence of a standing rule on the subject, a longer delay would be tolerated where there was a reasonable excuse for it. *In re Groetzinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124, where the court denied a motion to dismiss a petition for revision, not filed within six months, of an order relating to the distribution of the proceeds of the sale of real estate made by the trustee in bankruptcy, it appearing from the certificate of the clerk of the District Court, and otherwise, that important evidence, to wit, the books of the bankrupt, without fault on the part of the petitioners, had disappeared and could not be found, and that the judge below had made two orders enlarging the time for filing the record with reference to an appeal taken simultaneously with the petition for review.

In *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, where a petition for revision was dismissed because of a delay of more than three years without reasonable excuse, the court said: "An appeal from the adjudication of bankruptcy is required to be taken within ten days, and by analogy it would seem that a petition for revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months."

In *In re Good*, (C. C. A. 8th Cir. 1900) 99 Fed. 389, the court was evidently of opinion that if an adjudication of bankruptcy could be reviewed on a petition to revise, this could only be done on a petition filed within the

ten days limited for an appeal from the order. See also on that point the remarks of the court in *In re Friend*, (C. C. A. 7th Cir. 1906) 134 Fed. 778, 780; *In re Sweetser*, (C. C. Mass. 1907) 157 Fed. 567.

In *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98, a motion to dismiss a petition for revision was denied, "as the order sought to be revised is not one of those made specially appealable by section 25a, and as the petition was presented within the six months generally limited for invoking the appellate jurisdiction of a Circuit Court of Appeals."

In *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 106 Fed. 839, a motion to dismiss a petition, made on the ground that the same had not been taken within ten days, was denied, the court saying, "we do not think there has been any unreasonable delay in this case," but not stating any of the circumstances nor the length of the delay. Subsequently the court adopted the rule quoted *infra*, this page.

In *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396, more than three months after an order was made declaring a mortgage lien invalid a petition to revise the order was filed, and the court refused to dismiss it, there being "no suggestion that pending the delay the proceeds of the property mortgaged have been distributed, or that any party's rights have suffered."

A petition presented to a judge of the Circuit Court of Appeals five days after the judgment was rendered which it sought to have reviewed was held to be in ample time. *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910.

Where a party's appeal from an order, taken in due time, was dismissed by the Circuit Court of Appeals about a year afterward because the order was not appealable, but reviewable only on a petition for revision, the court noticed and refrained from deciding the question whether a petition for revision would then be too late. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 581.

Under a standing rule of court.—A limitation of ten days has been adopted by rule 38 of the Circuit Court of Appeals in the second circuit, which provides as follows: "Petitions to review orders in bankruptcy filed under the provisions of section 24b of the Bankruptcy Act must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively,"—in order "to conform the practice in review by petition to review by appeal," said the court in *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339.

An oral or a written stipulation of counsel extending the time, before expiration of the ten days, and with full knowledge of all existing facts, will not be recognized if the bankruptcy court entered no order thereon. *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339, where the court said: "It was the manifest object of the rule (38) to keep this important matter of enlargement of time to seek a review by the appellate court within the control of the court, and to prevent indefinite extension by mere agreement of counsel." And in the same case it was held that a *nunc pro tunc* order extending the time, entered after expiration of the ten days, cannot operate to enlarge the time; but the court expressly refrained from deciding what construction might or might not be given to the rule when the sudden illness of a judge or other untoward occurrence prevented a party, who had been himself careful and diligent to conform to the rule, from securing an order in time.

In the same circuit there was an unsuccessful attempt indirectly to extend the time within which to review an adjudication of bankruptcy by filing a petition for revision of an order denying a motion to vacate the order of adjudication after the time for appeal from the latter had expired. *In re Goldberg*, (C. C. A. 2d Cir. 1909) 167 Fed. 808, affirming the order for revision of which the petition was filed.

Doubtless the filing of a petition within the time prescribed is not a jurisdictional necessity; that is, it would be subject to waiver by the respondent. See *In re Sweetser*, (C. C. Mass. 1909) 168 Fed. 1018, 1019; *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916. In the latter case, however, it was held that the filing of a stipulation that two petitions to review, with the certified copies transmitted by the clerk of the District Court "be printed in one appeal book" did not constitute a waiver of objection that the petitions were not filed in time.

"Petition by any party aggrieved."—This phrase is liberally construed, and a doubt as to whether a petitioner in a given case is a party aggrieved "should be resolved in favor of the petitioner." *Clark v. Pidcock*, (C. C. A. 3d Cir. 1904) 129 Fed. 745, 749, where, after a bankrupt's estate had been closed without appointment of a trustee, for the reason that the schedule showed no assets, an assignee of a judgment creditor who alone proved his claim applied to have the estate opened on the ground that the bankrupt had assets which he had fraudulently destroyed, on which petition the court discharged a restraining order and refused an injunction to prevent a further transfer of the assets, and it was held that the petitioner was entitled to prosecute a petition for review of such order, as he "was a judgment creditor of the bankrupt, and so scheduled by him in his bankruptcy petition," and "whether he may or may not hereafter be allowed to prove his claim, he has an interest as a general creditor in the estate of the bankrupt."

Premature petition.—*In Sturgiss v. Corbin*,

(C. C. A. 4th Cir. 1905) 141 Fed. 1, it was held that the petitioner for revision of an order setting aside a sale and directing a resale, properly followed the West Virginia practice on appeals in such cases by refraining from filing his petition until after the resale was made and confirmed.

Matters res judicata on former petition.—A petition to revise proceedings in bankruptcy on the ground of the insufficiency of the creditor's petition for adjudication, was denied where the same matter was involved in a former petition for revision by the same petitioner and therein fully disposed of. *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736.

A petition for review should set out the facts or finding of facts on which the matters of law sought to be reviewed arise, and if it fails to do so, it ought to be dismissed. *Steiner v. Marshall*, (C. C. A. 4th Cir. 1905) 140 Fed. 710, the court saying: "Attorneys filing petitions under the statute where testimony has been heard, ought, in fairness to both the court asked to be reviewed and the appellate court, to give the latter court the benefit of the testimony, or the findings of fact by the district judge."

"It is . . . an elementary rule of procedure that the petition for a review shall set out the matters of law which we are asked to review." *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 513.

Statements in a petition for revision wholly unsupported by any evidence in the record cannot be considered. *Chestertown Bank v. Walker*, (C. C. A. 4th Cir. 1908) 163 Fed. 510.

"Due notice" of petition.—See cases cited 1 Fed. Stat. Ann. 600. Where an appeal was prayed for and allowed in open court, in the presence of all the parties or their attorneys, at the very instant that the judgment was announced, the proceeding constituted sufficient notice so as to authorize the appellate court to treat the appeal as a petition for revision without further notice. *In re Abraham*, (C. C. A. 5th Cir. 1899) 93 Fed. 767.

Response to petition.—Rule 39 of the Circuit Court of Appeals (150 Fed. cxix, 79 C. A. cxix), which provides that "the response to the petition, when the defendant elects to make a written response, shall be filed at least fifteen days before the day set for the hearing," contemplates that the defendant may take issue upon the allegations of the petition and deny or otherwise controvert the facts alleged therein, or he may admit the facts and challenge by demurrer, or in some other appropriate way, their legal sufficiency to warrant the granting of the relief prayed for. *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794, 796.

"A failure to deny or otherwise controvert the facts alleged will be deemed to be an admission that they are true." *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794.

Presentation and reservation in lower court of grounds of review.—The Circuit Court of Appeals will not ordinarily take jurisdiction over propositions not brought specifically to

the attention of the District Court. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 60 C. C. A. 118; *Shoe, etc., Reporter, Petitioners*, (1st Cir. 1904) 129 Fed. 588, 64 C. C. A. 156.

An objection to specifications of objections to a bankrupt's discharge, on the ground that the jurat was insufficient, cannot be made for the first time on a petition for review. *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580.

Where it was not objected in the District Court that part of the property of a bankrupt ordered to be sold had not been inventoried in the manner required by the Bankruptcy Act, such objection would not be considered on a revisionary petition. *Shoe, etc., Reporter, Petitioners*, (C. C. A. 1st Cir. 1904) 129 Fed. 588.

Where the only jurisdictional question urged in the District Court was by way of objection to the granting of the orders sought to be reviewed, the Circuit Court of Appeals could not pass upon an objection to the jurisdiction of the whole bankruptcy proceeding. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688.

On petition to review an order directing petitioners to pay over to a temporary receiver a certain sum of money, an objection that a copy of the testimony taken under section 21a, *supra*, was not served with the order to show cause, comes too late if not made at or before the argument in the court below. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

So an objection that petitioners were given no opportunity to cross-examine witnesses who testified against them is unavailable if no request to be allowed to cross-examine them was made. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260, where the court said: "The case differs fundamentally from *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, where the bankrupt never had any opportunity to show cause why he should not be ordered to turn over certain money."

Likewise the record ought to show that the petitioners objected to the jurisdiction of the bankruptcy court to determine summarily the question whether the money was or was not the property of the bankrupt, in order to preserve such objection for consideration on the petition for revision. So suggested in *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

Record for review.—In the Circuit Court of Appeals for the fourth circuit, rule 36, subd. 2, provides that: "The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition." This rule contemplates a transcript of the record and proceedings of the bankruptcy court certified by the clerk of that court and not a transcript certified by the referee. *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475, dismissing a petition where the record con-

sisted largely of proceedings, orders, and decrees authenticated by the certificate of the referee and specifically excepted by the clerk in his own certificate.

A record which fails to give the filing dates of all the material orders contained in it is defective. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

The matters of law of which revision is sought should in some manner be clearly presented by the record. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 60 C. C. A. 118; *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838; *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628, 630.

Statements made in the brief of counsel, which are unsupported by the record, cannot be considered as facts. "If the appeal book did not state the facts a motion should have been made to amend it." *In re Oakland Lumber Co.*, (C. C. A. 2d Cir. 1909) 174 Fed. 634.

Landry v. San Antonio Brewing Assoc., (C. C. A. 5th Cir. 1907) 159 Fed. 700, was a petition for revision of an order of allowance of a secured claim, but nowhere in the transcript was there an agreed statement of facts or a finding of facts by the judge. Denying the petition, the court said: "The referee found and formulated the facts on the evidence submitted to him, also his conclusions of law, and the whole, accompanied with the evidence, was transmitted to the district judge for review. The record shows that the judge on the hearing considered the certificate of the referee as to the questions presented and the summary of the evidence, and thereupon reversed the referee, and entered judgment accordingly, so that we cannot from the record say whether the judge decided the case upon the facts reported by the referee or upon facts found by himself on the evidence. To determine whether the judge *a quo* correctly ruled the law, we must necessarily have before us the facts upon which he acted."

In the fifth circuit there was a motion to dismiss a petition to revise, "because it was not allowed by any judge of this or the lower court; no bond has been given; the transcript of the record is not certified by the clerk of the lower court; the transcript does not contain the pleadings upon which the issues were tried, nor show who are the proper parties to this proceeding; the transcript does not contain the evidence upon which the findings of the referee were based, . . . and because no supersedeas has been granted." The court held that none of those grounds was well taken, inasmuch as there were no rules of court in that circuit referring to the formalities mentioned in the motion to dismiss. *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396.

Record on facts.—An order reducing the amount of a creditor's claim for a collection fee contracted for in the note given by the bankrupt in a state where such a contract is valid only to the extent of a reasonable fee, cannot be reversed on a petition to revise, where there is no evidence in the record to

show what would be a reasonable fee for the services which have been rendered or the amount the creditor has paid or contracted to pay for the same. *Chestertown Bank v. Walker*, (C. C. A. 4th Cir. 1908) 163 Fed. 510.

Matter of law.—See cases cited 1 Fed. Stat. Ann. 595, 596. "In a proceeding to revise under section 24b this court is limited to a review in matter of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed. We call attention to the following decisions of this court and of the Supreme Court: *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (6th Cir. 1900) 101 Fed. 699, 703, 41 C. C. A. 614; *In re Taft*, (6th Cir. 1904) 133 Fed. 511, 66 C. C. A. 385; *In re Throckmorton*, (6th Cir. 1906) 149 Fed. 145, 146, 79 C. C. A. 15; *Mueller v. Nugent*, (1902) 184 U. S. 1, 9, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 291, 292, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051." *In re Stewart*, (C. C. A. 6th Cir. 1910) 179 Fed. 222, 228. To the same effect see *In re Graessler*, (C. C. A. 9th Cir. 1907) 154 Fed. 478; *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927; *Ross v. Stroth*, (C. C. A. 3d Cir. 1908) 165 Fed. 628; *Lesauis v. Goodman*, (C. C. A. 3d Cir. 1908) 165 Fed. 889; *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94; *In re Baum*, (C. C. A. 8th Cir. 1909) 169 Fed. 410; *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579.

The master's findings of fact, approved by the district judge, are not brought up for review, and must be accepted as the basis of reviewable questions of law. *In re Caponigri*, (C. C. A. 2d Cir. 1910) 183 Fed. 307.

"We are not at liberty upon a petition for review to challenge the facts, or an inference of fact, found by the court below." *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249.

"Obviously our jurisdiction is restricted to matters of law, and the legal questions we can examine are only those which arise out of the facts found or conceded." *In re Throckmorton*, (C. C. A. 6th Cir. 1906) 149 Fed. 145, citing *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 291, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, and *In re Taft*, (6th Cir. 1904) 133 Fed. 511, 66 C. C. A. 385. To the same effect see *In re Cole* (C. C. A. 1st Cir. 1906) 144 Fed. 392.

An order of a bankruptcy court finding that \$100 was a reasonable attorney's fee in each of two voluntary cases could not be reviewed on a petition to revise, because the findings of the court on the facts could not be disturbed. *In re Irwin*, (C. C. A. 3d Cir. 1909) 174 Fed. 642.

"A petition to revise under section 24b can properly present for determination only questions of law and not doubtful or disputed questions of fact. But when facts are agreed upon, or are proven or admitted, that

leave nothing for determination but their legal import, such a determination of them by the court of bankruptcy may be reviewed upon a petition to revise. But a review of decisions which require the consideration of conflicting evidence, or evidence though not conflicting from which different deductions or conclusions may reasonably be drawn, may not be reviewed upon a petition to revise, but upon appeal only." *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794, 797.

In *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579, revision was had on agreed facts which were not contradictory, doubtful, or incomplete, and the only question presented was as to their legal import. *Hall, etc., Co. v. Friday*, (C. C. A. 3d Cir. 1907) 158 Fed. 593, was a case of review on an agreed statement of facts.

To determine as an ultimate proposition that a sale was "unfair, illegal, and void," as alleged in a petition for revision, "would require, in the absence of an agreed statement of facts or finding of facts by the referee or court, a consideration of all the evidence in the record entirely beyond the inquiries this court can make on a petition for revision." *Schuler v. Haessinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119, denying a petition.

In a controversy between the bankrupt and the trustee over land claimed by the former as a homestead the referee found that he was guilty of fraud and certified the evidence to the court, which reversed the decision of the referee and negated the existence of fraud. On a petition to revise, all the evidence not being brought up, it could not be inferred that the referee and the court merely drew different legal deductions from undisputed facts. "The record not showing to the contrary, there may have been a conflict in the evidence on the issue of fraud, and in that event a review could not be secured by petition to revise." *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78.

But if a finding of fact is so wholly unjustified on the proofs that the Circuit Court of Appeals would be required, on a writ of error, to set aside a verdict of a jury for want of any evidence whatever to sustain it, or for some other reason kindred thereto, it may be reversed on a petition to revise. *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180, (C. C. A. 1st Cir. 1906) 144 Fed. 392.

And where the Circuit Court of Appeals has under review an order adjudging the bankrupt guilty of contempt for failure to deliver property or proceeds thereof to his trustee, the evidence claimed to establish his possession thereof will be examined to the extent of ascertaining whether the court below could properly find the fact proved beyond reasonable doubt as the rule requires in such contempt cases. *In re Levy*, (C. C. A. 2d Cir. 1905) 142 Fed. 442, where it was held that the order affirming the referee's ruling would not be reversed except upon clear proof of error.

Findings of fact.—In order that it may appear by the record that issues raised on

appeal were presented below, findings of fact which involve distinct propositions of law, or something else as a substitute therefor, are necessary. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 60 C. C. A. 118; *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838.

Without either the testimony or a settlement of facts whereon an order was predicated, the record presents no question of law which can be reviewed on a petition to revise. *Hegner v. American Trust, etc., Bank*, (C. C. A. 7th Cir. 1911) 187 Fed. 599.

A mere opinion of the court below not specially made a matter of record does not take the place of a finding of facts, although it may be referred to for the purpose of ascertaining what propositions of law governed the court, or for the general purpose of determining whether the case went off on facts or law. *In re Pettingill*, (1st Cir. 1905) 137 Fed. 840, 70 C. C. A. 338. See also *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180; *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226.

But where the district judge made no separate finding of facts, but affirmed the "findings" and "decisions" of the referee, and the referee had not certified any particular facts as found by him, the Circuit Court of Appeals, by reference to other proceedings in the record, managed to discover with satisfactory clearness the conclusions of fact upon which the district judge made the order complained of. *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511.

Where the record on a petition to revise contains no findings of fact by the District Court, and the opinion of that court, although stating propositions of law, shows that they were not determinative of the matter at issue which was decided as a question of fact on the evidence, there is nothing upon which the Circuit Court of Appeals can act. *In re Pettingill*, (C. C. A. 1st Cir. 1905) 137 Fed. 840.

Where the record contains no findings of fact by the court itself, but only a decree which, in a formal manner, affirmed the action of the referee, this must be taken as affirming his findings of fact, and the appellate court cannot take cognizance of the evidence which was before the referee. *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838.

Hearing.—"It is not satisfactory . . . for counsel to say to this court that the facts appear in the record, instead of making a succinct statement of facts, especially when they do not appear at the hearing." *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 464.

Scope of review.—Ordinarily a petition to revise does not authorize the court to revise the proceedings of a referee, but only those of the court. *In re Pettingill*, (1st Cir. 1905) 137 Fed. 840, 70 C. C. A. 338.

On a bankrupt's petition to review an order adjudging him in contempt for failure to obey a prior order requiring him to turn over property, the propriety of such prior order cannot be considered. *In re Lans*, (C. C. A. 2d Cir. 1907) 158 Fed. 610.

On a petition to review an order holding that certain money claimed by the bankrupt's wife belonged to the trustee in bankruptcy, the court declined to consider an objection to the jurisdiction to make a prior order upon her to pay the money to the trustee subject to leave to prove her claim, there having been no proceeding taken to revise that prior order. *In re Bacon*, (C. C. A. 2d Cir. 1908) 159 Fed. 424.

Since a party in whose favor a decision of the bankruptcy court was rendered is not in a situation to ask for a review thereof, he may, as respondent in a petition for review attacking the decision, rely upon any ground that will support it, even though it be not the ground upon which that decision was made. *Davis v. Crompton*, (C. C. A. 3d Cir. 1907) 158 Fed. 735, certiorari denied (1908) 209 U. S. 548, 28 S. Ct. 759.

If a case "involves the construction or application of the Constitution of the United States" it is appealable from the District Court direct to the Supreme Court; such question is not open for review in the Circuit Court of Appeals. *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51. See section 5 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 398, 405, and the note at the corresponding place, *post*, vol. 2 of this Supplement, title JUDICIARY.

On a petition to revise an order denying the petitioner's claim to property seized by the receiver in bankruptcy, the petitioner is not at liberty to attack collaterally the official status of the receiver or the regularity of the proceedings leading to his appointment. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

Discretionary orders.—See cases cited 1 Fed. Stat. Annot. 596.

Orders which were in the discretion of the court will not be reviewed unless an abuse of discretion is shown. *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

Exercise of discretion to determine whether a suit pending in a state court should be stayed or not is subject to review, but will not be interfered with unless it appears to have been abused. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 886.

While it is the duty of the bankruptcy court to see that examinations of third persons for the discovery of assets are not permitted to transcend the limit of a legitimate investigation, this is a duty which involves the exercise of wide discretion which will not be interfered with by the appellate court except when it has been manifestly abused. *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, affirming an order upon the bankrupt to produce the books in his custody as president of a corporation and submit them for examination.

The bankruptcy court's exercise of discretionary power to dismiss an involuntary petition for want of prosecution will not be reviewed where it does not appear that the discretion was abused. *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962, certiorari denied (1906) 203 U. S. 596, 27 S. Ct. 784, 51 U. S. (L. ed.) 333.

Refusal of the judge of the bankruptcy court to sanction an arrangement between the bankrupts and certain creditors and persons who had received preferential transfers of the bankrupt's property does not present a "matter of law" reviewable on petition, as there is "no rule of law or of equity by which the propriety of that refusal is determinable." *Mulford v. Fourth St. Nat. Bank*, (C. C. A. 3d Cir. 1907) 157 Fed. 897, holding, however, that there was no abuse of discretion.

Questions "peculiarly administrative."—On a revisory proceeding under the Bankruptcy Act of 1867 the court said: "Any question of removing assignees or appointing trustees is so peculiarly an administrative one, and involves so thorough a knowledge . . . that an appellate tribunal ought not to interfere in regard thereto unless a sharp question of law is raised, or the demand for revision is very peremptory." *In re Sweetser*, (C. C. Mass. 1907) 157 Fed. 567.

The court sometimes exercises liberality with reference to the practice on petitions to revise and makes "due allowance" for lack of experience alike of the bench and the bar, and, where the petition involves substantial interests, endeavors to sift out from the record the issues of law, if it presents any; even in cases which could be said to relate to the mere administration by the District Court of the bankruptcy statute. *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, 229.

But where there was no suggestion of any practical detriment that would come to the estate from the determination of the District Court, even if, strictly speaking, that determination should have been otherwise than what it was, the court said: "It would be detrimental to the authority of the District Court, injurious to its administration of the bankruptcy statutes, and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if, in administrative matters where no substantial interests are concerned, we became meddlesome beyond what the law requires of us." *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, where the main question related to the powers of the bankruptcy court in canvassing votes for a trustee alleged to have been procured or solicited by the bankrupt, and how far it should exercise them, and according to what rules.

And in *Shoe, etc., Reporter, Petitioners*, (C. C. A. 1st Cir. 1904) 129 Fed. 588, where the order under review was one fixing a minimum bid for the sale of the assets of the bankrupt, and providing that five-sixths of the purchase price might be paid in bonds secured by mortgage assets, the objection to the order was "disposed of by the general rule in equity which applies to these summary petitions, to the effect that equity does not concern itself with mere trivialities, nor unless, on the whole case, the proponent satisfies the court that he has a substantial interest, which is in danger."

Unless convinced that manifest error has been committed the appellate court will refrain from meddling with the administration

of the estate by the officers of the bankruptcy court who are familiar with the local environment and the character and conduct of the parties. In *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, affirming an order adjudging the bankrupt in contempt of court for refusing to answer questions concerning his property and for concealing from his creditors all material facts relating thereto, the bankrupt's testimony having been certified to the court by the referee, Judge Cox said: "The questions of fact presented by this appeal are peculiarly within the province of the referee and district judge. The law cannot be promptly and efficiently administered if the collection and division of the bankrupt's property is to be suspended and delayed pending appeals from the orders of the court and referee having in view the discovery of the bankrupt's property, and the prevention of its fraudulent concealment and conversion. . . . In the case at bar we know nothing of the bankrupt Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book, and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. The referee certifies that after having taken the oath the bankrupt refused to be examined according to law and deliberately withheld facts within his knowledge as to the disposition of the property of the bankrupt's firm. Again, he certifies that the bankrupt withheld from the trustee and the court, with the deliberate intention of concealing his condition, the true facts relating to the conduct of his business, his dealings with his creditors and the amount and whereabouts of his property. The referee says: 'The manner of the bankrupt, his recollection when he desired to exercise it, convinced me as I watched him that where he desired to give the facts he could do so.' Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. . . . An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

Nonprejudicial error.—Whether or not an order permitting the amendment *nunc pro tunc* of a petition in involuntary bankruptcy after the sustaining of a demurrer to the original petition was erroneous, is immaterial where the original petition sufficiently charged an act of bankruptcy and the demurrer was erroneously sustained. *In re Riggs Restaurant Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 691.

Determination and disposition of matter.—Where the bankruptcy court erred in dismiss-

ing a claim for the return of personal property delivered to a bankrupt corporation, the Circuit Court of Appeals, upon reversing the order, entered its own order requiring the bankrupt's trustee or receiver to surrender the property. *Sprague Canning Machinery Co. v. Fuller*, (C. C. A. 5th Cir. 1908) 158 Fed. 588.

Where, on a petition to revise, there were no sufficient specifications of legal error presenting the questions sought to be reviewed, but the evidence was such as to raise a doubt as to the merits of petitioner's claim, his petition was dismissed without prejudice to such further proceedings as the District Court might consider proper. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

Proceeding after reversal and remand.—Where an order of the District Court is annulled by reversal thereof on petition for revision, the District Court cannot amend the order on mere petition therefor so as to make it the basis of another petition for revision. *In re Lesaius*, (C. C. A. 3d Cir. 1910) 181 Fed. 690.

Costs.—In *In re Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, dismissing a petition for revision filed by creditors who had opposed an application for discharge, they were charged with the costs in the appellate court, "and it is suggested that the District Court tax the contesting creditors with all 'wholly immaterial mat-

ters, captious objections, remarks, of counsel, reiteration of the same questions and demands' included in the depositions taken before the referee or special master and all unnecessary costs incurred at their instance."

Review by Supreme Court of decrees of Circuit Courts of Appeals.—By construction of the Bankruptcy Act of 1867 it was settled that appeals to the Supreme Court did not lie from decisions of the Circuit Courts in the exercise of supervisory jurisdiction in matter of law conferred on them by that Act. *Morgan v. Thornhill*, (1870) 11 Wall. 65, 20 U. S. (L. ed.) 60; *Conro v. Crane*, (1876) 94 U. S. 441, 24 U. S. (L. ed.) 145.

Hence the revision contemplated by section 24b of the Bankruptcy Act of 1898 being substantially of the same character as that in the Act of 1867, a decree of the Circuit Court of Appeals in the exercise of its supervisory power is not appealable to the Supreme Court. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116 (dismissing the appeal), *reaffirmed* in *Hewit v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, and *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047. Such a decree is reviewable only on certiorari. See III. *Writs of certiorari* in note to section 25d, *infra*, p. 643. See also *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14.

SEC. 25. APPEALS AND WRITS OF ERROR.—*a* [*Appeals.*] That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, [(1898) 30 Stat. L. 553.]

The provisions in section 25a, as far as they relate to the Circuit Court of Appeals, are recognized and confirmed in Judicial Code, sec. 130, *ante*, title, JUDICIARY, p. 196, of this Supplement.

Necessity of this provision.—"There is an appeal provided in section 25, with reference to the specific matters named therein. This was needed if an appeal was to be allowed, as the matters to which it relates could arise in bankruptcy only." *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217.

"By section 25a it [Congress] granted to the Courts of Appeals additional jurisdiction which before the enactment of the bankrupt law they could not exercise." *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, 367.

Exclusiveness with respect to section 24b.—See note to section 24b, *supra*, p. 611.

Exclusiveness with respect to section 24a.—To the point that a judgment appealable under section 25a (1), (2), or (3), cannot be appealable as a "controversy" under section 24a, see *Thompson v. Maury*, (C. C. A. 4th Cir. 1909) 174 Fed. 611.

Parties to appeal.—A trustee may appeal from an order denying his motion to expunge a claim allowed, unless further preferences

were surrendered, and directing a return of a preference previously surrendered by the creditor. *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786.

On appeal by a creditor of a bankrupt from an order approving a composition under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties. *Field v. Wolf, etc.*, *Dry Goods Co.*, (C. C. A. 8th Cir. 1903) 120 Fed. 815.

On an appeal by a trustee in bankruptcy from a judgment of the bankruptcy court allowing claims for expenses and costs of administration, the question whether the judgment shall stand or be reversed is of such direct interest to those whose claims are sustained by it that no determination thereof can be had without affording them an opportunity to be heard in defense of the judgment. On such an appeal the trustee represents the general creditors of the estate, and not those the allowance of whose claims is challenged by him. *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344.

"The cases cited present somewhat divergent views as to whether a creditor may as of right appeal from the allowance of a debt which affects him, but a concurrence in the

matter of allowing an appeal upon good cause shown by such creditors when the trustee refuses to appeal himself." *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, where the appeal was by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal; but Lurton, J., said "the better practice would be to order the trustee to appeal, or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors."

Effect of appeal.—The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal. For example, pending an appeal from a judgment rejecting a debt or claim, the court has no power to grant a rehearing upon the ground of alleged newly discovered evidence. *Miles City First Nat. Bank v. Miles City State Nat. Bank*, (C. C. A. 9th Cir. 1904) 131 Fed. 430.

Without a supersedeas, however, an appeal never suspends the execution of an order nor stops its enforcement, and, pending the bankrupt's appeal, without supersedeas, from an order adjudicating him a bankrupt, the court may, on motion of creditors, compel him to file his schedules. *In re Brady*, (D. C. Ky. 1908) 169 Fed. 152.

An appeal, with a supersedeas bond, from a judgment denying a discharge is in the nature of a cost bond, and does not supersede the judgment so as to prevent creditors from obtaining a second adjudication of bankruptcy on account of later acts of bankruptcy. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540. As to supersedeas on appeals or writs of error in federal courts, see R. S. secs. 1007, 1012, 4 Fed. Stat. Annot. 618, 624, and the Circuit Court of Appeals Act of March 3, 1891, ch. 517, sec. 11, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428.

Assignment of errors — *Circuit Court of Appeals Rule 11*, 91 Fed. vi, 32 C. C. A. lxxxviii (which is the same in all the circuits), makes the filing of an assignment of errors an essential condition to the granting of a writ of error or the allowance of an appeal, and concludes as follows: "Errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Total neglect to comply with the rule usually results in an affirmance of the order or decree appealed from or dismissal of the appeal. *Lockman v. Lang*, (C. C. A. 8th Cir. 1903) 128 Fed. 279, where the appeal was dismissed; *In re Dunning*, (C. C. A. 9th Cir. 1899) 94 Fed. 709, where the court said: "We place our judgment of affirmance wholly upon the ground indicated, in the hope that attention may be drawn to the necessity of compliance with the rule. It may be added that upon the hearing of the cause not only was no 'plain error not assigned' suggested, but, on the contrary, the court was convinced that upon the merits the decision of the District Court was not erroneous." *In Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, "there were other questions below, but we have only to deal with

such questions as are raised by the assignment of errors," said the court.

Time for filing.—When an appeal is prayed and allowed in open court, the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal, and it must be filed before or at the time of the allowance of the appeal. But if an appeal is allowed upon condition of filing an appeal bond, and the bond and assignment of errors are thereafter filed within the time required for appeal, the assignment of errors is not too late. *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

If an assignment of errors is not made and filed in the court below when an appeal is allowed, a subsequent assignment in the appellate court, without leave, will be disregarded. *Lloyd v. Chapman*, (C. C. A. 9th Cir. 1899) 93 Fed. 599.

If a party proceeds both by writ of error and by appeal to review the same rulings or adjudications, and the errors alleged are the same in each proceeding, a single assignment of errors duly filed is sufficient notwithstanding dismissal of the particular appellate proceeding with which the assignment was filed. *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

Amendment of defective assignment.—If an assignment of errors is filed, but it does not sufficiently indicate the particular error complained of to entitle it to be considered on the appeal, the appellate court is not deprived of jurisdiction because of the generality of the assignment, and amendment thereof may be allowed on motion of the appellant, when the special circumstances justify it, and the motion is promptly made upon discovery of the defect. *Flickinger v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162, (certiorari denied (1906) 203 U. S. 595, 27 S. Ct. 783, 51 U. S. (L. ed.) 332), where appellant was allowed to file more specific assignments upon his showing that in making the formal assignment he relied upon and followed a precedent contained in an approved book of forms.

Finding of facts.—In equity cases in federal courts it is not the practice to make findings of fact and conclusions of law. *Whitney v. Whitney Elevator, etc., Co.*, (W. D. N. Y. 1910) 180 Fed. 187. On appeal from a bankruptcy court to the Circuit Court of Appeals a finding of facts is not required by the Bankruptcy Act nor is it desirable. *In re Meyers*, (S. D. N. Y. 1900) 105 Fed. 353, where the referee's report in favor of the bankrupts discharge was confirmed, and opposing creditors submitted certain statements of fact and asked the court to find them for the purposes of a hearing on appeal. The court declined to do so and said: "It would impose additional burdens upon the court, and is not ordinarily essential: since in cases of reasonable doubt, the grounds of the decision usually appear sufficiently either in the report of the referee or in the opinion or memorandum of the judge thereon." But for the accommodation of the party the court proceeded to state more fully

than appeared in its former opinion filed in the same case the grounds for granting the discharge.

Appeal bond.—Before an appeal can be allowed or perfected an appeal bond must be given and approved, the court fixing the amount, and the bond should be filed and made a part of the record in the case, and the record, in order to be perfect, should recite that such bond has been given, approved, and filed. *In re Miller*, (1904) 13 Okla. 557, 75 Pac. 1128. If the record is silent upon that point, but the bond was actually given, the proper remedy of the appellant is to suggest a diminution of the record and have the clerk of the court below certify the record showing the fact. *In re Miller*, (1904) 13 Okla. 557, 75 Pac. 1128, in which case, however, a motion to dismiss the appeal having been filed, the court said: "If the appeal should be dismissed without having been heard upon the merits, possibly a new citation might be had and the appeal perfected, and for that reason alone we pass this proposition without further comment, to deal with one including more of the merits of the case."

On appeal by the bankrupt from an adjudication of bankruptcy in an involuntary proceeding the appeal bond is sufficient if it runs only to the original petitioners for the adjudication, although other creditors filed an intervening petition having the same object. *Flickinger v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162 (certiorari denied (1906) 203 U. S. 595, 27 S. Ct. 783, 51 U. S. (L. ed.) 332), where the court said: "As all the petitioners make common cause and not separate controversies, and the benefits of the bond will practically come to all, it would seem to be sufficient. The motion to dismiss the appeal is therefore denied."

Citation.—In proceedings in error the citation signed by the judge of the court to which the writ is addressed or any judge or justice of the appellate court is the notice required by R. S. sec. 998, 4 Fed. Stat. Annot. 609. *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 825, holding that service of a citation signed by the district judge was sufficient.

Where a citation is not issued nor an assignment of errors filed, on appeal to the Circuit Court of Appeals, until an entire term of the appellate court has intervened, the appeal becomes inoperative. *Nazima Trading Co. v. Martin*, (C. C. A. 9th Cir. 1908) 164 Fed. 838, dismissing an appeal.

Where an appeal is seasonably taken and seasonably docketed the appellate court has power to direct the issuance of an alias citation to omitted but necessary parties if application therefor is made before the expiration of the first term at which the case could have been heard. *Per Van Devanter, J.*, in *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344, citing *Lockman v. Lang*, (8th Cir. 1904) 132 Fed. 1, 65 C. C. A. 621. If such application is not made within that time, the necessity therefor having been brought to the attention of

appellant's counsel in ample time, the appeal becomes inoperative in so far as it challenges the claims of those who have not thus been brought into the appellate court. *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344.

Bill of exceptions.—On appeals in bankruptcy cases a bill of exceptions has no function and is entirely irregular as a means of bringing before the appellate court the evidence or other proceedings of the court below or the referee. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, where the court said: "An appeal makes the entire record available to counsel for the appellant, and imposes upon him and upon the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the hearing of the questions to be presented there. *Teller v. U. S.*, (8th Cir. 1901) 111 Fed. 119, 49 C. C. A. 263. The bill of exceptions must therefore be disregarded. It appears, however, that this bill of exceptions was presented by the appellant to the court below, that it bears the written approval of counsel for the appellee, and that it was filed in the case by the order of the District Court. In view of these facts, we have concluded, with some hesitation, that the paper called a 'bill of exceptions' may be deemed a written stipulation of the parties to the effect that it correctly portrays the evidence and the proceedings below, and upon this basis we proceed to consider the case it presents."

On appeal from a judgment of the bankruptcy court pursuant to the advisory verdict of a jury a bill of exceptions taken upon the jury trial is out of place and of no value except upon a motion for a new trial made to the court below. *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, an appeal from adjudication of bankruptcy in an involuntary proceeding, the appellant having waived the statutory right to a jury and issues having been submitted to the jury in the exercise of the court's discretion.

Record on appeal.—Rule 14 in all the Circuit Courts of Appeals specifies what shall constitute the record on appeal or error. By virtue of provisions in sec. 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428, the sections of the Revised Statutes relating to transcripts on appeals, viz., sections 698, 750, 4 Fed. Stat. Annot. 446, 556, are in full force and apply to bankruptcy cases. *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220, 222.

The language used in the law and rules of court in regard to the record on appeal is so general that in every case it is necessary for some one to specify what part of the record, in the particular case, comes within the general designations. *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 222, *per Holland, J.*

In one of the Pennsylvania districts, it is said the practice has there long prevailed of counsel's agreeing, by stipulation filed, as to what the record shall contain; that when counsel disagree and it is necessary to specify

the record, the best practice is to require the appellant to file a *præcipe* with the clerk, pointing out specifically what records, in his judgment, are necessary to be certified on the appeal; and that if the appellee is of opinion that these are not sufficient, he can suggest a diminution of the record and ask for a certiorari, and the question as to the necessity of additional matter will properly be determined by the appellate court. and that the judge of the bankruptcy court will not, on petition of an appellant, designate what records shall be certified to the appellate court. *Per* Holland, J., in *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220, where the court also said: "The petition of the [appellants] . . . sets forth such parts of the record as they regard sufficient for a full and complete understanding of the case in the appellate court, and we are of opinion that their judgment is right in this respect; but we know of no law which authorizes the court from which an appeal is taken to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal. In fact, the judge of the court from which the appeal is taken ought not in the least to interfere in the discretion allowed by the general terms used in the Acts of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed, and his opinion of the importance and relevancy of matters contained in the record might, in the estimation of counsel for one side or the other, be as faulty as it is claimed his judgment is from which an appeal is taken; and if an order of the court from which the appeal is taken could have the effect of restricting the record in all cases where such a decree had been made there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on a full record."

. . . Holding this view as to the authority of this court and the practice to be adopted, we conclude that the counsel for the appellant must assume the responsibility of designating what records shall be certified by the clerk, and present to him a *præcipe* stating specifically which of the papers on file in the case he desires him to certify to the appellate court."

"In *Union Pac. Co. v. Stewart*, (1877) 95 U. S. 284, 24 U. S. (L. ed.) 431, it is made the duty of appellant to see that the record is properly presented to the appellate court." *Per* Simonton, J., in *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497, 498.

In his certificate to the transcript of the record it is customary for the clerk of the court below to state, if it be the fact, that the transcript contains only such papers as the attorney for the appellant designated. See *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485.

Neither the counsel for the appellant nor the clerk of the court below can conclusively determine what parts of the record are necessary on the hearing of the appeal. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, *per* Lurton, J.

An appeal may be dismissed on motion where the transcript is incomplete in respect of essential jurisdictional information, and verbal explanations made by appellant's counsel at the bar cannot be treated as part of the record. *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497, dismissing an appeal from a judgment granting a discharge where the record, made up, as the clerk certified, under the instructions of appellant's counsel, failed to show whether any of the steps to perfect the appeal were taken in proper time, or indeed when they were taken; or to show when the petition for appeal was presented, or when the order granting its prayer was granted or filed, or whether they were filed at all; "there is nothing in the record which can inform the court when this appeal was taken."

If a transcript is defective by omission of matters necessary to a proper understanding of the evidence the appropriate remedy for the appellee is not a motion to strike the transcript from the files, but a suggestion to the appellate court of the defect complained of and application for a certiorari to send up the missing matter. *Flickinger v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162 (certiorari denied (1906) 203 U. S. 595, 27 S. Ct. 183, 51 U. S. (L. ed.) 332), where a motion to strike was denied, the only ground therefor being that the transcript was not submitted to counsel for the appellees, and that none of said counsel had notice of the filing thereof, and that the record was imperfect because it did not contain all the evidence on which the cause was decided, and that what was given was stated in a narrative form, without giving the questions put to the witnesses.

When the clerk's certificate does not show that the record is a full and complete record of the entire proceedings, it ought to appear, by stipulation or otherwise, that it does include all that is necessary to a determination of the matters involved by the appeal; and if the appellee is not content with the transcript as filed, he should seasonably move the court to require the appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932.

On appeal from an adjudication of bankruptcy the appellee's motion that several matters and things, not included in the transcript, be brought up, as necessary to a satisfactory examination of the questions raised, was granted, with a reservation as to the costs, although the appellant insisted that the record was sufficient. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485, where the court said: "That motion we are disposed to allow, with the reservation of power in this court to ultimately determine where the costs of that additional matter of the transcript should be placed, determinable upon the question whether or not it is necessary to be brought, in order to have a proper understanding. With this reservation, the motion will be granted; but for special reasons, which we

do not care to dwell upon, we further order that the charges incident to the supplying of this additional matter be paid by the appellees, and so of the cost of printing it, the ultimate liability for which is also to be determined hereafter."

On a bankrupt's appeal from an adjudication of bankruptcy the appellee's motion for an order requiring that the original books and records in the business of the bankrupt be sent up, it being claimed that there was something about them which could not be adequately transcribed, was denied. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485, where the court said: "There is a rule which we have taken from the Supreme Court rules, so far as this branch of it is concerned, that where there are exhibits in the record in the court below, such as cannot be transcribed or brought here by proper representation, as, for instance, models and the like, which have been made part of the evidence in that court, they may be ordered by the judge of the court below to be sent here as part of the return to the appeal. The rule applies generally to such matters as cannot be transcribed so as to be exhibited to this court as they were exhibited to the court below. The application for an order to send up the original books and records is not within the scope of that provision. It is not shown that transcription, or representation by photographic copies, if necessary, cannot be made. Therefore no ground is made which would bring the case within the scope of the rule."

The presumptions are in favor of the correctness of the action of the court below, and a reversal thereof cannot be had unless the transcript of the record affirmatively shows the ground upon which the action complained of was taken. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

The record ought to show that the appeal and the steps to perfect the same were taken in proper time. *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497.

On appeal from a judgment allowing a claim an assignment of error because the claim was not proved within one year after adjudication of bankruptcy is not available if the date of adjudication nowhere appears in the transcript of the record. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, where the defect was called to the attention of the appellant in the brief filed by the appellee, and no step was taken to supplement the transcript by supplying the date, although appellant had ample time to do so.

An order of the bankruptcy court restraining a referee in petition proceedings in a state court from paying over the fund in his hands is not reviewable if neither the order nor the papers upon which it was granted appear in the record on appeal. *In re Lyman*, (C. C. A. 2d Cir. 1903) 127 Fed. 123.

If the record on appeal suggests material facts, but does not set them forth as clearly as is necessary for the decision of the question, the cause may be remanded with instructions to the court below to have the essential facts ascertained and reported and to pass

upon the same. *Devries v. Shanahan*, (C. C. A. 4th Cir. 1903) 122 Fed. 629.

Where the referee, pursuant to the petition of a party desiring review of an order, has certified to the judge the question presented, with a summary of the evidence relating thereto and the finding and order of the referee thereon, and such certificate and summary appear in the record on appeal, it will be presumed, in the absence of some order of the court below, that the hearing therein was upon the summary of the evidence certified by the referee, and that the original evidence before the referee constituted no part of the record in the court below; especially where nothing indicates that any effort was made, either before the referee or judge, to supplement the summary of evidence certified. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, where appellee's motion for a rule upon the appellant to file a more complete transcript was denied, although "it was entirely within the competency of the judge at request of either party to have directed the filing of all or any part of the original documents or proofs which were on file with the referee."

The transcript from the records of the lower court imports absolute verity, and it is not competent to contradict, explain, or extend the recital of the record by evidence dehors the record. *Per Lurton, J.*, in *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 902.

A certified record purporting to contain an entry on the journal of the court below on a stated date controls a different date of an indorsement upon the entry of a direction to enter the same; such indorsement having no proper place upon the journal, its date will be treated as a clerical mistake. *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 903.

Questions considered and determined in general.—An appeal from a judgment adjudicating the appellant a bankrupt brings up the whole case. *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160.

Errors assigned upon instructions given or refused, or other rulings made, on a jury trial demanded by the alleged bankrupt as of right can be considered only upon a writ of error and not upon appeal from an adjudication of bankruptcy. *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160.

While a general appeal opens up all prior decrees of an interlocutory character, questions reviewable on appeal from a final decree may be limited by the terms in which the appeal was prayed for and allowed. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, where, for the reason stated, on appeal from a decree allowing a claim on confirmation of a master's report, the court was inclined to regard the appeal as limited to the question of the amount allowed and not extending to the question of the right to recover at all.

If an appeal is taken from an order allowing a claim under section 25a (3), only the validity of the claim allowed can be considered, and it seems that complaint of inter-

locutory orders affecting the appellant would be excluded. *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

A decree found correct upon any ground established in the case will be affirmed, though a wrong reason was given for it in the court below. *Naylon v. Christiansen Harness Mfg. Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 290, 293.

On appeal from a judgment denying a discharge where the referee's report adverse to the bankrupt shows that he passed upon only one of several specifications of objections, that specification alone is brought before the appellate court. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694.

Where a party's appeal from the disallowance of his debt concerns the amount of the claim, he may also present any question relating to the security or rank of the debt, as an incident thereof, though the question of lien or priority, if alone involved, could be reviewed only on a petition for revision. *In re Cosmopolitan Power Co.*, (C. C. A. 7th Cir. 1905) 137 Fed. 858, where the court said: "If the case of *In re Worcester County*, (1st Cir. 1900) 102 Fed. 808, 42 C. C. A. 637, is to be construed as requiring us to split the case and dismiss the portion that affects priority, we are not disposed, as now advised, to follow it."

Presumptions on appeal.—On appeal the presumptions are in favor of the correctness of the action of the court below. *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686; *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

The presumption of correctness of findings of fact on a given point is conclusive if the record does not show that it contains all the evidence on that point. *In re French*, (1904) 13 Okla. 549, 75 Pac. 278, where the court presumed there was sufficient evidence to warrant the finding that certain payments constituted preferences and that at the time they were made the bankrupt was insolvent.

Where the clerk's certificate appended to the record on an appeal from an order denying a bankrupt's discharge, recited that the record was a true transcript of so much of the record and proceedings of the court as was requested by counsel for appellant, it was presumed, in the absence of anything showing to the contrary, that there was a sufficient appearance by the objecting creditors on the day they were required to show cause against a discharge, as required by general order No. 32, 1 Fed. Stat. Annot. 611. *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71.

Presentation and reservation in lower court of ground of review.—An objection to the consideration of specifications of objection to a bankrupt's discharge, not urged in the trial court, is unavailable on appeal. *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71, where, for that reason, it was presumed that such appearance as is required by general order No. 32, 1 Fed. Stat. Annot. 611, was duly and properly entered.

Although a sworn proof of claim has probative force and is *prima facie* evidence of

its allegations even when objected to (*Whitney v. Dresser*, (1906) 200 U. S. 532, 535, 26 S. Ct. 316, 317, 50 U. S. (L. ed.) 584), it cannot be regarded as self proving on the claimant's appeal from a judgment disallowing it unless he relied upon it in the bankruptcy court. *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, where the claimant did not stand upon his proof of claim before the referee and insist that the objectors should go forward, but attempted, by insufficient evidence, to establish the allegations in his proof of claim; and it was held that he could not be permitted to use those very allegations to supply the deficiencies in his evidence.

Review as dependent on state of record.—Where, out of abundant caution, review is sought by appeal and also by petition to revise, both cases may, by agreement of the parties, be considered upon the same record, as in *Franklin v. Stoughten Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

On appeal from an adjudication of bankruptcy if the evidence heard below is not brought up, the appellate court is limited to a consideration of the case made by the pleadings when these alone are found in the record. *Corwith First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, where the court said: "The issue of fact presented by the bank's answer to the effect that the debtor was a wage earner, and, therefore, not subject to the provisions of the Bankruptcy Act, cannot be considered by us. The trial court by its decree of adjudication necessarily found that issue against the bank, and as no evidence is preserved in the record we are unable to review its finding."

The record must in some form show that it includes the entire evidence, or at least the entire evidence on a given proposition, which the appellate court is asked to consider; if this is not shown in some form, the appellate court will not presume that the entire evidence is included in the record, and will not reverse a case because a finding of fact is not, seemingly, supported by the evidence. *In re French*, (1904) 13 Okla. 549, 75 Pac. 278, affirming a judgment disallowing a claim.

If the referee failed to take and preserve the testimony which he excluded, and it is not presented to the appellate court, his rulings excluding it are not reviewable. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, where the court said: "The established practice in the federal courts in equity is that examiners, masters, and the Circuit Courts must, under rule No. 67 in equity, take, record, and, in case of an appeal, return to the appellate court all the evidence offered by either party, that which was held to be incompetent or immaterial as well as that which they deemed competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the ex-

cluded evidence. If evidence is objected to and ruled out, it must nevertheless be written down and preserved in the record subject to the objections, or the ruling cannot be considered in the appellate court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. . . . When the rejected testimony is made a part of the record and returned to an appellate court, and then only, can such a court consider and decide the legality of the rulings which excluded it, and after determining that question it will proceed to decide whether or not all the admissible evidence presented to it sustains the decree below, and to render a final decree accordingly." The foregoing statement is substantially a repetition of what was said by the same court in *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, where an adjudication of bankruptcy was reversed for insufficiency of the evidence.

Under the rule that every presumption must be indulged in favor of the correctness of a judgment rendered by a court of competent jurisdiction until the contrary appears, and the rule that after a judgment has been rendered it will be presumed, in the absence of a contrary showing, that the facts necessary to support it were proved, and the complaint will be treated as amended to conform to the proofs, it will be presumed on appeal from an adjudication of involuntary bankruptcy that a defect in the petition was supplied by the proof, where the latter is not brought up for the consideration of the appellate court. *Corwith First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, affirming a decree of adjudication, even though it were conceded that the petition failed to describe sufficiently the land charged to have been unlawfully conveyed, by not specifying the county or state in which it was located; especially "because the record does not disclose that the alleged defect was ever called to the attention of the trial court, and because the facts of the case are not brought here for our consideration."

Harmless or prejudicial error.—"When it can be seen that no harm resulted to appellant, this court will not reverse a decree on account of an immaterial departure from technical rules of proceeding." *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

A creditor's appeal from a judgment granting a discharge, upon the contention that the court erroneously referred the application for a discharge to the referee, is without merit where no prejudice whatever has resulted to the appellant through such reference. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241.

The decisive issue is not whether there was an error in the admission or exclusion

of evidence, but whether or not all the competent and relevant evidence presented to the appellate court sustains the decree. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, following the rule announced in *Blease v. Garlington*, (1875) 92 U. S. 1, 23 U. S. (L. ed.) 521.

Admission of incompetent evidence by a referee is not ground for reversal of an order pursuant to his finding where the latter was not based upon the incompetent testimony and the court below apparently acted only upon the competent evidence. *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89.

A judgment refusing an adjudication of bankruptcy on the advisory verdict of a jury will not be reversed for mere informalities in the proceedings, where the merits of the question involved were passed upon by the trial judge and substantial justice was effected. *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

An order granting a discharge will be affirmed on appeal if the appellate court is satisfied that it was correct, regardless of the question whether it was made by the court below without investigation of the merits. *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686.

An order of adjudication will not be reversed on the ground that certain alleged acts of bankruptcy were not properly pleaded and proved if enough was alleged and proved to warrant the adjudication. *In re Lyman*, (C. C. A. 2d Cir. 1903) 127 Fed. 123.

Although the record may conclusively show that a party against whom a decree is rendered has suffered no prejudice from a refusal to take and hear cumulative evidence on his behalf, yet when a court of bankruptcy refuses to take and consider evidence which the losing party desires to offer before that evidence has been presented to it so that it can determine the question of its admissibility, the presumption that error produces prejudice necessarily prevails. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, reversing an adjudication of bankruptcy for the reason above stated.

Discretion of lower court.—Where the allowance of a claim by the bankruptcy court is discretionary the appellate court strongly inclines to affirm the action of the court below in that behalf unless it appears that clear wrong was done. *Gold v. South Side Trust Co.*, (C. C. A. 3d Cir. 1910) 179 Fed. 210, affirming disallowance by the court below and the referee of a claim by a broker to a commission for sale of the bankrupt's real estate, the claimant having no contract therefor with the trustee. It was considered to be "an administrative matter" and the court said: "If abuses threaten to creep into bankruptcy procedure those charged with local administration are in better position to prevent such abuses than are appellate tribunals."

Allowance or refusal of amendments to a petition in bankruptcy being entirely within the judicial discretion of the bankruptcy court, is not ground for reversal where the

record discloses no abuse of discretion. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (C. C. A. 3d Cir. 1907) 154 Fed. 662, where the court affirmed a refusal to allow amendment of a petition in involuntary bankruptcy by inserting additional alleged acts of bankruptcy, inspection of the proposed amendments showing that they lacked the specific particularity requisite to the statement of an act of bankruptcy, or to sufficiently distinguish them from acts not in violation of the bankrupt law.

The Circuit Court of Appeals is loath to interfere with the amount allowed as an attorney's fee for services rendered to petitioning creditors in involuntary cases unless fully persuaded that the judgment of the court below was founded in misconception of the ground upon which the allowance should be based, or, if proceeding upon correct grounds, that the amount allowed was largely excessive or greatly inadequate. *Per Jenkins, J.*, in *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784. But a judgment for a clearly inordinate allowance may be reversed with directions to reduce the allowance to a stated amount. This was done in *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784.

Questions of fact—*In general*.—"A proceeding in bankruptcy is a proceeding in equity, and on an appeal to this court, or to the Supreme Court, the decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the appellate court sustains the decree." *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852.

On an appeal the facts as well as the law are before the appellate court for review, *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 6th Cir. 1900) 101 Fed. 699; and the evidence is therefore re-examined in that court, *Simonsen v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, where the court also said: "An appeal as in equity cases necessarily involves the idea of re-examination by the appellate court of both the facts and the law of the case."

On appeal from an order refusing a discharge, if any one of the several specifications of objections to the discharge is sustained by sufficient evidence the order will be affirmed. *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691.

Where an error of the referee calls for reversal of the order confirming his report, unless the court is satisfied by the evidence in the record that his ultimate conclusion was right, the court will not weigh the testimony on the mere printed record if the questions of fact seem doubtful, but will reverse and remand in order that further evidence may be taken. *In re Straschnow*, (C. C. A. 2d Cir. 1910) 181 Fed. 337.

Findings of referee or master.—As to the weight to be attached to a finding of fact by a bankrupt referee alone, it has been said that no arbitrary rule can be laid down for determining it; that his position and duties

are analogous to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report; that much in both cases must depend upon the character of the finding; that if it be a deduction from established fact, the finding will not carry any great weight, for a reviewing court having the same facts may as well draw inferences or deduce a conclusion as the referee; but that if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion. *Per Lurton, J.*, in *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, 158.

In re Howard, (C. C. A. 2d Cir. 1910) 180 Fed. 399, where an order denying a discharge was reversed, the court said: "In our opinion the evidence was insufficient to warrant a finding that the failure to keep more complete records arose from any intention upon the part of the bankrupt to conceal his financial condition. Certainly we think the evidence would not warrant such a finding in the face of the report of the special master who saw the bankrupt upon the stand and heard his testimony at length."

An order of the bankruptcy court disregarding a referee's findings that are amply supported by the testimony will be reversed. *Boyd v. Arnold*, (C. C. A. 5th Cir. 1906) 149 Fed. 187 (certiorari denied (1907) 207 U. S. 593, 28 S. Ct. 259), reversing a judgment denying a discharge contrary to the recommendation of the referee.

Findings of fact dependent upon conflicting testimony have every reasonable presumption in their favor, and will not be set aside or modified by an appellate court unless it clearly appears that there was error or mistake, though the court below disagreed with such findings. *Southern Pine Co. v. Savannah Trust Co.*, (5th Cir. 1905) 141 Fed. 802, 73 C. C. A. 60, reversing an order which set aside the report of a referee in favor of a claimant of proceeds of property sold by a trustee in bankruptcy, the court saying: "Upon the trial of the issues before him the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts which have nothing before them but the printed record."

Judgment allowing a claim was reversed in *Rush v. Lake*, (C. C. A. 9th Cir. 1903) 122 Fed. 581 (certiorari denied (1903) 191 U. S. 571, 24 S. Ct. 843, 48 U. S. (L. ed.) 307), where the appellate court found, contrary to the opinion of the court below, that there was sufficient evidence to justify the referee's finding that the creditor was a silent partner of the bankrupt.

Concurrent findings of referee or jury and court below.—Appeals from judgments of the bankruptcy court are taken "as in equity cases" to a Circuit Court of Appeals or to the Supreme Court of a territory, and consequently the proceeding thereunder should conform itself, as far as may be consistent

with justice, to the ordinary course of equity procedure. *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, *per Aldrich*, J. Hence findings of fact made by a referee or master and confirmed by the judge are to be accepted by the appellate court, unless clear error in them is shown. *Ellsworth v. Lyons*, (C. C. A. 6th Cir. 1910) 181 Fed. 55, finding that the bankrupt corporation was solvent at the date of a transaction involved; *Canner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 516, affirming an adjudication of bankruptcy; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, affirming an order that a claim be expunged unless the creditor surrendered security which the court below and the referee held on conflicting evidence to have been obtained with reasonable cause to believe that it was intended as a preference; *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, affirming an order refusing a discharge, and holding that the credibility and reasonableness of the bankrupt's story of his loss of money being addressed to the judicial discretion of the court below, "as there was, in our judgment, reasonable ground for discrediting his explanation, we will not review the exercise of that discretion;" *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, affirming a judgment allowing a claim, which was assailed mainly upon the ground of relationship, and because it did not appear from the books of either the creditor or the debtor, the court saying that "in this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr.; the conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge; under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake;" *Naylor v. Christiansen Harness Mfg. Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 290, where, on appeal from an adjudication in involuntary bankruptcy, the appellate court, concurring with the court below, declined to believe that the officers of the bankrupt corporation "could be and continue so utterly ignorant of the financial condition of their company as the general terms in which their testimony was given would seem to indicate;" *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, affirming an adjudication of bankruptcy where the evidence left it uncertain whether or not the alleged bankrupt was chiefly engaged in farming; *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89, affirming an order denying the petition of an adverse claimant for the surrender of property to him by the trustees in bankruptcy, since "the master was in the best position to judge of the weight and credibility of the testimony, which was given orally before him," as to the title and right of possession of the claimant; *In re Lawrence*, (C. C. A. 2d Cir. 1904) 134 Fed. 843, affirming an order, findings not to be disturbed "unless they are manifestly unsup-

ported by the evidence;" *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, affirming a judgment allowing a claim as to the amount thereof, which "this court will not reverse or modify unless a very plain mistake is definitely pointed out;" *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, affirming a judgment allowing a debt, the court saying: "Some cases go so far as to hold that a chancellor's findings will not be reversed where the appellate court cannot see that the decree is right, and where the evidence raises some doubt as to its correctness. But it is not necessary to go to that extreme in this case, for, while the evidence presented by the record is meagre, there is nothing in the case to lead us to doubt the correctness of the finding below."

Conclusions of the trial judge, according with those of a jury in an advisory verdict, are entitled to the same weight as the concurrent findings of a referee and the judge. See *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, affirming an adjudication of bankruptcy, the court seeing "no sufficient reason for disagreeing with the conclusions."

Findings of a referee affirmed by the court may not be adopted by the appellate court where they appear to be clearly against the weight of testimony, or where they proceed upon an erroneous theory of the principles of law upon which the case was to be tried and determined, or where the appellate court finds that there are no substantial contradictions in the testimony which the court below thought had developed. *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, where a judgment rejecting a claim was reversed because it depended upon an erroneous assumption that the burden of proof on one of the issues involved rested on the creditor.

In *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, where the dismissal of an intervening claimant of property sold to the bankrupt was affirmed, the referee's report and finding, concurred in by the court below, was that the intervener had ample evidence, on a stated date, to put him on notice of the bankrupt's failing condition. "To justify us in a contrary conclusion," said the Circuit Court of Appeals, "it should plainly appear that the finding or conclusion was based upon some error of law or plain mistake of fact."

Finding of judge.—A judgment denying a discharge on an issue of fraud, the court below having seen the witnesses and heard their testimony, will not be disturbed unless the appellate court can clearly see that it is opposed to the weight of evidence. *Osborne v. Perkins*, (C. C. A. 1st Cir. 1901) 112 Fed. 127, *per Aldrich*, J., "or, as otherwise stated, unless plain and manifest error appears," he continued.

While the presumption is that all facts necessary to a decree were found by the court below, in the absence of circumstances showing the contrary, the appellate court is not aided in consideration of the case by the weight which ordinarily attaches to findings of the court below if there are no express findings stated in such a way as to make it clear that they were distinct findings upon

questions of fact. *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, reversing a decree adjudging that certain property constituted assets of the bankrupt's estate, it appearing that the conclusions of the court below were reached "upon general reasoning in respect to law and fact."

An appeal will be dismissed by the court of its own motion if it appears that the order or judgment was not one from which an appeal would lie. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579; *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362.

Where an appeal is taken to the Circuit Court of Appeals from an order which is not appealable, but subject to review only on petition to revise, the appeal should be dismissed. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1151.

Where the record on appeal from an order allowing a claim was not filed within the time allowed by law, and no motion to extend the time had been made within that period, the appeal was dismissed on motion. *In re Alden Electric Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 415.

"Appeals will not be entertained to argue moot questions only." *In re Berkebile*, (C. C. A. 2d Cir. 1906) 144 Fed. 577, dismissing an appeal for that reason.

Where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendants were adjudicated bankrupts in another district, the appeal will be dismissed, since under general order No. 6, 1 Fed. Stat. Annot. 607, the court making the first adjudication has exclusive jurisdiction, and the questions involved in the appeal have therefore become academic; and especially where such questions relate to an alleged preferential transfer of property, charged as an act of bankruptcy, which may again come before the court in a suit by the trustee against the transferee. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

Where, on a former appeal, it was determined that if the alleged bankrupt committed the acts of bankruptcy in question while insane the adjudication was wrong, but if the acts were committed while sane it was proper to continue the case, though the bankrupt subsequently became insane, and the case was remanded to give the petitioning creditors an opportunity to rebut the presumption of insanity arising from the in-

quisition, and on such hearing a number of witnesses testified that he was sane when the acts of bankruptcy were committed, and no evidence to the contrary was offered by the bankrupt's committee, a further appeal by such committee, raising the same question previously determined, was dismissed as frivolous and taken for delay. *In re Kehler*, (C. C. A. 2d Cir. 1908) 162 Fed. 674.

Appeal taken on erroneous theory. — An appeal taken on the erroneous supposition that the order was appealable under section 25a (3) will not be dismissed if the order was appealable as a "controversy" under section 24a. *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43.

Reversal and remand. — Where an order denying a discharge was reversed on appeal the court below was instructed to sustain the bankrupt's exceptions to the master's report against his petition for discharge, and to grant the discharge; this courts being deemed more equitable, under all the circumstances, than to leave the question of discharge open to a new inquiry. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694.

Mandate and proceedings thereon. — The District Court is a mere instrument to make effectual the mandate sent down by the Circuit Court of Appeals, which must be carried into effect without any limitation whatever. *In re Hudson River Electric Co.*, (N. D. N. Y. 1911) 184 Fed. 970, where the Circuit Court of Appeals having affirmed an order dismissing a petition in involuntary bankruptcy, the petitioner moved in the District Court to insert in the order entered on the mandate a provision that it should not be prejudicial to his right to apply to the Supreme Court for a writ of certiorari to review the order; the motion was denied.

Costs. — Appeals are not now allowed *in forma pauperis*, much less ought the court to allow a bankrupt's appeal to be financed by means to be supplied out of a fund which it may ultimately be held ought to go to the benefit of creditors. Hence, where the bankrupt appealed from an involuntary adjudication, he was not entitled to an order requiring a receiver of his property to pay the costs of the transcript and the printing of the record out of the proceeds of the estate in his hands because the appellant was without the means required for that purpose. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485.

(1) [From judgment granting or denying adjudication.] from a judgment adjudging or refusing to adjudge the defendant a bankrupt; [(1898) 30 Stat. L. 553.]

An order dismissing a petition in involuntary bankruptcy is a judgment refusing to make an adjudication and appealable under this clause. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, where the court said: "A decision which finally determines the rights of parties to secure in that suit the relief they seek is a 'final decision' within the meaning of that

term in the Act creating the Circuit Courts of Appeals, although it is not a decision of the merits of the case and does not bar another suit or proceeding for the same cause. It is a final adjudication of the particular case, and that is sufficient to vest in the defeated parties the right of review" by appeal.

Refusal to set aside adjudication. — An or-

der or judgment overruling a motion to set aside a judgment of adjudication of bankruptcy is not appealable. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576.

The appeal from an adjudication should not be taken to the Supreme Court, but only to the Circuit Court of Appeals, if it does not involve a question of jurisdiction of the District Court within the cases cited *supra*, p. 603, in note to section 24a. *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 825; *Columbia Ironworks v. National Lead Co.*, (8th Cir. 1904) 127 Fed. 99, 62 C. C. A. 99.

Where question of jurisdiction of the District Court is claimed to be in issue, see *supra*, note to section 24a, p. 603.

Appeal or petition for revision. — A judgment of adjudication is appealable, even though it might be reviewable in matter of law on petition for revision. *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369. But see as to exclusiveness of remedies note to sec. 24b, *supra*, p. 611.

Writ of error or appeal. — The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by the federal Supreme Court, and been recognized by the legislation of Congress from the foundation of the government. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 136, 47 U. S. (L. ed.) 200, *per* Chief Justice Fuller. And the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Seventh Amendment to Constitution, 8 Fed. Stat. Annot. 370. Hence a judgment that a defendant is or is not a bankrupt, entered by a federal District Court pursuant to a verdict of a jury on a trial under section 19 of the Bankruptcy Act, *supra*, p. 586, is not appealable to the Circuit Court of Appeals, and can be reviewed for alleged errors of the court on the trial only by a writ of error accompanied by a bill of exception. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839; *In re Neasmith*, (6th Cir. 1906) 147 Fed. 160, 77 C. C. A. 402; *Lennox v. Allen-Lane Co.*, (C. C. A. 1st Cir. 1908) 167 Fed. 114; *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 825 (writ of error to review a judgment of adjudication on a jury trial).

The provision in section 25a (1), authorizing an appeal "from a judgment adjudging or refusing to adjudge the defendant a bankrupt," applies only to judgments when trial by jury is not demanded and the court of bankruptcy proceeds on its own findings of fact. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200.

A writ of error to review the judgment just mentioned is of adjudication after a jury trial demanded as of right, authorized by the Circuit Court of Appeals Act of March 3, 1891, ch. 517, sec. 6, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409 (now embodied in Judicial Code, sec. 128, *ante*, p. 195, title JUDICIARY, in this Supplement), in connection with section 24a of the Bankrupt Act, *supra*, p. 603. *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839.

Under the Bankruptcy Act of 1867 it was also held that a writ of error is the proper remedy in such a case. *Knickerbocker Ins. Co. v. Comstock*, (1872) 16 Wall. 258, 21 U. S. (L. ed.) 493.

An adjudication of bankruptcy without a jury trial is reviewable only by appeal and not by a writ of error. *Lockman v. Lang*, (C. C. A. 6th Cir. 1903) 128 Fed. 279. See also *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

Appeal and not a writ of error is the proper remedy for appellate review by a bankrupt of an order of adjudication upon the advisory verdict of a jury upon issues submitted in the exercise of the court's discretion. *In re Neasmith*, (6th Cir. 1906) 147 Fed. 160, 77 C. C. A. 402; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

"The practice of taking an appeal and a writ of error to review the same adjudications is not only permissible, but commendable, in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the Appellate Court. In such cases the reviewing court will consider both proceedings, will dismiss that one which is ineffective, and will review the rulings of the court below in accordance with the rules of the method applicable to the nature of the case before it." *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

Both an appeal and a writ of error were taken from an adjudication which followed the verdict of a jury in *Lennox v. Allen-Lane Co.*, (C. C. A. 7th Cir. 1908) 167 Fed. 114, the court dismissing the appeal.

Other matters of appellate procedure, see the first note to section 25a, *supra*, p. 623.

(2) [From grant or denial of discharge.] from a judgment granting or denying a discharge; and [(1898) 30 Stat. L. 553.]

Judgment on composition. — A judgment confirming a composition is appealable as a judgment granting a discharge. *In re Friend*, (C. C. A. 7th Cir. 1905) 134 Fed. 778; *U. S. v. Hammond*, (C. C. A. 6th Cir. 1900) 104 Fed. 862.

The bankrupt has an equal right to appeal from a judgment refusing confirmation. *U.*

S. v. Hammond, (C. C. A. 6th Cir. 1900) 104 Fed. 862; *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967. *Contra*, *Ross v. Saunders*, (C. C. A. 1st Cir. 1901) 105 Fed. 915.

An order dismissing an application for discharge for want of prosecution, after so long a time had elapsed that the application

could not be reviewed, is appealable as a judgment denying a discharge. *In re Kuffer*, (C. C. A. 2d Cir. 1903) 127 Fed. 125.

Whether an order dismissing a petition to revoke a discharge is appealable as an order granting a discharge was expressly left undecided, the court finding no authorities on the point, in *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611.

Entry of order.—An honest bankrupt's right to a discharge is to be jealously protected, and where petitioners were adjud-

cated bankrupts Sept. 9, 1904, and applied for their discharge June 7th following, which application was dismissed for a technical error Sept. 13, 1905, but no order was entered on the judge's memorandum, and new proceedings were instituted, in which the former denial was pleaded as *res adjudicata*, the bankrupts were still entitled to have an order entered on the prior decision and to appeal therefrom under section 25a (2). *In re Elkind*, (C. C. A. 2d Cir. 1909) 175 Fed. 64.

(3) [From allowance or rejection of claim.] from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. [(1898) 30 Stat. L. 553.]

For matters of appellate procedure see the first note to section 25a, *supra*, p. 623.

"That 'claim,' as used here, means a 'debt' is settled by *Holden v. Stratton*, (1903) 191 U. S. 115, 118, 24 S. Ct. 45, 48 U. S. (L. ed.) 116, where it was said by Chief Justice Fuller that 'while the word "claim" is used in its signification of the demand or assertion of a right in subdivision 11 of section 2, in respect of all claims of bankrupts to their exemptions, it is also used in many parts of the act, and, as we think, in section 25, as referring to debts . . . presented for proof against estates in bankruptcy.'" *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 714.

Where a creditor asserts both a debt and a lien to secure the same, the procedure as to the debt or claim governs, with incidental right to determine the validity and priority of the lien asserted, and a judgment in his favor is appealable by the trustee under section 25a (3), although the latter makes no objection to the amount found due, and only seeks by his appeal to further contest the right to the security asserted. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

An order disallowing a claim for voting purposes in the selection of a trustee in bankruptcy, "without prejudice to the claimant's right to present the claim hereafter," is not appealable, and is reviewable only on a petition for revision. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

Disallowing priority.—Where a claim of debt is allowed, an order disallowing priority to it is not appealable. *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

And an order allowing a claim as a general debt, but disallowing in part a claim of the creditor to priority as a lien holder, is not appealable. *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311.

"But where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered upon the appeal as an incident of the debt." *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 714.

Claim for franchise tax.—Where a state filed a claim against a bankrupt corporation for an alleged franchise tax, and more than

\$500 of such claim was disallowed, the state was entitled to appeal from such disallowance under section 25a (3). *In re Cosmopolitan Power Co.*, (7th Cir. 1905) 137 Fed. 858, 70 C. C. A. 388, *reversed* on the merits, *sub nom.* *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

Denial of business homestead exemption.—Where, in a proceeding to determine a bankrupt's homestead exemption, the creditor secured by a deed of trust of property, claimed by the bankrupt as a business homestead, intervened, on the ground that the bankrupt was not entitled to a business homestead exemption, and prayed that all the property covered by the deed of trust be adjudged subject thereto and be ordered sold to satisfy the debt, which exceeded \$2,000, a judgment of the district judge reversing a referee's decision and holding that the bankrupt was not entitled to a business homestead, and directing that the property covered by the deed should be applied to its satisfaction, was applicable under section 25a (3). *Burow v. Grand Lodge, etc.*, (C. C. A. 5th Cir. 1905) 133 Fed. 708, *distinguishing In re Whitener*, (5th Cir. 1900) 105 Fed. 180, 44 C. C. A. 434.

An order allowing expenses incurred by a bankrupt's trustee for counsel fees is not appealable. *Davidson v. Friedman*, (C. C. A. 6th Cir. 1906) 140 Fed. 853.

An order passing upon a creditor's claim for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate is not appealable. *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362.

Orders of miscellaneous character.—A judgment is appealable as one rejecting a claim where a referee's order disallowing a claim "as the proof now stands" was approved and affirmed by the bankruptcy court. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945, *affirming* (2d Cir. 1906) 144 Fed. 818, 75 C. C. A. 548, which *reversed* (N. D. N. Y. 1905) 134 Fed. 101.

Where the creditor of a bankrupt, after the filing of the petition, sold securities which it held, credited the proceeds on its debt, and filed a claim for the balance due, an order

disallowing such claim and directing a resale of the securities at public auction was one rejecting the claim and appealable. *In re Mertens*, (2d Cir. 1906) 144 Fed. 818, 75 C. C. A. 548, *affirmed* (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945.

Where a creditor holding a note given by a bankrupt firm and signed as surety by a member of the firm, also bankrupt, proved the debt against the firm estate and also filed it as an individual debt against the estate of the surety, the only question determined by an order allowing such claim was that it was a provable debt against the individual estate, and the order was appealable, the amount allowed being over \$500. *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711.

An order denying to a creditor of a partnership the right of participation in the individual assets of a bankrupt partner until the individual creditors were first paid is not a rejection of the debt claimed and is not appealable. *Euclid Nat. Bank v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1906) 149 Fed. 975, *certiorari denied* (1906) 205 U. S. 547, 27 S. Ct. 793, 51 U. S. (L. ed.) 924.

Where an order of sale recognized and adjudicated the validity and amount due on mortgages as incidental to the necessary sale of the property free and clear of all incumbrances, "it is doubtful if such recognition was such an allowance of a claim as would

entitle any party not adversely affected to appeal therefrom." *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

An order denying a petition for rehearing is not appealable. *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232. See also *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

Limitation as to amount.—"The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restriction plainly has reference, not to the amount of the original claim, but to the amount of the allowance or rejection; that is, to the amount which will be put in controversy by the appeal." *Per Van Devanter, J.*, in *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344, stating, however, that where the trustee in bankruptcy is given or refused credit for different payments aggregating \$500 or over, claimed to have been actually made by him in the due administration of the estate, he would be the creditor or claimant, the different payments would be only items of a single debt or claim, and the order of allowance or rejection would be appealable.

[*Time for taking appeal—hearing.*] Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. [(1898) 30 Stat. L. 553.]

The time limit in this paragraph applies only to the three judgments specifically mentioned in the preceding part of the section, and the time limit for appeal from other judgments is six months, as provided in the Circuit Court of Appeals Act of 1891, ch. 517, sec. 11, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579. And see *supra*, p. 603, note to section 24a.

If an order dismissing a petition to revoke a discharge is appealable under section 25a (2), the appeal must be dismissed for want of jurisdiction unless it is taken within ten days. *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611.

Where a creditor's claim was disallowed, and the question of its preference also decided against him, it was held that his appeal was governed by the ten days limitation, and not by the limitation of six months applicable to appeals by adverse claimants in "controversies arising in bankruptcy proceedings." *Kenova L. & T. Co. v. Graham*, (C. C. A. 4th Cir. 1905) 135 Fed. 717.

Nonenumerated judgments "in bankruptcy proceedings."—If there be any appealable orders or decrees of the District Court "in bankruptcy proceedings" that are not "controversies arising in bankruptcy proceedings" under section 24a, nor enumerated as appealable under section 25a, an appeal therefrom

will not be controlled by the limitation of ten days for appeals from enumerated judgments, but may be taken within the same period as other appeals to the Circuit Court of Appeals from that court; that is to say, "within six months after the entry of the order, judgment, or decree sought to be received," as provided in the Circuit Court of Appeals Act of March 3, 1891, ch. 517, sec. 11, 26 Stat. L. 829, 4 Fed. Stat. Annot. 428. *Per Sanford, J.*, in *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579; *per Caldwell, J.*, in *Steele v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, sustaining a bankrupt's appeal, within six months, from an order denying his claim to exemption of certain insurance policies and their cash value.

Allowance of an appeal after expiration of the time limited has no efficacy to prevent dismissal of the appeal on motion. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 578.

Judgment "rendered."—Statutes limiting a stated period for appeal after a judgment has been "rendered" are usually construed as meaning from the date of the decision by the court, and not from the date of its subsequent entry in the journal, or signing by the judge; and if the time for appeal is suspended during the pendency of a petition for rehearing (see *infra*, this note), it will begin to run when a decision denying the petition

is rendered, although the decision be actually entered at a later date. *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 902.

Presumptively, however, an unannounced judgment is not "rendered" when the judge signs it under a given date, but only until it is handed to the clerk and filed by him. *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, in which case there was an interval of two days between the date of an appealable order and the date of filing, the appeal having been taken within ten days of the latter date but more than ten days from the former. The record failed to disclose where the signed order was during the two days. The court presumed it was in the judge's possession "unannounced and unpublished and still subject to his consideration and determination," and "in the absence of a showing to the contrary" denied a motion to dismiss the appeal.

Where the judge filed an opinion, the time for appeal did not begin to run until his conclusion was placed in the form of a judgment and entered as such. *Rush v. Lake*, (C. C. A. 9th Cir. 1903) 122 Fed. 561, certiorari denied (1903) 191 U. S. 571, 24 S. Ct. 843, 48 U. S. (L. ed.) 307. See also *In re Elkind*, (C. C. A. 2d Cir. 1909) 175 Fed. 64.

If, in a given case, an order denying a motion to set aside a judgment would be appealable, the time for appeal would begin to run from the entry of the order and not from the entry of the original judgment. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579.

Effect of proceedings for rehearing.—For evident reasons this topic is here considered in connection with cases where the same question arose under section 25b.

If a party subject to the limitation of thirty days for appeals to the Supreme Court from a Circuit Court of Appeals (see *infra*, p. 638, note to sec. 25b), suffers the time to elapse without filing a petition for rehearing, his right of appeal expires and cannot be resuscitated by merely filing a petition for rehearing. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; especially if the petition is afterward denied, *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232; even though the term of court has not expired and by its rules of practice petitions for rehearing may be presented at any time during the term, *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128, dismissing an appeal from the Circuit Court of Appeals for the Second Circuit.

Whether the Circuit Court of Appeals has power to grant a rehearing after the lapse of thirty days from an appealable judgment, in view of the terms and spirit of the Bankruptcy Act, even though the term of the court has not expired, and the effect of granting it in restoring the right to appeal, were questions expressly left undecided by the Supreme Court. *Conboy v. Jersey City*

First Nat. Bank, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

But since the decision in the Supreme Court case last above cited, as well as before, it has been expressly held in other federal courts that the bankruptcy court has sufficient control of any order so that, in the exercise of a sound judicial discretion, it may set aside the order even after the expiration of the time for appeal, whereupon the right of appeal is revived. *Per Evans, J.*, in *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, 126, citing *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, as "so decided upon a kindred proposition." *Per contra*, in *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, where a petition to set aside an adjudication of bankruptcy was filed more than ten days after the adjudication was entered, and the petition was afterward denied, an appeal from the original judgment of adjudication was dismissed. So in *In re Berkebile*, (C. C. A. 2d Cir. 1906) 144 Fed. 577, where an adjudication of bankruptcy was entered, and a few days thereafter an alias adjudication to precisely the same effect and without vacating the prior adjudication, it was held that this subsequent entry did not extend the time for appeal from the original adjudication. And in *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339, the court said *arguendo*: "It is well settled that this statutory limitation [of ten days] cannot be enlarged either by the bankruptcy or by the appellate court."

It has also been held that the right of appeal is revived where a rehearing is granted upon petition filed after the time for appeal has expired, but not for the mere purpose of evading the statutory limitation, and the court adheres to its first determination. *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, a case of an appeal from the disallowance of a claim, where *Evans, J.*, said: "The learned judge of the District Court not only re-examined the questions involved, but more elaborately stated his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him." In *In re Brady*, (W. D. Ky. 1908) 169 Fed. 152, the point was expressly left undecided.

Some courts have held that while the bankruptcy court will not grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appeal (*In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841), because that "would be the employment of an unworthy fiction" (*In re Wright*, (D. C. Mass. 1899) 96 Fed. 820), the court has a right to grant a rehearing upon a petition filed avowedly for the purpose of regaining by that means a right of appeal lost by expiration of time. *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, where it was "apparent that the purpose was to revive the right of appeal;" *In re Wright*, (D. C. Mass. 1899) 96 Fed. 820, where the court

said "the record should show the true purpose for which the rehearing was sought and granted;" *In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841, stating that the petition should set forth the reasons for the failure to appeal in due season. In such cases as the last cited perhaps the petition must be filed during the same term, as in *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, where the court said: "We have no occasion to consider whether or not the organization of the District Court, sitting in bankruptcy, is, by the statute, of a continuous nature, so that according to the expressions in *Sandusky v. Indianapolis First Nat. Bank*, (1874) 23 Wall. 289, 292, 293, 23 U. S. (L. ed.) 155, and in *Stickney v. Wilt*, (1874) 23 Wall. 150, 164, 23 U. S. (L. ed.) 50, its proceedings are not subject to the ordinary rule that rehearings must be asked for at the term at which the judgment is entered."

Courts holding that they have power to grant a rehearing after the time for appeal has expired, and in order to revive the right to appeal, declare that they may properly do so when satisfied that the failure to appeal was not due to the culpable neglect of the party or his counsel (*In re Wright*, (D. C. Mass. 1899) 96 Fed. 820), but that the court "must exercise a very guarded discretion in granting" such a rehearing, and "should never do this unless the facts in the case clearly warrant it." *In re Hudson Clothing Co.*, (D. C. Me. 1905) 140 Fed. 49, 51, where the judge denied a petition for rehearing because he thought the parties had "acted advisedly in failing to preserve the record and to apply for an appeal," and because, he said, "if I should grant this rehearing for this purpose, it might fairly be used as a precedent for such action in almost any case where a party had not taken an appeal from an adverse decree within the ten days allowed by the bankruptcy statute."

For a contrary view as to the propriety of granting a rehearing to restore a party's right of appeal, see *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, where the judge who entered an order, having at once left upon a vacation trip, was not, for over ten days, within the reach of appellant's counsel, who desired to take steps for an appeal, but no reason was disclosed by the record for not taking other available steps for that purpose. *Evans, J.*, in the case cited, said: "One purpose which runs through the Act is to require the prompt and expeditious winding up of estates, and the provision just quoted [limiting ten days for appeal] was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it we cannot accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion."

Where a petition for rehearing is filed be-

fore the time for appeal has expired, the finality of the order or judgment sought to be reviewed is thereby suspended, and the period of limitation for appeal does not begin to run until the court disposes of the petition. *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897 (*distinguishel* *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128); *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898.

When appeal is "taken." — Whether a citation is needful, by way of notice to the parties, in any appeal in bankruptcy, may not be clear under the authorities. *Per Seaman, J.*, in *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, where it was also said: "The general rule is established, as stated by this court in *McNulta v. West Chicago Park Com'rs*, (7th Cir. 1900) 99 Fed. 328, 39 C. C. A. 545, that no citation is required 'when an appeal is allowed in open court at the same term when the decree was rendered.' In appeals in bankruptcy, however, this rule may not be applicable, for the reason that there are no stated terms of the bankruptcy court, as such, but the jurisdiction is exercised by the District Courts throughout the proceedings [citing Bankruptcy Act, sec. 2, *supra*, p. 469] 'in vacation in chambers and during their respective terms.' Thus each 'proceeding in bankruptcy, from its commencement to its close upon the final settlement, is but one suit.' *Wiswall v. Campbell*, (1876) 93 U. S. 347, 348, 23 U. S. (L. ed.) 923."

And the cases are not harmonious in reference to citation or bond as requisites to confer jurisdiction of an appeal. *Per Seaman, J.*, in *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, continuing as follows: "In *Jacobs v. George*, (1893) 150 U. S. 415, 416, 14 S. Ct. 159, 37 U. S. (L. ed.) 1127, and *Mattingly v. Northwestern Virginia R. Co.*, (1895) 158 U. S. 53, 56, 15 S. Ct. 725, 39 U. S. (L. ed.) 894, however, the general doctrine is established for appeals in equity that 'neither signing nor service of the citation is jurisdictional, its only office being to give notice to the appellees,' and that failure or defects therein may be cured after the time limited for appeal. Like rule is applied to perfect the bond for appeal. *Edmonson v. Bloomshire*, (1868) 7 Wall. 306, 311, 19 U. S. (L. ed.) 91; *Peugh v. Davis*, (1884) 110 U. S. 227, 228, 4 S. Ct. 17, 23 U. S. (L. ed.) 127."

It has been held that an appeal is not "taken" within the meaning of the statute until the petition and allowance of appeal (if there be such petition and allowance) and the appeal bond and the citation are presented to and filed in the court which made the decree appealed from; and that the filing of a bond is only one step towards perfecting the appeal, and the presumption that might arise from its filing and approval does not obtain when the record affirmatively discloses that there was a prayer for the appeal, and its allowance and a citation, none of which was filed in the court until after the expiration of the time for appeal. *Norcross v. Nave, etc., Mercantile Co.*, (C. C. A. 8th Cir. 1900) 101 Fed.

796, dismissing an appeal although the bond was filed and approved in time, Caldwell, J., saying: "The case of Credit Co. v. Arkansas Cent. R. Co., (1888) 128 U. S. 258, 9 S. Ct. 107, 32 U. S. (L. ed.) 448, is directly in point and concludes the question; and to the same effect are Fowler v. Hamill, (1891) 139 U. S. 549, 11 S. Ct. 663, 35 U. S. (L. ed.) 266; Farrar v. Churchill, (1890) 135 U. S. 609, 10 S. Ct. 771, 34 U. S. (L. ed.) 246."

It has also been held that an appeal must be dismissed where there is no evidence in the record that the bond was filed in time nor the time when the petition for appeal was presented, or filed, or granted, or whether it was filed at all. Williams v. Savage, (C. C. A. 4th Cir. 1903) 120 Fed. 497.

On the other hand, a motion to dismiss an appeal was denied where the petition and allowance of the appeal were in due time, but citation was not issued to the appellee moving to dismiss the appeal, and the bond, although filed in due time, ran to the other appellee alone. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, certiorari denied, (1907) 207 U. S. 589, 28 S. Ct. 256. See also Gray v. Grand Forks Mercantile Co., (C. C. A. 8th Cir. 1905) 138 Fed. 344.

A motion to dismiss was also denied where the appeal was allowed and bond approved in time, but a citation was not issued until several days after the time for appeal had expired, Lockman v. Lang, (C. C. A. 8th

Cir. 1904) 132 Fed. 1; and where the filing of the bond and the service of the citation were done before motion to dismiss the appeal was made, but not within the time limited for appeal, Columbia Ironworks v. National Lead Co., (C. C. A. 6th Cir. 1904) 127 Fed. 99, the court saying: "The delay was for a few days only, and we do not think the interests of the opposite party were to any appreciable extent impaired thereby."

And an appeal "not taken strictly within the statutory limitation" was entertained where there was no motion to dismiss. Stroud v. McDaniel, (C. C. A. 4th Cir. 1901) 106 Fed. 493, the report not otherwise showing what was the omission, and Judge Purnell quoting as follows from Justice Brewer's opinion in Mutual L. Ins. Co. v. Phinney, (1900) 178 U. S. 327, 20 S. Ct. 909, 44 U. S. (L. ed.) 1093: "While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that a party seeking a review must act in time, and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction."

b [Appeal to Supreme Court.] From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: [(1898) 30 Stat. L. 553.]

This paragraph is re-enacted in Judicial Code, sec. 252, *ante*, title JUDICIARY, p. 237 of this Supplement.

That this provision is to be strictly construed is indicated by the following quotation from Holden v. Stratton, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116: "The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the Act of 1867 it was held that this court had no jurisdiction to review judgments of the Circuit Courts dealing with the action of the District Courts in such allowance or rejection, because they were not final. Wiswall v. Campbell, (1876) 93 U. S. 347, 23 U. S. (L. ed.) 923; Leggett v. Allen, (1884) 110 U. S. 741, 4 S. Ct. 195, 28 U. S. (L. ed.) 313. The jurisdiction now given is carefully restricted, and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. *McLish v. Roff*, (1891) 141 U. S. 661, 12 S. Ct. 118, 35 U. S. (L. ed.) 893."

The provision in this section is exclusive with reference to its subject-matter, so that if a final decision allowing or rejecting a claim fails to meet the requirements of this

section and is therefore not appealable under it, an appeal cannot be taken to the Supreme Court under section 24a, *supra*. *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14.

No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128. See also *Morgan v. Benedict*, (C. C. A. 4th Cir. 1907) 157 Fed. 232.

What constitutes decision "allowing or rejecting a claim."—See also cases cited in note to section 25a (3), *supra*, p. 634.

A decision of a Circuit Court of Appeals reversing a bankruptcy court's disallowances constitutes an appealable decision rejecting a claim. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945.

An order allowing a claim as a general debt but disallowing it as preferred is appealable. *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065, *affirming* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

In *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, an appeal was entertained from a decision permitting secured creditors to apply the proceeds of the sale of the se-

curities first to interest accrued since the filing of the petition, then to the principal debt, and to prove for the balance.

A judgment which reversed an order of the District Court allowing a claim against a bankrupt's estate and held that the creditor must first surrender a certain alleged preference was treated as appealable in *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380.

A judgment of a Circuit Court of Appeals denying a state's claim to preferential payment of taxes was treated as appealable in *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

A decision of the Circuit Court of Appeals on petition for revision of an order allowing an exemption is not a decision "allowing or rejecting a claim," and is not appealable, but reviewable only on certiorari, under section 25d, *infra*. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116.

A decree denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as the first claim on the property of a bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, is not a decision "rejecting a claim," but is the determination of a "controversy" under section 24a. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

Time for appeal.—Appeals under this paragraph must be taken within thirty days after the judgment or decree, as required in general order 36, par. 2, 1 Fed. Stat. Annot. 612. This limitation is "in harmony with the policy of the Bankruptcy Act, requiring prompt action and the avoidance of delay," and "has the same effect as if written in the statute." *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

The allowance of an appeal by the Circuit Court of Appeals and the granting of a certificate by a justice of the Supreme Court under section 25b, subd. 2, cannot operate as an adjudication that it was taken in time. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128, where such appeal on certificate was dismissed because not taken in time, thereby indicating that the italicized clause in the following quotation from the opinion of the court in *Coder v. Arts*, (1909) 213 U. S. 223, 237, 16 Ann. Cas. 1008, 29 S. Ct. 436, 444, 53 U. S. (L. ed.) 772, must have been an inadvertence and does not support an implication that any other time than thirty days is limited for appeal even if there is a certificate: "*As there is no such certificate* the question is, was the appeal taken within the time prescribed by the rules of this court," viz., thirty days?

Nor can a party whose time for appeal has expired derive any benefit from the subsequent filing *nunc pro tunc* by the Circuit Court of Appeals, as though filed at the time of entry of the judgment or decree, of findings of fact and conclusions of law, as required by general order No. 36, par. 3, 1

Fed. Stat. Annot. 612. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

Effect of proceedings for rehearing as extending the time, see note to last clause of section 25a (3), *supra*, p. 635.

Findings of fact and conclusions of law must be filed pursuant to the requirements of general order No. 36, subd. 3, 1 Fed. Stat. Annot. 612. If the court fails to make those findings, the omission cannot be supplied in the Supreme Court by reference to the opinion of the court below. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

"But if the case was not appealable the appeal must be dismissed, even though clause 3 [of general order No. 36] had been complied with." *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

Where an appeal was allowed within thirty days of the entry of the judgment, and afterward, but still within the thirty days, an order was made which recited that the court had made certain findings of fact and conclusions of law, and the same was entered *nunc pro tunc* as of the date of the judgment, it was held that this was a compliance with the requirement that the findings be made at or before the time of entering the judgment or decree. *Coder v. Arts*, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, where the court said: "We think that the court must be presumed to have acted within its authority to correct the record by this order, made within the time allowed for an appeal, to make it show the findings at or before the time of entering the judgment."

In *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, where an appeal was dismissed, it was apparently deemed worthy of remark that the court below "filed no finding of facts at or before the time of entering its decree, as required by the general orders, but did so only two months after the decree had been entered, and a month after an appeal had been taken and allowed by a justice of this court."

The general order provision above cited "does not require such findings to be made without request, but is intended to give the party a right to such findings, to be conceded if he demands it, which we think he should do, either before the opinion of the court is given, or, if thereafter, before the judgment is entered." *Crucible Steel Co. v. Holt*, (C. C. A. 6th Cir. 1909) 174 Fed. 127. See also *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirmed* (1910) 216 U. S. 545, 30 S. Ct. 412.

There is set forth in full a finding of facts and conclusions of law in Coder v. Arts, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, and *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997, and a finding of facts in *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571.

The Supreme Court can look only at the facts found by the Court of Appeals. *Coder v. Arts*, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 442, 53 U. S. (L. ed.) 772.

Record on appeal.—General Order No. 36, subd. 3, 1 Fed. Stat. Annot. 612, limits and defines what shall constitute the record on appeal under section 25b, and a general appeal bringing up the entire record is not a correct proceeding in that class of appeals.

1. [*Jurisdictional amount — question involved.*] Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or [(1898) 30 Stat. L. 553.]

This subdivision is now a part of Judicial Code, sec. 252, *ante*, title JUDICIARY, p. 237, of this Supplement.

In order to be appealable under this subdivision—that is, in the absence of a certificate provided for in the next succeeding subdivision—the decision of the Circuit Court of Appeals must involve a federal question as the latter is defined in Rev. Stat., § 709, 4 Fed. Stat. Annot. 467, which is the provision to which this subdivision alludes. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 239, 49 U. S. (L. ed.) 571; *Coder v. Arts*, (1909) 213 U. S. 223, 238, 16 Ann. Cas. 1008, 29 S. Ct. 436, 442, 53 U. S. (L. ed.) 772.

A federal question is not involved in a decision which proceeds on well-settled principles of general law broad enough to sustain it without reference to provisions of the Bankruptcy Act. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116, where, for that reason, the court dismissed an appeal from the allowance of the claim of a creditor against the bankrupt estate of an individual partner as well as against the estate of the bankrupt partnership; *Blake v. Openhym*, (1910) 216 U. S. 322, 30 S. Ct. 309, dismissing, for want of jurisdiction, an appeal from a decree reversing the disallowance of a certain claim as entitled to be preferred.

A trustee's bare denial of a creditor's claim allowed him by the Circuit Court of Appeals is not the assertion of a right under federal law, but a denial of such right, and the decision allowing the claim is not appealable. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

A decision allowing a claim and declaring the validity of a mortgage lien to secure it was held to be appealable where a construction of the Bankruptcy Act insisted upon by the trustee would defeat the lien and a construction contended for the creditor would give the law validity. *Coder v. Arts*, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

Following *Coder v. Arts*, last above cited, an appeal was entertained from a decree sustaining an equitable charge asserted by an intervener as a preferential claim against

Chapman v. Bowen, (1907) 207 U. S. 89, 29 S. Ct. 32, 52 U. S. (L. ed.) 116.

If the Circuit Court of Appeals had no appellate jurisdiction in the case wherein it rendered the decision, its decision must, of course, be reversed by the Supreme Court for that reason. See *Coder v. Arts*, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, where, however, it was held that the Circuit Court of Appeals had jurisdiction.

assets of the bankrupt in the hands of the trustee. *Hurley v. Atchison, etc., R. Co.*, (1909) 213 U. S. 126, 29 S. Ct. 466, 53 U. S. (L. ed.) 729.

Where a decision rejecting a claim is based upon the denial of the creditor's right to a set-off asserted under the provisions of section 68 of the Bankruptcy Act, the construction of those provisions is involved so that a claim of federal right is presented and the decision is appealable. *Western Tie, etc., Co. v. Brown*, (1900) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, reversing decree in (C. C. A. 8th Cir. 1904) 129 Fed. 728.

An appeal was entertained from a decision which affirmed a judgment disallowing a claim except upon a surrender of an alleged preference. *Wild v. Provident L. & T. Co.*, (1909) 214 U. S. 292, 29 S. Ct. 619, 53 U. S. (L. ed.) 1003, reversing (3d Cir. 1907) 153 Fed. 562, 82 C. C. A. 516, and holding that the transaction involved did not constitute a preference.

An action in a state court by a trustee in bankruptcy seeking to recover what is asserted to be an asset of the bankrupt estate under the Bankruptcy Act presents a federal question, so that a judgment denying the asserted right is a denial of a right or title specially claimed under a law of the United States and appealable under Rev. Stat., § 709, cited near the beginning of this note. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

The question whether a bankrupt's conveyance of property was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577.

A judgment recovered by a trustee in bankruptcy in his suit to avoid an alleged unlawful preference, the state court having answered some of the contentions of the defendant by the construction it gave to the Bankruptcy Act, is appealable to the federal Supreme Court. *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, where the court said: "The case, therefore, comes within the ruling in *Nutt v. Knut*, (1906) 200 U. S. 13, 26

S. Ct. 216, 50 U. S. (L. ed.) 348. It was there said: 'A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709 [4 Fed. Stat. Annot. 467] to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.' See also *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527."

While a certificate made by the state court of last resort and filed by it as part of the record cannot import a federal question into a record where otherwise such question does not arise, such certificate may serve to elucidate the determination whether a federal question exists. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, holding that the certificate in the case at bar made clear the fact, if it were otherwise doubtful, that rights under the Bankruptcy Act were relied upon and passed upon below.

2. [Certification of question by Supreme Court justice.] Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States. [(1898) 30 Stat. L. 553.]

This subdivision is re-enacted in Judicial Code, sec. 252, *ante*, title JUDICIARY, p. 237, of this Supplement.

National Bank of Commerce v. Downie, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065, and *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717, were cases brought up with a certificate under this subdivision.

On appeal from a decision of a Circuit

Court of Appeals allowing or rejecting a claim, the court will not determine the question involved solely on the ground that such determination is essential to a uniform construction of the Bankruptcy Act, if the appeal is not accompanied by a certificate of a justice of the Supreme Court. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116; *Blake v. Openhym*, (1910) 216 U. S. 322, 30 S. Ct. 309.

c [Bond on appeal by trustees.] Trustees shall not be required to give bond when they take appeals or sue out writs of error. [(1898) 30 Stat. L. 553.]

d [Certification to Supreme Court by other courts.] Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. [(1898) 30 Stat. L. 553.]

I. IN GENERAL, 641.

II. QUESTIONS CERTIFIED, 641.

III. WRITS OF CERTIORARI, 643.

I. IN GENERAL.

"The provisions of the United States laws" referred to in this section are the provisions in section 6 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. L. 828, 4 Fed. Stat. Annot. 409, as reproduced in sections 239 and 240 of the Judicial Code, set forth *ante*, pp. 231, 232, title JUDICIARY, in this Supplement. This section 25d of the Bankruptcy Act is also re-enacted without change in section 252 of the Judicial Code, set forth *ante*, p. 237, title JUDICIARY, in this Supplement.

In *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, Chief Justice Fuller said: "The certification referred to is that provided in sections 5 and 6 of the Act of March 3, 1891, [4 Fed. Stat. Annot. 398, 409]." His reference to section 5 was probably an inadvertence, since the certificate under that section, unlike a certificate under section 6, is not an

independent proceeding, but always and necessarily an incident to an appeal or a writ of error. See 4 Fed. Stat. Annot. 402-404, and the corresponding place in title JUDICIARY, vol. 2 of this Supplement.

"The construction which the *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, suggests may be put on section 25d with reference to certification and writs of certiorari, as between the Supreme Court and the Circuit Courts of Appeals, makes it applicable to bankruptcy proceedings, no matter in what way they get into the Circuit Courts of Appeals, and whether they come up under section 24 or section 25 . . . and this is clearly a just construction of that section." *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 19.

II. QUESTIONS CERTIFIED.

The leading provision for certification of questions to the Supreme Court by the Circuit Court of Appeals is in section 6 of the Circuit Court of Appeals Act of March 3, 1891, annotated in 4 Fed. Stat. Annot. 418, and in title JUDICIARY, vol. 2 of this Supplement,

Despite the comprehensive phrase "other courts" the provision in section 25d refers only to certificates from the Circuit Court of Appeals. See *Bardes v. Harwarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261, holding that a certificate under that provision cannot be employed to bring a question of jurisdiction direct from the District Court to the Supreme Court. As to certification of questions of jurisdiction in connection with direct appeals or writs of error, see 4 Fed. Stat. Annot. 418, and the corresponding place in title JUDICIARY, vol. 2 of this Supplement.

Cases in Circuit Court of Appeals on appeal.—In *Toxaway Hotel Co. v. Smathers*, (1910) 216 U. S. 439, 30 S. Ct. 263, a question was certified in a bankruptcy case pending in the Circuit Court of Appeals on appeal.

In proceedings to revise in matter of law.—Certification of questions from the Circuit Court of Appeals is not only authorized in bankruptcy cases pending in that court on appeal or writ of error, but also in bankruptcy cases pending on petition to superintend and revise in matter of law; certificates in the latter class of cases constitute a large proportion of the bankruptcy cases presented to the Supreme Court on certificate. The following were certified cases of that description: *White v. Schloeb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183; *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992; *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377; *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557.

At what stage of the case.—Section 6 of the Circuit Court of Appeals Act of March 3, 1891, 4 Fed. Stat. Annot. 409, re-enacted in Judicial Code, sec. 239, set forth *ante*, p. 231, title JUDICIARY, in this Supplement, provides for the certification of questions or propositions of law concerning which the Circuit Court of Appeals "desires the instruction" of the Supreme Court "for its proper decision," clearly implying that a question cannot be certified after the Circuit Court of Appeals has decided it. But the court may grant a rehearing after deciding a case or question, and then certify the question to the Supreme Court, as was done in *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845, where, prior to granting a rehearing, the Circuit Court of Appeals had affirmed a decision of the District Court on a petition for revision.

Motion for certificate.—In *Andrews v. National Foundry, etc., Works*, (C. C. A. 7th Cir. 1897) 77 Fed. 774, 778, not a bankruptcy case, the court said questions are certified "only upon our own motion."

Frame and contents of certificate.—See

cases cited 4 Fed. Stat. Annot. 419, and the corresponding place in title JUDICIARY, vol. 2 of this Supplement. Supreme Court Rule 37, par. 1, 210 U. S. appendix 501, 20 S. Ct. xxii, requires that a certificate shall contain "a proper statement of the facts" on which the certified question or proposition of law arises. Facts implied in a question certified may, perhaps, aid the statement of facts. See remark of Justice White in *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790.

Following a concise chronological statement of the fundamental facts the questions arising thereon are propounded, each in a numbered paragraph. See certificates used in bankruptcy cases and quoted in full in *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377.

The questions should be numbered so that the Supreme Court, in its reported opinion, may refer to one as "the second question," for instance, as is commonly done, without quoting it again.

Captions distinguishing the "statement of facts" from the "questions certified" appear in the certificate copied in *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, and appear in other cases not in bankruptcy.

The Supreme Court will take judicial notice of the public statutes of every state in the Union and of every territory. 1 Fed. Stat. Annot. xi, xii. But if the construction or effect of a state or territorial statute is necessarily involved in a certified question, good practice will suggest that the statute be not only accurately cited in the certificate, but copied therein. See, for example, the certificate in *Evans v. Nellis*, (1902) 187 U. S. 271, 23 S. Ct. 74, 47 U. S. (L. ed.) 173, not a bankruptcy case.

An essential point not clearly expressed in a question may sufficiently appear in the accompanying statement of facts, as in *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183.

Consideration and disposition of questions certified.—In disposing of the questions certified, the Supreme Court is confined to the facts stated in the certificate, and cannot consider allegations of other facts that are made in the briefs. *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845.

A question may be regarded as too comprehensive and indefinite to be answered at all. Thus, in *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845, a trustee in involuntary bankruptcy filed a plenary bill in equity in the federal District Court where he was appointed, to set aside an alleged fraudulent sale by the bankrupt and praying for an injunction and receiver. The court granted an injunction and appointed a temporary receiver. A petition for revision was thereupon filed in the Circuit Court of Appeals, which certified a question as fol-

lows: "Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings, instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property thus in the court's possession, and do full and complete justice in one litigation?" The Supreme Court declined to answer that question, and said: "It speaks generally of the District Court having appointed a receiver, but does not state, nor does the certificate show, that the receiver was appointed before the election of the trustee in bankruptcy. Beyond this, the question comprehends what the District Court may do, not merely on this bill by the trustee, but on proceedings, original or ancillary, by the petitioning creditors or by the receiver, or on the court's own motion."

If the certificate is entertained by the Supreme Court, and the questions therein propounded are considered, the court gives categorical answers, as in *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377, and *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, or gives its response in a formal statement, if the latter appears desirable, as in *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183. But it is not disposed to volunteer instruction not expressly sought. "Not going beyond what the decision of the case before us requires, we are of opinion that," etc., was the response of the court in *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183.

In some cases answers to one or more questions obviously dispense with the necessity of answering the remaining questions, as in *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Yaple v. Dahl-Millikan Grocery Co.*, (1904) 193 U. S. 526, 24 S. Ct. 552, 48 U. S. (L. ed.) 776; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147.

The certificate will be "dismissed" if the case, or the stage of the case, was one where a certificate for instruction was not authorized by law, as in *Bardes v. Hawarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261.

The mandate of the Supreme Court on the disposition of the certificate is sent down and filed in the Circuit Court of Appeals, and in subsequent proceedings that court adopts the advice received. See *Toxaway Hotel Co. v. Smathers*, (C. C. A. 4th Cir. 1910) 178 Fed. 1005.

Certiorari to bring up entire record.—See also *infra*, this note, III. *Writs of Certiorari*, and section 6 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 409, as annotated in title JUDICIARY, vol. 2 of this Supplement.

When questions are certified to the Su-

preme Court, which thereupon requires that the whole record and cause be sent up for its consideration, as it is authorized to do by section 6 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 409, now embodied in the Judicial Code, sec. 239, *ante*, p. 231, title JUDICIARY, in this Supplement, it issues a writ of certiorari for that purpose. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061. The certified questions then become *functus officio*, the Supreme Court decides the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal, and remands the case to the proper District Court for further proceedings. See, for example, the conclusion of the opinion in *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061.

III. WRITS OF CERTIORARI.

Cases in Circuit Court of Appeals on appeal or error.—Decisions in cases non-appellable to the Supreme Court are reviewable by the Supreme Court on certiorari. *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, to review a judgment which affirmed a judgment of the District Court on a directed verdict for defendants in a suit by a trustee in bankruptcy to recover alleged preferences; *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, to review an order which reversed an order of the District Court directing certain claims to be filed as of the date when delivered to the trustee in bankruptcy; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, to review a decree which reversed on appeal a decree of the District Court and sustained the jurisdiction of the latter over a summary proceeding by the receiver in bankruptcy.

Cases in Circuit Court of Appeals "to superintend and revise."—A decision made by the Circuit Court of Appeals in a case of that class is reviewable on certiorari. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047; *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116. The following were cases of that description: *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, to review a decree which reversed a decree adjudicating a corporation a bankrupt in involuntary proceedings; *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845, to review a judgment which affirmed a judgment of the District Court directing trustees in bankruptcy to turn over certain certificates of stock and proceeds of the certificates to divers claimants; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, to review a judgment which reversed a decision of the District Court that certain life insurance policies of the bankrupt had no cash surrender value and ordering him to assign them to the trustee in

bankruptcy, there being a conflict of opinion in lower federal courts as to the construction of the Bankruptcy Act, and a question of construction of a prior opinion of the Supreme Court; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 987, and *McHarg v. Staake*, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971, to review an order affirming a decree of the District Court in favor of a trustee in bankruptcy subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens as they might have done had not the bankruptcy proceedings intervened, there being a division of opinion in the Circuit Court of Appeals; *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018, to review a judgment which reversed an order of the District Court requiring a bankrupt to pay to the trustee in bankruptcy the cash surrender value of certain life insurance policies as a condition precedent to the exemption of the policies; *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, to review a judgment which affirmed an order of the District Court restraining a sheriff from paying an execution creditor the money derived from a sale on the execution, and directing the sheriff to pay the money to the trustee in bankruptcy of the execution debtor; *Louisville Trust Co. v. Comigor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, to review a decree which reversed for want of jurisdiction a decree of the District Court ordering a bankrupt's general assignee for the benefit of creditors to pay to the trustee in bankruptcy certain moneys disbursed by the assignee and certain moneys retained by him; *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, to review a decree which reversed a decree of the District Court directing a person's imprisonment until he should pay over certain money to a trustee in bankruptcy as he had been ordered to do; *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, to review a decision which reversed a decree of the District Court ordering the marshal to hold property that he had taken from the possession of a claimant, the Circuit Court of Appeals directing, by a divided court, that he be ordered to restore it to the claimant.

A case which was in the Circuit Court of Appeals on an appeal, but there treated as on a petition for revision, may be reviewed on certiorari. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116; *Bryan v. Bernheimer*, (1901) 181 U. S. 192, 193, 21 S. Ct. 557, 45 U. S. (L. ed.) 815, 816; *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

Certiorari is the exclusive remedy where the case was not in the Circuit Court of Appeals on an appeal or writ of error. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, and *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116, where,

for that reason, appeals to the Supreme Court were dismissed.

Before or after final judgment.—In no reported bankruptcy case has the Supreme Court been asked to grant a writ of certiorari prior to final judgment in the Circuit Court of Appeals. While it has power to issue the writ before final judgment, "it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." *Per Justice Brewer, in Forsyth v. Hammond*, (1897) 166 U. S. 506, 514, 17 S. Ct. 665, 41 U. S. (L. ed.) 1095. See also *The Conqueror*, (1897) 166 U. S. 114, 17 S. Ct. 510, 41 U. S. (L. ed.) 937; *The Three Friends*, (1907) 166 U. S. 1, 17 S. Ct. 495, 41 U. S. (L. ed.) 897; *American Constr. Co. v. Jacksonville, etc., R. Co.*, (1893) 148 U. S. 384, 13 S. Ct. 758, 37 U. S. (L. ed.) 486.

Amount in controversy.—Nowhere do the federal statutes prescribe any jurisdictional amount as a condition for the issuance of a writ of certiorari; and see *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963.

When an appeal is dismissed for want of jurisdiction because certiorari is the exclusive remedy in the particular case, the question on the merits may not be deemed of sufficient importance to justify the granting of a writ of certiorari, even though a justice of the court had given the appellant a certificate under section 25d, subd. 2, of the Bankruptcy Act, *supra*, p. 641. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, where the writ was denied. On the other hand, it may, after such a dismissal of an appeal, grant a writ of certiorari if application therefor is made in time, as was done in *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116, (1904) 193 U. S. 672, 24 S. Ct. 854, 48 U. S. (L. ed.) 841, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018.

The proper petitioner for the writ of certiorari is the party who would be entitled to appeal or sue out a writ of error if the decision of the Circuit Court of Appeals were reviewable on appeal or error; for example, the petitioning creditors in involuntary bankruptcy, as in *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261; the trustee or trustees in bankruptcy, as in the following cases: *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Louisville Trust Co. v. Comigor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771; *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845; attachment or execution creditors, as in

Clarke v. Larremore, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555; Baltimore First Nat. Bank v. Staake, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 987; McHarg v. Staake, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971; creditor claimants, as in J. B. Orcutt Co. v. Green, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390; or adverse claimants of property, as in Chicago First Nat. Bank v. Chicago Title, etc., Co., (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051 — according to the circumstances of the particular case.

In Bryan v. Bernheimer, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, where a marshal, who, in behalf of petitioning creditors, had seized property in the hands of a claimant and had been ordered by the Circuit Court of Appeals to restore it to the claimant, the marshal, in behalf of those creditors, obtained the writ of certiorari.

Form of petition. — A petition for a writ of certiorari is quoted, substantially in full, in Chicago First Nat. Bank v. Chicago Title, etc., Co., (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, where the writ was granted.

Miscellaneous matters of practice relating to certiorari, see 4 Fed. Stat. Annot. 420, *et seq.*, and note at the corresponding place in the title JUDICIARY, vol. 2 of this Supplement.

A certified copy of the entire record of the case in the Circuit Court of Appeals must be furnished to the Supreme Court by the applicant for a writ of certiorari, as a part of the application. Supreme Court rule 37, subd. 3, 210 U. S. appendix 501, 29 S. Ct. xxii. See generally "Instructions by clerk of Supreme Court as to applications for writs of certiorari under Act of March 3, 1911," which follow rule 39 in current publications of Supreme Court rules, and are printed in 210 U. S. appendix 503, 29 S. Ct. xxiii.

An agreed statement of acts was used in Friday v. Hall, etc., Co., (1910) 216 U. S. 449, 30 S. Ct. 261.

A motion to quash the writ was filed in one case, after the writ had been granted, on the ground that the petitioner's remedy in the particular case was by appeal or writ of error instead of certiorari. Chicago First Nat. Bank v. Chicago Title, etc., Co., (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, where consideration of the motion was postponed to the hearing on the merits, when the motion was denied.

Determination and remand. — See the last paragraph of II. *Questions Certified*, *supra* this note; Chicago First Nat. Bank v. Chicago Title, etc., Co., (1905) 198 U. S. 280, 288, 25 S. Ct. 693, 697, 49 U. S. (L. ed.) 1051; *Ex p.* Chicago First Nat. Bank, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, reversing *Ex p.* Chicago Title, etc., Co., (C. C. A. 7th Cir. 1906) 146 Fed. 742.

SEC. 26. ARBITRATION OF CONTROVERSIES. — *a* [*Trustees may submit.*] The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. [(1898) 30 Stat. L. 553.]

b [*Selection of arbitrators.*] Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator. [(1898) 30 Stat. L. 553.]

Selection of arbitrators. — It is an irregularity if one of the arbitrators is selected by the trustee, one by the other party, and the

third agreed upon by the two contending parties. *In re* McLam, (D. C. Vt. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245.

c [*Findings.*] The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury. [(1898) 30 Stat. L. 553.]

The finding of arbitrators is subject to be set aside or adjudged upon by the court in like manner as a verdict would be. *In re*

McLam, (D. C. Vt. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245.

SEC. 27. COMPROMISES. — *a* [*When allowed.*] The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate. [(1898) 30 Stat. L. 553.]

When compromise will be approved. — Where litigation would result in probable and almost inevitable defeat, and both the

trustee and his attorney, as well as the learned referee and a very large majority of the creditors, have united in virtually de-

clearing the defense of a suit not wise or beneficial to the estate, the acceptance of a proposed compromise and settlement would seem to be proper. *In re Kearney*, (N. D. N. Y. 1910) 184 Fed. 190.

Compromise must be for best interests of estate.—Section 27 does not authorize the bankruptcy court to confirm a proposed plan for the reorganization of a bankrupt corporation, not amounting to a composition, by which dissenting creditors will be compelled to accept stock in the new corporation to be placed in a voting trust for a term of years in exchange for their claims on the money and assets of the bankrupts, consenting, in addition to the creation and priority of a large mortgage, to provide a working capital for the new corporation. A construction which would justify such action on the part of the court would be an undue enlargement of the section. *In re Northampton Portland Cement Co.*, (E. D. Pa. 1911) 185 Fed. 542. See also *In re Geiselhart*, (W. D. Pa. 1910) 181 Fed. 622.

SEC. 28. DESIGNATION OF NEWSPAPERS.—*a* [*To publish notices.*] Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published. [(1898) 30 Stat. L. 554.]

SEC. 29. OFFENSES.—*a* [*Misappropriating property—secreting or destroying documents.*] A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. [(1898) 30 Stat. L. 554.]

Cross-reference: As to

Commission of offense as an objection to discharge, see section 14b (1), *supra*, p. 557.

Suspicious circumstances are not enough to show such a fraudulent transfer as is meant by section 29a. *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399.

Defendant may refuse to answer incriminating questions.—A trustee in bankruptcy, who has been arrested under section 29a, charged with a misappropriation of the funds of the estate, on an examination before the referee, pending such charge, with reference to the bankrupt estate, has the constitutional right to refuse to answer a ques-

Lienors and Creditors Protected.—In *In re Adamo*, (E. D. N. Y. 1907) 151 Fed. 716, 18 Am. Bankr. Rep. 181, it was said that "inasmuch as the attorney for the bankrupt, who has prosecuted the mechanic's lien action, has an attorney's lien for services therein, and inasmuch as the rights in that action cannot be adjudicated in the bankruptcy proceedings, except as the matter is brought into the bankruptcy court by consent, it is impossible to approve the compromise and direct that the trustee be allowed to carry it out, unless all the parties interested waive any particular right to litigate their claims in the state court."

Bankrupt cannot sue to restrain compromise.—Where a bankrupt's title to property, in the hands of his wife, passes by the adjudication to his trustee, he has no capacity to sue, in a state court, to restrain the trustee from carrying out a proposed compromise of the claim against the wife. *In re Kranich*, (E. D. Pa. 1909) 174 Fed. 908, 23 Am. Bankr. Rep. 550.

tion asked him, on the ground that his answer may tend to incriminate him. *In re Smith*, (S. D. N. Y. 1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213.

Release on habeas corpus.—A bankrupt, arrested and held on a capias in an action to recover from him the value of property which it is alleged he embezzled and fraudulently converted to his own use, is entitled to release on a writ of habeas corpus, where no facts are pleaded which show such embezzlement to have been committed while he was acting in a fiduciary capacity, so as to prevent a discharge in bankruptcy from being a release of the debt under section 17a (4). *Barrett v. Prince*, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64.

b [*Punishment.*] A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently [(1898) 30 Stat. L. 554.]

(1) [*Concealing property.*] concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or [(1898) 30 Stat. L. 554.]

Concealment of assets.—One who, while a bankrupt, or after his discharge, knowingly or fraudulently conceals from his trustee any of the property belonging to his estate in bankruptcy, is guilty of an offense under section 29b (1). *In re Ahlowich*, (S. D. N. Y. 1900) 99 Fed. 81; *In re Welch*, (S. D. Ohio 1899) 100 Fed. 65; *In re Mendelsohn*, (S. D. N. Y. 1900) 102 Fed. 119; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282; *In re Hoffmann*, (S. D. N. Y. 1900) 102 Fed. 979; *In re Bemis*, (N. D. N. Y. 1900) 104 Fed. 672; *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *Cohen v. U. S.*, (C. C. A. 2d Cir. 1907) 157 Fed. 651, 19 Am. Bankr. Rep. 8, *distinguishing* *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568; *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *Alkon v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 810, 22 Am. Bankr. Rep. 489; *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223; *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *Kerch v. U. S.*, (C. C. A. 1st Cir. 1909) 171 Fed. 366, 22 Am. Bankr. Rep. 544; *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29; *U. S. v. Comstock*, (C. C. Mass. 1908) 20 Am. Bankr. Rep. 520.

Effect of disclosure after arrest.—The offense of concealment of assets by a bankrupt, when once committed, cannot be retrieved by the bankrupt's atonement, after extradition, by disclosing to the trustee the assets concealed. *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223.

Merely omission of property from schedule insufficient.—The offense of concealing property by a bankrupt from his trustee consists of a continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings, or beyond, and is therefore not necessarily consummated by an omission of the property from the schedules. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

Actual bankruptcy essential.—As the statute provides for concealment "while a bankrupt, or after his discharge," it has been held that the concealment must have actually taken place, or continued, while there is a person in bankruptcy. *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747; *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507; *In re Gilroy*, (S. D. N. Y. 1905) 140 Fed. 733, 14 Am. Bankr. Rep.

627; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *U. S. v. Grodson*, (N. D. Ill. 1908) 164 Fed. 157, 21 Am. Bankr. Rep. 68; *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32; *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *In re Adams*, (N. D. N. Y. 1909) 171 Fed. 599, 22 Am. Bankr. Rep. 613.

The present or past bankruptcy of the person accused is an indispensable element of the offense denounced by the statute. *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507.

Trustee must be entitled to concealed property.—It is necessary to show that the concealment was of property to which the trustee is entitled, and it must have been made knowingly and fraudulently by the bankrupts while such; that is, after they were adjudicated bankrupts. *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

Must have been an adjudication.—A charge against a bankrupt of concealing from his trustee property belonging to the estate cannot be sustained without a bankruptcy adjudication, even though the proof establishes a flagrant concealment of the property from the trustee *de facto*. *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

Necessity of appointment of trustee.—In *In re Adams*, (N. D. N. Y. 1909) 171 Fed. 599, 22 Am. Bankr. Rep. 613, it was held that a person cannot be convicted of an offense, and imprisoned, for fraudulently concealing, while a bankrupt, property "from his estate in bankruptcy." Before this offense can be committed there must be a trustee.

But see *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755, wherein it was held that the concealment of property by a voluntary bankrupt after his adjudication, although before the appointment of a trustee, is a concealment from the trustee, which, if knowingly and fraudulently done, constitutes a criminal offense.

Knowledge of trustee's appointment immaterial.—The offense of concealment of goods may be completed by a physical act, intended or calculated to prevent a trustee when appointed from securing the goods, and the character of the offense is in no way dependent upon knowledge that a particular person is clothed with legal authority. *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

Continuing concealments.—It is not necessary, in order to constitute the offense of unlawfully concealing assets, that the original concealment actually occur during bankruptcy, providing that it continue thereafter; and it has been held that the concealment will be none the less criminal where, although it was effected prior to bankruptcy, the property or its proceeds are concealed by the bankrupt from his trustee after his appointment. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357;

Johnson v. U. S., (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; U. S. v. Young, etc., Co., (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; U. S. v. Stern, (E. D. Pa. 1911) 186 Fed. 854.

The word "concealed," employed in this connection, is sufficiently elastic in its signification to comprise a "continuing concealment." Thus, if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within his authority to use and appropriate subsequently, there is a continuing concealment for which he is amenable to the law, although the fact of concealment, by intent and purpose, took place while he was not a bankrupt. *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

Concealment by corporation.—A bankrupt corporation may be guilty of concealing assets, and an officer thereof may be indicted therefor if he participated therein. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236.

Conspiracy to conceal corporation assets.—Individuals may be guilty of a conspiracy which includes in its purpose a fraudulent concealment of the assets of a bankrupt corporation, even if the corporation could not be charged as a conspirator. *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484. And see to the same effect *Cohen v. U. S.*, (C. C. A. 2d Cir. 1907) 157 Fed. 651, *distinguishing* *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568.

But it has also been held that section 29b (1) must be strictly construed, and that, so construed, it does not include concealments by the officers of a corporation which has been declared bankrupt. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270; *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568, 14 Am. Bankr. Rep. 507.

So also it has been held that since the Act does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment charging that defendants, who were in no manner officially connected either as directors or stockholders with a bankrupt corporation, conspired to conceal assets of the corporation from the trustee in bankruptcy, and in pursuance of such conspiracy they removed the corporation's stock of goods from its place of business and caused the same to be sold and concealed the proceeds, did not state an offense. *U. S. v. Waldman*, (S. D. N. Y. 1911) 188 Fed. 524.

Conspiracy to conceal.—An indictment will lie under Rev. Stat., sec. 5440, 2 Fed. Stat. Annot. 247, now Cr. Code, sec. 37, 1909 Supp. Fed. Stat. Annot. 415, making it an offense to conspire to commit any offense against the United States, for conspiracy to conceal from a trustee in bankruptcy property belonging to the estate, in violation of section 29b (1). *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357, *affirmed* (C. C. A. 2d Cir. 1907) 157 Fed. 651, 19 Am. Bankr. Rep. 8; *U. S. v. Young, etc.,*

Co., (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854; *Radin v. U. S.*, (C. C. A. 2d Cir. 1911) 189 Fed. 568.

And such conspiracy may be entered into prior to the bankruptcy, in contemplation thereof; and defendants may be convicted although it is not alleged nor proved that a trustee was actually appointed, where the evidence warrants a finding that the conspiracy was so successfully carried out that, when the bankruptcy proceedings were instituted, the bankrupt's property had all been removed beyond the jurisdiction of the court, so that the appointment of a trustee would have been a useless formality. *Radin v. U. S.*, (C. C. A. 2d Cir. 1911) 189 Fed. 568.

Conspiracy prior to bankruptcy as continuing concealment.—A conspiracy by bankrupts to conceal their property from their trustee, formed within thirty days of the filing of the petition in bankruptcy and followed by actual concealment of the property, is an offense which continues to the date of the refusal to turn over the property to the trustee on his election; and an indictment for conspiracy under Rev. Stat., sec. 5440, 2 Fed. Stat. Annot. 247, now Cr. Code, sec. 37, 1909 Supp. Fed. Stat. Annot. 415, properly charges the commission of the offense as of such date. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

Criminal intent.—In order to constitute an offense under section 29b (1), the concealment must have been knowingly and fraudulently made; therefore it has been held that there can be no conviction of such offense where the concealment complained of was made in good faith, unintentionally, or because of ignorance or mistake. *In re Adams*, (N. D. N. Y. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696; *U. S. v. Lowenstein*, (E. D. Pa. 1904) 126 Fed. 884, 11 Am. Bankr. Rep. 134; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

Omission to schedule property.—The mere omission, through ignorance or otherwise, to turn over property, or to put it in the schedule, is not a criminal offense; for it may happen that bankrupts may innocently omit from their schedules property in which they may have an interest, the character of which is so indefinite that they do not consider it necessary to mention it, or through sheer neglect they may fail to turn over property which they have overlooked. The essence of the criminal offense is that it should be committed knowingly and fraudulently, and the jury must be satisfied beyond a reasonable doubt that any property alleged to have been concealed was knowingly and fraudulently concealed. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

But where a bankrupt's schedule is indefinite, and the bankrupt, by active endeavor, keeps valuable assets in hiding, the fact that the title to all of his property passes to the trustee by operation of law is no defense to a prosecution for concealing assets,

since the schedules point out to the trustee only such assets as the bankrupt actually discovered to him, or as the trustee would be likely to discover. *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223.

Use of concealed property to pay debts.—The fact that a bankrupt used a part of the proceeds of property concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment. *Corenman v. U. S.*, (C. C. A. 2d Cir. 1911) 188 Fed. 424.

Advice of counsel is ineffective as a defense when it does not go so far as to cover the actual concealment; thus it has been held, on the prosecution of a bankrupt for concealing money from his trustee, that testimony offered to show that the bankrupt's attorney advised him to continue his business until the usual time for closing on the day when the petition was filed and the adjudication made is immaterial, since, if true, and the business was continued in good faith and without criminal intent, and the money was received for goods sold during that time, such facts would give the defendant no right to withhold it from his trustee. *McNiel v. U. S.*, (C. C. A. 5th Cir. 1907) 150 Fed. 82, 18 Am. Bankr. Rep. 19.

Evidence—Schedules not admissible.—In the prosecution of a bankrupt for concealing property from his trustee, the schedules filed by him are not admissible in evidence against him, being within the provision of Rev. Stat., sec. 860, 3 Fed. Stat. Annot. 5, that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence in any criminal proceeding. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *Cohen v. U. S.*, (C. C. A. 4th Cir. 1909) 170 Fed. 715, 22 Am. Bankr. Rep. 333.

But it has been held that R. S. sec. 860, 3 Fed. Stat. Annot. 5, applies only to prosecutions in the federal courts, and that in a prosecution under a state statute the bankrupt's schedule is competent evidence as an admission. *Com. v. Ensign*, (1909) 22 Am. Bankr. Rep. 797, 40 Pa. Super. Ct. 157.

Examination under section 7a (9).—On the trial of a bankrupt for a criminal offense, it was held to be error to permit the prosecuting attorney, on the cross-examination of defendant as a witness, to read from a copy of his examination before the referee in the bankruptcy proceedings, under section 7a (9), and to interrogate him thereon for the purpose of impeachment. *Jacobs v. U. S.*, (C. C. A. 1st Cir. 1908) 161 Fed. 694, 20 Am. Bankr. Rep. 550. And see the annotation under section 7a (9).

Bankrupt's books of account.—On the trial of an involuntary bankrupt for conspiracy to conceal property from his trustee, it was held not to be error to admit in evidence, over defendant's objection and claim of privilege, his books of account which had been taken possession of by a receiver appointed by the bankruptcy court. *Kerreh v. U. S.*, (C. C. A. 1st Cir. 1909) 171 Fed. 366,

22 Am. Bankr. Rep. 544. And see the annotation to this effect under section 7a (4), *supra*, p. 520.

Proof of concealment of any part of property sufficient.—The government, to warrant a conviction, need not prove the concealment of every article of property, or of every cent of the cash, but proof of the concealment of any part of the property or the cash warrants a conviction. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

Value of stock before and after filing petition.—On the trial of a bankrupt, who was a dealer in jewelry, and was charged with the concealment of a portion thereof from his trustee, it was held not be error to admit evidence of the amount and value of defendant's stock in trade a few days prior to the filing of the petition in bankruptcy, and also a short time afterward, where the jury were properly instructed and cautioned in reference to such testimony. *Jacobs v. U. S.*, (C. C. A. 1st Cir. 1908) 161 Fed. 694, 20 Am. Bankr. Rep. 550.

Failure to give trustee information as to property.—On the trial of a bankrupt charged with concealment of property from his trustee, testimony of the trustee is admissible to show that he was not informed by the defendant that property belonging to him was stored in places where that which was charged to have been concealed was found by the trustee. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1909) 170 Fed. 581, 22 Am. Bankr. Rep. 359, explaining *Jacobs v. U. S.*, (1st Cir. 1908) 161 Fed. 694, 88 C. C. A. 554, and *Johnson v. U. S.*, (1st Cir. 1908) 163 Fed. 30, 89 C. C. A. 508.

In order to prove a continuous concealment of property by a bankrupt from his trustee, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted, and prove what he did, as a means of proving what he did not; it being sufficient to introduce secondary evidence of the property disclosed by the bankrupt, he being entitled at his election to introduce his schedules to show that the property claimed to have been omitted was in fact included, as a matter of defense. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724.

Circumstantial evidence is competent as in other cases; and where such evidence warrants the jury in finding beyond a reasonable doubt that the accused was guilty, a judgment on the verdict should not be arrested. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

Indictment—Alleging that property concealed was part of estate.—It has been held that an indictment which charges that a bankrupt unlawfully, knowingly, wilfully, and fraudulently concealed from his trustee certain property belonging to his estate in bankruptcy, carries with it a sufficient averment of his knowledge that such property belonged to his estate. *McNiel v. U. S.*, (C. C. A. 5th Cir. 1907) 150 Fed. 82, 18 Am. Bankr. Rep. 19. See also *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

The mode of the alleged concealment is entirely immaterial, and need not be set forth in the indictment. U. S. v. Comstock, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

Alleging appointment of trustee.—In an indictment against a bankrupt and others for conspiracy to conceal assets from the trustee in bankruptcy, an averment that a person named was "duly" appointed trustee is sufficient; the matter of appointment being an incidental matter only, and not a vital element of the crime. Kerch v. U. S., (C. C. A. 1st Cir. 1909) 171 Fed. 366, 22 Am. Bankr. Rep. 544.

Knowledge of trustee's appointment.—An indictment under section 29b need not charge that the defendant bankrupt, at the time of the alleged concealment of his property, knew that a trustee had been appointed, or knew the name of the trustee. U. S. v. Comstock, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

Time of commission of offense in continuing concealments.—A concealment by a bankrupt from a trustee after his appointment of any property or cash which the bankrupt has in his possession, and a failure to deliver it over to him on demand, is an offense as of any date the concealment continues; and an indictment charging the offense properly charges its commission as of the date of the refusal to turn over the property to the trustee. U. S. v. Stern, (E. D. Pa. 1911) 186 Fed. 854.

An indictment for conspiracy that one of the conspirators should purchase goods and afterwards go into bankruptcy, and that the goods should be concealed by the other, in violation of section 29b (1), is not insufficient because it avers that the conspiracy was

formed and the goods were to be concealed prior to the bankruptcy, where it also avers that it was the intention to continue the concealment thereafter. Alkon v. U. S., (C. C. A. 1st Cir. 1908) 163 Fed. 819, 22 Am. Bankr. Rep. 489.

An indictment for conspiracy to conceal assets of a corporation in contemplation of bankruptcy is not objectionable because there was no existing bankruptcy when the conspiracy was originated. U. S. v. Young, etc., Co., (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484.

But an indictment against a bankrupt and others, charging a conspiracy to conceal property of the bankrupt from his trustee in violation of the Bankruptcy Act, does not charge an offense under Rev. Stat., sec. 5440, 2 Fed. Stat. Annot. 247, where it shows that the conspiracy was formed and the property removed and concealed by the defendants prior to the bankruptcy; but does not aver that such concealment was in contemplation of bankruptcy, or that any overt act was committed after the bankruptcy, although it charges a further conspiracy thereafter to continue the concealment. U. S. v. Grodson, (N. D. Ill. 1908) 164 Fed. 157, 21 Am. Bankr. Rep. 68.

And where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustees alleged, as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the bankrupt's receiver and trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that such removal was illegal, and not under legal process, it was held to be insufficient. U. S. v. Waldman, (S. D. N. Y. 1911) 188 Fed. 624.

(2) [*False oaths or accounts.*] made a false oath or account in, or in relation to, any proceeding in bankruptcy; [(1898) 30 Stat. L. 554.]

False oath.—Knowingly and fraudulently making a false oath or account in, or in relation to, any proceeding in bankruptcy, constitutes a punishable offense under section 29b (2). Kentucky Nat. Bank v. Carley, (C. C. A. 3d Cir. 1904) 127 Fed. 686, 12 Am. Bankr. Rep. 119; *In re* Conroy, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; Edelstein v. U. S., (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; Troeder v. Lorsch, (C. C. A. 1st Cir. 1908) 150 Fed. 710, 17 Am. Bankr. Rep. 723; U. S. v. Liberman, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734; U. S. v. Freed, (S. D. N. Y. 1910) 179 Fed. 236.

The term "false oath" is not limited to proceedings under section 7a (9), nor to false swearing in connection with the bankrupt's schedules, but is related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge. Edelstein v. U. S., (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649.

False testimony given by a bankrupt on

his examination in respect to his ownership of, or interest in, property conveyed to his wife some years before the bankruptcy proceedings, constitutes the making of a false oath in relation to a proceeding in bankruptcy. *In re* Conroy, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249.

Oath must be corruptly false.—The term "false oath" means a corruptly false oath, such as would subject the affiant to a prosecution for perjury. *In re* Gilpin, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

Objection that examination was unauthorized is unavailable.—If the bankrupt or a creditor appears prior to the first meeting of creditors, and at an examination before a special referee, special commissioner, or special master, consents to be sworn, and does not refuse to testify, he cannot then object to the authority of the court in requiring his examination. U. S. v. Liberman, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734.

Indictment—Alleging false oath to schedules.—Where an indictment against the president of a bankrupt corporation, for

making a false oath to its schedules, alleged that the corporation was adjudged a bankrupt; that defendant, as its president, in compliance with the bankruptcy law, did file in the bankruptcy proceeding with the referee the schedules required by law, subscribed and sworn to by him as president, etc.; that defendant stated on his oath that such schedules contained a true and complete statement of all the corporation's property; and that the statement that the bankrupt corporation had then on hand only a certain sum, which was all the money the corporation then and there had, was false, it was held that such indictment followed the strict language of the statute, and sufficiently showed the materiality of the false statement, without an express averment thereof. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270.

In an indictment against the president of a bankrupt corporation for making a false oath to its schedules, a description of the assets charged to have been fraudulently and knowingly omitted from such schedules as "one hundred and fifty thousand dollars in lawful money of the United States" was held to be sufficiently specific. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270.

But an indictment charging the accused with having committed perjury by falsely omitting assets from his sworn schedule in bankruptcy, which alleges that he knew his schedule was false, and that he knew he was the owner of a specified sum of money in addition to what was mentioned in his schedule, is fatally defective, unless it also charges directly that he had other property than

that described in his schedule. *Bartlett v. U. S.*, (C. C. A. 9th Cir. 1901) 106 Fed. 884, 5 Am. Bankr. Rep. 678.

An indictment charging conspiracy to give false oaths in a bankruptcy proceeding, which failed to allege what false oaths were to be given, or what the subject of the oaths was, with such reasonable particularity as would advise defendant of the charge against him, was held to be insufficient. *U. S. v. Waldman*, (S. D. N. Y. 1911) 188 Fed. 524.

Alleging false testimony.—It is sufficient that an indictment for perjury allege that defendant's testimony was false, and that he believed it to be false, without alleging the actual facts. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236.

Evidence—Testimony given under section 7a (9) admissible.—The immunity provided by section 7a (9) does not protect the bankrupt from the use of testimony, given in pursuance thereof, upon the trial of an indictment for perjury committed by the making of a false oath in, and in relation to, the bankruptcy proceedings. *U. S. v. Brod*, (N. D. Ga. 1910) 23 Am. Bankr. Rep. 740, following *Edelstein v. U. S.*, (8th Cir. 1906) 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. N. S. 236, 17 Am. Bankr. Rep. 649; *Wechsler v. U. S.*, (2d Cir. 1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

But see *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41, wherein it was held that the provisions of section 7a (9) prevented a prosecution for perjury for false swearing, in an examination thereunder in support of a claim against the estate.

(3) [*False claims.*] presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or [(1898) 30 Stat. L. 554.]

(4) [*Receiving property from bankrupt.*] received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or [(1898) 30 Stat. L. 554.]

Receiving property with intent to defeat the Bankruptcy Act.—It is an offense under the bankruptcy law, punishable by imprisonment for a period not exceeding two years, knowingly and fraudulently to receive any material amount of property from a bankrupt, after the filing of a petition, with intent to defeat the Act. *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

Participants in forbidden acts.—Section 29b (4) is to be read and construed in con-

nection with section 1a (19), in which it is distinctly provided that the word "persons" "when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts." The use of the word "forbidden" makes this phraseology peculiarly applicable to such criminal provisions as are embraced in section 29b (4). *Matter of Lutig*, (D. C. Mass. 1905) 15 Am. Bankr. Rep. 773. See also *U. S. v. Young, etc., Co.*, (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484.

(5) [*Extorting money or property.*] extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. [(1898) 30 Stat. L. 554.]

c [Punishment.] A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly [(1898) 30 Stat. L. 554.]

(1) [Acting as referee when interested.] acted as a referee in a case in which he is directly or indirectly interested; or [(1898) 30 Stat. L. 554.]

(2) [Purchasing property.] purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or [(1898) 30 Stat. L. 554.]

(3) [Refusal to permit inspection of accounts and papers.] refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. [(1898) 30 Stat. L. 554.]

d [Limitation.] A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense. [(1898) 30 Stat. L. 554.]

Limitation does not apply to prosecution for conspiracy to commit offense.—The limitation of one year imposed by section 29d, for the finding of an indictment for offenses under section 29 generally, does not apply to

an indictment under Rev. Stat., sec. 5440, 2 Fed. Stat. Annot. 247, for a conspiracy to commit an offense thereunder. U. S. v. Comstock, (C. C. R. I. 1908) 162 Fed. 416, 20 Am. Bankr. Rep. 525.

SEC. 30. RULES, FORMS, AND ORDERS. — *a* [Made by Supreme Court.] All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States. [(1898) 30 Stat. L. 554.]

The power to prescribe necessary rules, forms, and orders, as to procedure and for the purpose of carrying the Bankruptcy Act into force and effect, is vested in the Supreme Court of the United States. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

Force and effect.—The rules, forms, and orders prescribed by the Supreme Court are intended to provide for the enforcement of the bankruptcy law, and not to enlarge, take from, or vary its provisions; and, within this purpose and limitation, they are of binding force and effect on the courts. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 336, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72; *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *Burke v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1905) 134 Fed. 562, 14 Am. Bankr. Rep. 31; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56; *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606; *Weidenfeld v. Tillinghast*, (1907) 18 Am. Bankr. Rep. 531, 54 Misc. 90, 104 N. Y. S. 712.

Force and effect of law.—It has been held that the rules and forms prescribed by the Supreme Court, under and by virtue of the Bankruptcy Act, and for its administration, have the force and effect of law. *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693.

Equivalent to interpretation.—The rules, forms, and orders adopted by the Supreme Court amount to an interpretation or construction of the law in that respect. *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606.

Forms prescribed should be followed.—The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and less suitable forms of special pleadings and procedure used in chancery cases. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

Necessary alterations allowable.—The bankruptcy forms were not designed to effect any change in the law. They are "forms," and nothing more, and they are to be observed and used with such alterations as may be necessary to suit the circumstances of any particular case. *Burke v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1905) 134 Fed. 562, 14 Am. Bankr. Rep. 31.

SEC. 31. COMPUTATION OF TIME. — *a* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. [(1898) 30 Stat. L. 554.]

Computation of time. — In accordance with section 31 time shall be computed by excluding the first day and including the last. *Day v. Beck, etc., Hardware Co.,* (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.,* (C. C. A. 3d Cir. 1907) 154 Fed. 662, 18 Am. Bankr. Rep. 756.

Where the last day falls on Sunday or on a holiday, one has until the next day thereafter which is not a Sunday or a holiday in which to act. *Matter of Amos,* (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804.

Computation of time by months or years. — While the first six words of section 31 would seem to indicate that it was not intended to apply where the time is enumerated by months or years, the following words, "or in any proceeding in bankruptcy," make it applicable to any proceeding in bankruptcy

where the number of days is material. *In re Holmes,* (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339.

Thus in the dissolution of attachments made within four months, section 31 has been applied in computing these months. *In re Warner,* (D. C. Conn. 1906) 144 Fed. 987, 16 Am. Bankr. Rep. 519; *In re Holmes,* (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339; *Jones v. Stevens,* (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170.

Where a general assignment was made by the debtor Oct. 1, 1900, and recorded on that day at 10.08 A. M., and the petition in bankruptcy was filed against the debtor at 4.45 P. M., Feb. 1, 1901, it was held that the petition was filed within four months after the date of the recording of the general assignment. *In re Tonawanda St. Planing Mill Co.,* (D. C. N. Y. 1901) 6 Am. Bankr. Rep. 38.

SEC. 32. TRANSFER OF CASES. — *a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest. [(1898) 30 Stat. L. 554.]

Transfer for convenience of parties. — Where petitions are filed against the same individual, partnership, or corporation, in different courts of bankruptcy, each of which has jurisdiction thereof, such cases shall be transferred to, and consolidated in, the court which can proceed therewith for the greatest convenience of the parties in interest. *In re Sears,* (W. D. N. Y. 1901) 112 Fed. 58, 7 Am. Bankr. Rep. 279, (C. C. A. 2d Cir. 1902) 117 Fed. 294, 8 Am. Bankr. Rep. 713; *In re United Button Co.,* (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761; *In re General Metals Co.,* (S. D. N. Y. 1904) 133 Fed. 84, 12 Am. Bankr. Rep. 770; *In re Southwestern Bridge, etc., Co.,* (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304; *Kyle Lumber Co. v. Bush,* (C. C. A. 5th Cir. 1905) 133 Fed. 688, 13 Am. Bankr. Rep. 535; *In re United Button Co.,* (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

The words "parties in interest" are not limited to the unsecured creditors of the bankrupt, but include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings. *In re United Button Co.,* (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

The proximity of the place of business of a bankrupt to the court entertaining proceedings in bankruptcy, and the proximity of a majority of the bankrupt's creditors in num-

ber or amount of claims, though persuasive, is not conclusive in determining the court which shall assume final jurisdiction of the proceedings commenced in several districts in courts having concurrent jurisdiction. *In re United Button Co.,* (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

Filing first petition in court of domicile gives exclusive jurisdiction. — Where a petition was first filed against a corporation in the district of its domicile, which was followed by a prompt adjudication thereon, before a hearing on petitions filed in the meantime in other districts, the court of the domicile acquires exclusive jurisdiction over all proceedings in the case; and the courts in other districts will stay the proceedings therein. *In re United Button Co.,* (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761.

Intermingled business transactions of two corporations. — Where the business of two corporations, each of which was petitioned against in bankruptcy proceedings which were instituted in different jurisdictions, was so intermingled that it was considered necessary, in order to protect the interests of the creditors, that the two estates should be administered together, it was held that the court first acquiring jurisdiction should retain it and proceed to a final adjudication and determination of the rights of the cred-

itors in the joint property. *In re Southwestern Bridge, etc., Co.*, (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304.

Transfer in partnership cases.—A consolidation and transfer may be made where different petitions are filed against partnerships, as well as where petitions are filed against individual members of a partnership, in different jurisdictions. *In re Sears*, (W. D. N. Y. 1901) 112 Fed. 58, 7 Am. Bankr. Rep. 279.

Transfer of petitions against corporations.—The word "individual" as used in general order in bankruptcy No. 6, which supplements section 32 in providing for the transfer of cases where more than one petition has been filed against the same person, includes a corporation. *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761; *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

Voluntary and involuntary proceedings included.—Section 32 applies not only to the case of two or more involuntary petitions being filed, but also to a case where an involuntary petition is presented in one district, and the debtor's voluntary petition in another. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

First hearing in district of domicile.—General order in bankruptcy No. 6 provides that where two or more petitions are filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile; and it has been held that the word "domicile," so used, means the domicile which has existed during the greater portion of the six months immediately preceding the filing of the petition in bankruptcy. *In re Isaacson*, (E. D. N. Y. 1908) 161 Fed. 779, 20 Am. Bankr. Rep. 430.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

SEC. 33. CREATION OF TWO OFFICES.—*a* [Referee and trustee.] The offices of referee and trustee are hereby created. [(1898) 30 Stat. L. 555.]

SEC. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, [(1898) 30 Stat. L. 555.]

(1) [Appointment and removal of referees.] appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and [(1898) 30 Stat. L. 555.]

Who may appoint referee.—*A United States district judge*, even though a judge of the northern and middle districts of Alabama, has no jurisdiction, while holding court in the middle district thereof, to make an order appointing a referee in bankruptcy for the northern district of Alabama. *In re Steele*, (N. D. Ala. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446.

Where there are two district judges of a federal district, having equal and concurrent authority, one of such judges, sitting in bankruptcy within the district, the other judge being absent from the district, constitutes the court of bankruptcy, and has power to make a valid and binding appointment of

a referee in bankruptcy, and the absent judge cannot subsequently come into the district, while the judge making the appointment is holding court therein, and, without the latter's concurrence, set aside such appointment and remove the appointee from office. *In re Steele*, (N. D. Ala. 1907) 156 Fed. 853, 19 Am. Bankr. Rep. 671.

A District Court, sitting as a court of bankruptcy, which is a court held by one judge, has power to appoint or remove a referee, although there may be another judge who is also authorized to hold the same court. *Birch v. Steele*, (C. C. A. 5th Cir. 1908) 165 Fed. 577, 21 Am. Bankr. Rep. 539.

(2) [Districts of referees.] designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district. [(1898) 30 Stat. L. 555.]

SEC. 35. QUALIFICATIONS OF REFEREES.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively [(1898) 30 Stat. L. 555.]

(1) [*Competent.*] competent to perform the duties of that office; [(1898) 30 Stat. L. 555.]

(2) [*Not officeholders.*] not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; [(1898) 30 Stat. L. 555.]

(3) [*Not related to judges.*] not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and [(1898) 30 Stat. L. 555.]

(4) [*Residents of districts.*] residents of, or have their offices in, the territorial districts for which they are to be appointed. [(1898) 30 Stat. L. 555.]

SEC. 36. OATHS OF OFFICE OF REFEREES. — a Referees shall take the same oath of office as that prescribed for judges of United States courts. [(1898) 30 Stat. L. 555.]

SEC. 37. NUMBER OF REFEREES. — a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy. [(1898) 30 Stat. L. 555.]

SEC. 38. JURISDICTION OF REFEREES. — a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to [(1898) 30 Stat. L. 555.]

Review of proceedings had before referees. — The right of review provided for by the statute extends to every act of the referee in bankruptcy. *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 692, 6 Am. Bankr. Rep. 73; *In re Carver*, (E. D. N. C. 1902) 113 Fed. 138, 7 Am. Bankr. Rep. 539; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *In re Yost*, (M. D. Pa. 1902) 117 Fed. 792, 9 Am. Bankr. Rep. 154; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Swift*, (D. C. Mass. 1902) 118 Fed. 348, 9 Am. Bankr. Rep. 237; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129; *In re Shea*, (C. C. A. 1st Cir. 1903) 126 Fed. 153, 11 Am. Bankr. Rep. 209; *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 419; *In re Milgraum*, (E. D. Pa. 1904) 133 Fed. 902, 13 Am. Bankr. Rep. 337; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 306; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785, affirmed (C. C. A. 4th Cir. 1906) 16 Am.

Bankr. Rep. 210; *Ellis v. Krulewitch*, (C. C. A. 8th Cir. 1905) 141 Fed. 954, 15 Am. Bankr. Rep. 616; *In re Wilde*, (C. C. A. 2d Cir. 1906) 144 Fed. 972, 16 Am. Bankr. Rep. 386; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439; *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 256, 20 Am. Bankr. Rep. 244; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re Nippon Trading Co.*, (W. D. Wash. 1910) 182 Fed. 959.

Petition to review as supersedeas. — In the absence of statute or rule of court to the contrary, a petition to review or revise an order of a referee in bankruptcy does not of itself operate as a supersedeas; and whether or not it shall have that effect rests in the discretion of the reviewing or reviewed authority in the particular case. *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

Mode of review. — The general orders in bankruptcy, No. 27, provide that when a bankrupt, creditor, trustee, or other person shall desire a review, by the judge, of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relat-

ing thereto, and the finding and order of the referee thereon. This order is mandatory. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Russell*, (N. D. Cal. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, 11 Am. Bankr. Rep. 97; *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 419; *In re Milgraum*, (E. D. Pa. 1904) 133 Fed. 802, 13 Am. Bankr. Rep. 337; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 596, 16 Am. Bankr. Rep. 85; *In re Home Discount Co.*, (M. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 281, 22 Am. Bankr. Rep. 496; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *Craddock-Terry Co. v. Kaufman*, (D. C. Tex. 1909) 175 Fed. 303, 23 Am. Bankr. Rep. 725; *In re Home Discount Co.*, (N. D. Ala. 1906) 17 Am. Bankr. Rep. 175.

Inadvertent filing with clerk, amendable. — Where a petition to review an order of a referee was inadvertently filed with the clerk of the court, instead of with the referee as required by the general orders in bankruptcy, leave will be granted to correct the error. *In re Nippon Trading Co.*, (W. D. Wash. 1910) 182 Fed. 959, 25 Am. Bankr. Rep. 695.

Referee's findings and conclusions. — In every case in bankruptcy, on a petition for discharge and objections thereto sent up for review, the referee should find the facts and state his conclusions of law. *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.

The provision of the general orders in bankruptcy, No. 27, which requires a referee, on the filing of a petition for the review of an order made by him, to certify a summary of the evidence relating thereto to the judge, should be observed; but where it appears from the referee's certificate that, instead of making a summary, he has returned all the evidence taken, and the matter has been determined by the judge without any motion having been made to require the evidence to be summarized, the proceeding for review will not be invalidated, where it involves substantial matters, because the rule was not observed by the referee. *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302.

Time for review. — There is no provision of the Bankruptcy Act, or of the general orders in bankruptcy, fixing the time within which a petition for the review of an order of a referee must be filed; and it has been quite generally held that, in the absence of a rule of court on the subject, the time within which such a petition may be entertained is discretionary, subject only to the limitation that it must be filed within a reasonable

time in view of the general purpose of the act to expedite the proceedings. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 6 Am. Bankr. Rep. 709; *In re Russell*, (N. D. Cal. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 106 Fed. 839, 5 Am. Bankr. Rep. 697; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *In re Milgraum*, (E. D. Pa. 1904) 133 Fed. 802, 13 Am. Bankr. Rep. 337; *In re Reukauff*, (E. D. Pa. 1905) 135 Fed. 251, 14 Am. Bankr. Rep. 344; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302; *In re Grant*, (D. C. R. I. 1906) 143 Fed. 661, 16 Am. Bankr. Rep. 256; *Bacon v. Roberts*, (C. C. A. 3d Cir. 1906) 146 Fed. 729, 17 Am. Bankr. Rep. 421; *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

The right to file a petition for review cannot be so exercised as unreasonably and unnecessarily to delay the distribution of the assets of the bankrupt. *In re Grant*, (D. C. R. I. 1906) 143 Fed. 661, 16 Am. Bankr. Rep. 256.

A motion to vacate an order made by a referee in bankruptcy, on the ground that he was without jurisdiction to make it, should be entertained at any time and disposed of on the merits; the doctrine of laches having no application in such case. *In re Willis W. Russell Card Co.*, (D. C. N. J. 1909) 174 Fed. 202, 23 Am. Bankr. Rep. 300.

Taking exceptions before referee — Necessity. — The general rule is that exceptions should be duly taken before the referee in bankruptcy, as in other equitable proceedings, so that, on review, the errors complained of may be properly brought to the attention of the court. *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 286, 20 Am. Bankr. Rep. 244; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555; *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

In excepting to findings of fact or conclusions of law by a referee in bankruptcy equity rule 83, requiring the errors to be specifically pointed out, should be followed. *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

Ruling on evidence.—Rulings of a referee in bankruptcy excluding evidence, not taken and returned to the appellate court, are not reviewable there. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555.

Ruling as to exemptions.—Where a bankrupt files no exceptions to a referee's order determining his right to exemptions, he cannot object to any of its provisions on certificate for review. *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

Exception cannot be made in reviewing court.—The ruling of a referee in bankruptcy allowing the claim of a creditor cannot be brought into the District Court for review by filing exceptions thereto in that court. *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 423, 8 Am. Bankr. Rep. 632.

Formal exceptions unnecessary.—That no formal exceptions were filed to the decision and ruling of a referee on a creditor's claim, does not prevent a review of the referee's findings, in the absence of a rule or order of the District Court requiring such exceptions to be filed. *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 286, 20 Am. Bankr. Rep. 244.

Determination on review.—*De novo on the evidence.*—On review of proceedings before a referee, the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence; but it is his duty to determine the issues *de novo* upon the competent evidence in the record, or he may recommit the case for further hearing as the circumstances may require. *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599.

An the review may be properly restricted to the referee's report, the evidence to which he refers therein, and to such evidence as the petitioner may include in his exceptions to the referee's finding. *In re Stokes*, (S. D. Ga. 1910) 185 Fed. 994.

On a referee's certificate to review the partial allowance of a claim against a bankrupt, it was held to be error for the court to increase the allowance for alleged damages for breach of a patent license agreement, \$1,000, where there was no evidence in the case that damages in any amount had been proved by breach of such agreement. *In re Dr. Voorhees Awning Hood Co.*, (C. C. A. 3d Cir. 1911) 188 Fed. 425.

Judge may take new evidence.—On certificate of a referee in a proceeding to set aside an alleged fraudulent preference, the district judge, if the petition is sufficient, may take new evidence if it is offered. *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599.

Court may consider any point presented by record.—A District Court, in reviewing an order or report of a referee, may properly consider any point presented by the record before it, whether or not such point was discussed before or by the referee. *In re Wilde*,

(C. C. A. 2d Cir. 1906) 144 Fed. 972, 16 Am. Bankr. Rep. 386.

Costs.—Where proceedings for the review of an order of a court of bankruptcy are dismissed by the appellate court for want of jurisdiction, without any motion therefor, neither party will be allowed costs. *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 729, 7 Am. Bankr. Rep. 186.

Weight of referee's findings of fact.—The findings of fact of the referee, where there is a conflict of evidence, are entitled to great weight; and they will not be disturbed excepting where they appear to be clearly erroneous. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 811, 3 Am. Bankr. Rep. 192; *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Carver*, (E. D. N. C. 1902) 113 Fed. 138, 7 Am. Bankr. Rep. 539; *In re Royal*, (E. D. N. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636; *In re B. H. Douglass, etc., Co.*, (D. C. Conn. 1902) 114 Fed. 772, 8 Am. Bankr. Rep. 113; *In re Swift*, (D. C. Mass. 1902) 114 Fed. 947, 9 Am. Bankr. Rep. 237; *In re West*, (N. D. Ga. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Grant*, (S. D. N. Y. 1902) 118 Fed. 73, 9 Am. Bankr. Rep. 93; *In re Williams*, (W. D. Ga. 1903) 120 Fed. 542, 9 Am. Bankr. Rep. 731; *In re Shriver*, (E. D. Pa. 1903) 125 Fed. 511, 10 Am. Bankr. Rep. 746; *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257; *In re Shults*, (W. D. N. Y. 1905) 135 Fed. 623, 14 Am. Bankr. Rep. 378; *Southern Pine Co. v. Savannah Trust Co.*, (C. C. A. 5th Cir. 1905) 141 Fed. 802, 15 Am. Bankr. Rep. 618; *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171; *In re Harr*, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; *In re Simon*, (E. D. Ga. 1907) 151 Fed. 507, 18 Am. Bankr. Rep. 204; *In re Forth*, (E. D. N. Y. 1907) 151 Fed. 951, 18 Am. Bankr. Rep. 186; *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560; *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 194; *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1908) 163 Fed. 155, 20 Am. Bankr. Rep. 40; *Canner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872; *In re McCrary*, (S. D. Ala. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Braselton*, (N. D. Ga. 1909) 169 Fed. 960, 22 Am. Bankr. Rep. 419; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555; *In re Hoffman*, (E. D. Wis. 1909) 173 Fed. 234, 23 Am. Bankr. Rep. 19; *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966; *In re Big Cahaba Coal Co.*, (N. D. Ala. 1910) 183 Fed. 662; *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

Weight dependent on character of evidence.—The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it

being entitled to less weight, if a deduction from established facts, than if based on conflicting evidence. *In re McCrary*, (S. D. Ala. 1909) 189 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Big Cahaba Coal Co.*, (N. D. Ala. 1910) 183 Fed. 662.

And it has been held that the court is not bound by the findings of the referee in bankruptcy on a question of fact based on inferences drawn from the evidence. *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

Certifying questions to District Court.—Specific questions arising in proceedings before a referee in bankruptcy, and upon which the opinion of the district judge is desired, may and should be presented on the certificate of the referee; or, in the case of orders entered, on petition for review, and not in the form of an assignment of errors. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

(1) [*Consider petitions.*] consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; [(1898) 30 Stat. L. 555.]

Authority to make adjudication or dismiss petition.—The referee, under section 38a (1), has authority to consider such petitions as have been referred to him by the clerk, and to make an adjudication thereon, or to dismiss the petition. *In re Clisdell*, (N. D. N. Y. 1900) 101 Fed. 246, 4 Am. Bankr. Rep. 95; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358.

(2) [*Administer oaths, examine witnesses, require production of documents.*] exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; [(1898) 30 Stat. L. 555.]

Examination of witnesses—General rule.—A referee taking testimony in a controversy or hearing in bankruptcy is required to take, record, and, in case of an appeal, to return to the appellate court, all the evidence offered by either party to the controversy, that which is held by them to be incompetent, irrelevant, or immaterial, as well as that which they deem to be admissible, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and conclude the litigation without remanding the suit to procure the excluded evidence. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436. And see the following earlier cases to the same effect: *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Lipset*, (S. D. N. Y. 1902) 119 Fed. 379, 9 Am. Bankr. Rep. 32; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr.

But a referee has no jurisdiction of his own motion to certify a question not raised by the parties to a bankruptcy proceeding, which the referee foresees may arise, and on which he desires to be advised. *In re Reukauff*, (E. D. Pa. 1905) 135 Fed. 251, 14 Am. Bankr. Rep. 344.

Duty to give notice of referee's decisions.—Where there is an appearance in a contest before referees in bankruptcy, the litigating parties should be notified of the referee's decisions. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

But where creditors do not appear, or where they appear and their appearance is not noted, no duty rests on the referee to give notice of his decisions, especially where claims are presented and no objection is made. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

Dismissal after adjudication.—The statute does not authorize a referee to dismiss a bankruptcy proceeding after adjudication; that duty devolves alone upon the judge under section 14 of the Act. *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734.

But in *In re Scott*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 35, it was held that the referee had jurisdiction to dismiss a petition after adjudication for want of jurisdiction.

Rep. 541; *In re Wilde*, (S. D. N. Y. 1904) 131 Fed. 142, 11 Am. Bankr. Rep. 714; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *In re Sturgeon*, (C. C. A. 2d Cir. 1905) 139 Fed. 608, 14 Am. Bankr. Rep. 681; *Ravenwood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206.

Referee cannot excuse witness from answering.—A referee in bankruptcy is governed by the rules in equity in taking testimony, and is not authorized to excuse a witness from answering questions on objection thereto. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

Exception to general rule.—From the general rule that all evidence offered should be received, the evidence of a privileged witness, privileged evidence, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power

of the court to compel its production or permit its introduction, is excepted. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

Manner of conducting examination.—Under the general orders in bankruptcy, No. 22, the referee, in taking testimony, is required to have it taken down in writing, and preferably in narrative form; and, on objection being raised, to require the question, the objection, and reason therefor, with his

ruling, to be entered, and then, though he rule the question to be improper, allow it to be answered. *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785.

Referee should be present at examination.—A referee in bankruptcy, having power to rule on the admissibility of testimony offered before him, is bound personally to hear the evidence, unless his presence is waived by the parties. *In re Wilde*, (S. D. N. Y. 1904) 131 Fed. 142, 11 Am. Bankr. Rep. 714.

(3) [*Taking possession of and releasing property.*] exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; [(1898) 30 Stat. L. 555.]

Authority with respect to possession and release of property—Referee may appoint receivers.—A referee has authority to exercise the powers of a judge in the taking possession of, and releasing, the bankrupt's property, on the issuance of a certificate by the clerk showing the absence of the judge from the district, or his inability to act. In accordance with this provision it has been held that the referee may appoint receivers in bankruptcy for the purpose of taking possession of the assets of the estate. *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Floerken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *In re Sonnabend*, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

The authority of courts of bankruptcy to appoint receivers and marshals to take charge of the property of bankrupts, when necessary for the preservation of the estate, has been considered generally under sections 2 (3) and 3e, *supra*, pp. 472, 494, and section 69, *infra*.

It has been said that the jurisdiction of referees to appoint receivers is not qualified by subdivision 3e, but is obviously the correlative of section 69a, authorizing the judge on proof of specified facts to issue a warrant for the seizure of the bankrupt's prop-

erty. *In re Floerken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

Must be necessity for receiver.—A referee is without power to appoint a receiver after adjudication, on the petition of a voluntary bankrupt, without any finding as to its necessity. *In re Rosenthal*, (D. C. N. J. 1906) 144 Fed. 548, 16 Am. Bankr. Rep. 448.

Referee cannot act until receipt of order.—A referee's authority to appoint a receiver dates from the time the order of reference has actually been placed in his hands, and not from the time of its signing or filing; and his appointment of a receiver, merely on being indirectly informed through a telephone message of the order for his appointment as referee, is unauthorized. *In re Floerken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

Turning over books to receiver.—An alleged bankrupt will be required to turn over books of account relating to his business, to a receiver appointed by the court of bankruptcy, where it is shown that they are necessary to enable the receiver to continue the business as directed by the court, notwithstanding a claim of privilege by the bankrupt on the ground that the books contain evidence which will tend to incriminate him, unless it appears that such claim is made in good faith and has a reasonable foundation; it not being his right to determine such questions for himself. *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663.

(4) [*Perform certain duties of courts.*] perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and [(1898) 30 Stat. L. 555.]

Authority to perform duties of court.—Under section 38a (4) the referee is authorized to perform the duties of a court of bankruptcy as prescribed by the statute and the general orders; he is thus made a judicial officer whose official acts, within his jurisdiction, are entitled to due weight as such,

subject only to review by the District Court sitting in bankruptcy. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 36; *In re Baber*, (E. D.

Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 602; *Ellis v. Krulwich*, (C. C. A. 8th Cir. 1905) 141 Fed. 954, 15 Am. Bankr. Rep. 615; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593; *In re Schenectady Engineering, etc., Co.*, (N. D. N. Y. 1906) 147 Fed. 868, 17 Am. Bankr. Rep. 279; *In re Simon*, (E. D. Ga. 1907) 151 Fed. 507; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *Clendening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245; *Conti v. Sunseri*, (Pa. 1907) 18 Am. Bankr. Rep. 891; *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10.

The referee is, in general, a court of original jurisdiction possessing, with certain exceptions, all the powers in regard to bankruptcy vested in the United States District Court. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10.

Referee cannot acquire jurisdiction by consent.—If the subject-matter of a controversy is not within the jurisdiction of a referee, consent will not confer it; and the court upon a petition for review will acquire none, except to determine the jurisdiction of the referee. *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472.

Turning property over to trustee.—The referee may order the surrender, to the trustee in bankruptcy, of any property of the estate remaining in the hands of the bankrupt; or which is subject, in other hands, to the control, management, or disposition of the bankrupt. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663; *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302; *In re Fidler*, (M. D. Pa. 1908) 163 Fed. 973, 21 Am. Bankr. Rep. 101; *In re Baum*, (C. C. A. 8th Cir. 1909) 169 Fed. 410, 22 Am. Bankr. Rep. 295; *In re Averick*, (M. D. Pa. 1909) 170 Fed. 521, 22 Am. Bankr. Rep. 518; *In re Koplin*, (E. D. Pa. 1910) 179 Fed. 1013; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *In re Krall*, (D. C. Conn. 1910) 182 Fed. 191; *In re Shaffer*, (E. D. N. Y. 1911) 185 Fed. 549; *In re Belfast Mesh Underwear Co.*, (D. C. Conn. 1911) 185 Fed. 834; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *In re Shaffer*, 26 Am. Bankr. Rep. 54.

The failure to turn over property, when ordered to do so by the referee in a proper case, constitutes a contempt, and is punishable as such. See the annotation under section 41a (1), *infra*, p. 668.

A partner may be ordered to turn over to the firm's trustee in bankruptcy any partnership assets traced into his hands. *In re Shaffer*, (E. D. N. Y. 1911) 185 Fed. 549.

Where a third party claims an interest in property which was in the possession of a bankrupt at the time of the bankruptcy and passed into that of his trustee, the referee may by a summary proceeding require such third party to appear in the bankruptcy court, and present his claim, and may adjudicate the rights of the parties in respect thereof. *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242.

Where, on a claim of a bankrupt's trustee to possession of property in the possession of another, the referee finds that the latter's claim is in good faith and probably real, it should then be determined by a plenary suit; but if he finds that the claim is without any actual merit or legal foundation, he should regard the property as subject to the bankruptcy court's jurisdiction as property of the bankrupt, and require its surrender to the trustee. *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511. See also the annotation under section 23b as to jurisdiction and procedure with respect to adverse claimants.

The fact that respondent was under indictment, charged with a violation of section 29, for having received and retained money for the purpose of defeating the operation of the bankruptcy law, furnishes no excuse for his failing to make a full disclosure of the facts, in response to the referee's order to show cause. *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747.

Proceedings to require a bankrupt to pay over money or surrender property to his trustee, should ordinarily be by motion for a rule on him to show cause, and should be justified by the facts brought out in the examination of himself and other witnesses in the regular course of the proceedings. Unless under exceptional circumstances, where it is necessary to bring before the court facts not appearing in the examination, or new parties, a formal petition and pleadings as in a suit in equity are unnecessary, and an expense which should not be permitted by the court; nor should the court or referee entertain such proceedings at all unless there is sufficient in the evidence, taken in the regular course of the proceedings, to warrant the order sought *prima facie*. *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19.

Order to show cause.—A referee in bankruptcy has power in the first instance to enter an order to show cause why a person should not be required to pay over, to the trustee in bankruptcy, money in his hands belonging to the bankrupt's estate; and, upon the hearing, to enter an order directing the payment of such money by a certain date. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

Petition for order.—An order requiring a bankrupt to turn over money or property to his trustee should be made only after a hearing on a petition therefor, making definite averments on the subject and offering a definite issue, upon which both parties may

adduce evidence. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

Preponderance of evidence sufficient.—The issue whether an order should be made requiring a bankrupt to turn over money or property to the trustee is purely of a civil character determinable on a preponderance of the evidence. *In re Alphin, etc.*, Cotton Co., (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194; *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302.

Competency of evidence.—Testimony of a person, other than the bankrupt, or, in case of a corporation, of a person not an officer or a stockholder of such corporation, taken generally and not directed to any defined issue, is not admissible in subsequent proceedings against the bankrupt, or, in case of a corporation, against its officers, to compel a surrender of money or property of the estate, under penalty of punishment for contempt. *In re Alphin, etc.*, Cotton Co., (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

Property must be part of bankrupt estate.—To justify an order directing money or other property to be turned over to the trustee, it must appear that such money or other property is a part of the assets of the estate in bankruptcy. *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 502, 4 Am. Bankr. Rep. 153; *In re Felson*, (N. D. N. Y. 1903) 124 Fed. 288, 10 Am. Bankr. Rep. 716; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912. See also the cases cited in the following paragraph.

Possession or control necessary.—A referee can only order the turning of assets to the trustee where it clearly appears that such assets are in the possession, or within the control, of the bankrupt, and rightfully constitute a part of his estate in bankruptcy. *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 502, 4 Am. Bankr. Rep. 153; *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45; *In re Antigo Screen Door Co.*, (7th Cir. 1903) 123 Fed. 249, 59 C. C. A. 248, 252; *In re Felson*, (N. D. N. Y. 1903) 124 Fed. 288, 10 Am. Bankr. Rep. 716; *In re Rodgers*, (7th Cir. 1903) 125 Fed. 169, 60 C. C. A. 567, 575; *Burleigh v. Forman*, (1st Cir. 1903) 125 Fed. 217, 218, 60 C. C. A. 109; *In re Leinweber*, (D. C. Conn. 1904) 128 Fed. 641, 12 Am. Bankr. Rep. 175; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 603; *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986, 22 Am. Bankr. Rep. 521; *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660, following *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 139, 53 C. C. A. 459; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 946; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912. See also the annotation under section 41a (1) as to contempt proceedings for failure to turn over property.

Possession or control necessary when order

is made.—A finding by a referee that at the time of his bankruptcy a bankrupt had in his possession or under his control money or property of his estate which he withheld from his trustee, does not warrant an order, seven years afterward, requiring him to turn the same over to his trustee; it not being shown that he is then able to comply with such order. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

Evidence based on comparative value of stock at different times.—To justify an order requiring a bankrupt to turn over property, the proof that he has withheld property should be clear; and, where it depends upon the comparative estimates of the value of a stock of goods at different times, the discrepancy must be great and such as cannot be otherwise explained. *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986, 22 Am. Bankr. Rep. 521.

Property out of possession and control.—A court of bankruptcy, or a referee, is without power to order a bankrupt to pay over to his trustee money collected from his debtors after he had knowledge of the filing of the petition in bankruptcy against him by creditors, where such money has since passed into the possession of others, and is not under the bankrupt's control. *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 464, 11 Am. Bankr. Rep. 360.

The treasurer of a bankrupt corporation cannot be required, by a summary order, to turn over to the trustee money which he in fact paid out in settlement of debts of the corporation between the filing of the petition and the adjudication, even though such payments were not justified and resulted in preferences to the creditors receiving the same. *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729.

A proceeding to compel the bankrupt to turn over property which was concealed for him or by him may be based upon an examination of the bankrupt's agent as to what disposition he made of the bankrupt's property. But until the property or its proceeds have been traced through the hands of the bankrupt, and until he avoids responsibility by showing that his control over it had terminated because it had reached the possession of his agent and been converted or stolen, and was hence out of his own control, the trustee is not in a position to demand that the agent be compelled to make good or account for the bankrupt's property, unless the property or the proceeds be specifically shown to be in his hands. *In re Fogelman*, (E. D. N. Y. 1911) 188 Fed. 755.

Ability to comply with order necessary.—In view of the fact that the failure of a bankrupt to obey an order to turn over money or property to his trustee is punishable by imprisonment for contempt, such an order should only be made on the clearest proof of his present ability to comply with it, since contempt proceedings cannot be invoked as a means of coercing the payment of debts, or to punish a bankrupt for transferring his property with intent to hinder,

delay, or defraud his creditors. *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660, following *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 139, 53 C. C. A. 459; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 946.

Presumption of possession or control.—It is well settled that where assets of the estate in bankruptcy have been traced to the recent possession or control of the bankrupt, they will be presumed to have remained in his possession or under his control until their disposition or disappearance has been satisfactorily accounted for. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *Schweer v. Brown*, (8th Cir. 1904) 130 Fed. 328, 64 C. C. A. 574; *Seigel v. Cartel*, (8th Cir. 1908) 164 Fed. 691, 90 C. C. A. 512, 21 Am. Bankr. Rep. 140; *In re Meier*, (C. C. A. 8th Cir. 1910) 182 Fed. 799; *In re Nisensohn*, (D. C. N. J. 1910) 182 Fed. 912.

Effect of admission.—Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to account clearly for the same to the satisfaction of the court; otherwise, he must be held still to have it in his possession, and to be able to turn it over to his trustee. *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723.

Denial of possession or control.—The denial of the bankrupt that he has money or other property in his possession, or under his control, is not conclusive, but is entitled to its due weight in connection with the other evidence and circumstances shown. *In re Shachter*, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *Schweer v. Brown*, (C. C. A. 8th Cir. 1904) 130 Fed. 329, 12 Am. Bankr. Rep. 178; *In re Feldser*, (E. D. Pa. 1905) 134 Fed. 307, 14 Am. Bankr. Rep. 216; *In re Weinreb*, (C. C. A. 2d Cir. 1906) 148 Fed. 243, 16 Am. Bankr. Rep. 702; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

Jurisdiction with respect to sales of property.—A referee to whom a bankruptcy case has been referred generally has jurisdiction, on the petition of the trustee, to enjoin the sale of the property of the bankrupt by one of a number of lienholders, to order its sale free of incumbrances, and to settle the priority of liens, where all the parties in interest voluntarily appear and submit the controversies between them to his decision without objection. See *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 302; *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Sanborn*, (D. C. Vt. 1899) 96 Fed. 551, 3 Am.

Bankr. Rep. 54; *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *McFarland Carriage Co. v. Solanes*, (E. D. La. 1901) 108 Fed. 532, 6 Am. Bankr. Rep. 221; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 351; *In re Mathews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96, affirmed (C. C. A. 8th Cir. 1902) 9 Am. Bankr. Rep. 444; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624; *In re Waterloo Organ Co.*, (W. D. N. Y. 1902) 118 Fed. 904, 9 Am. Bankr. Rep. 427; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *In re Kellogg*, (2d Cir. 1903) 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7, affirming (W. D. N. Y. 1902) 7 Am. Bankr. Rep. 623; *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404, affirming *In re Wilka*, (N. D. Ia. 1904) 12 Am. Bankr. Rep. 727; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 528; *In re Miner's Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Murphy*, (D. C. Mass. 1900) 3 Am. Bankr. Rep. 505 note; *Matter of New England Piano Co.*, (C. C. A. 1st Cir. 1903) 9 Am. Bankr. Rep. 767; *In re Rochford*, (C. C. A. 8th Cir. 1903) 10 Am. Bankr. Rep. 608; *In re Prince*, (M. D. Pa. 1904) 12 Am. Bankr. Rep. 675; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 14 Am. Bankr. Rep. 483.

Stays and injunctions.—The referee has authority to grant stays and injunctions upon a proper showing of cause therefor. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *In re Steuer*, (D. C. Mass. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209; *In re Martin*, (W. D. N. Y. 1900) 105 Fed. 753, 5 Am. Bankr. Rep. 423; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 294; *In re Benjamin*, (M. D. Pa. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251; *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89; *In re Sabine*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 315; *In re Northrop*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 427; *In re Rogers*, (D. C. Ky. 1899) 1 Am. Bankr. Rep. 541; *In re Huddleston*, (N. D. Ala. 1899) 1 Am. Bankr. Rep. 572; *Matter of White*, (N. D. Ala. 1901) 10 Am. Bankr. Rep. 799; *In re Mussey*, 2 Nat. Bankr. N. 113. And see generally the annotation under section 11a.

Referee cannot restrain court or officer thereof.—The word "herein" as used in section 38a (4) refers to the entire Act, including the general orders in bankruptcy, and the provision must be construed in connection with general order No. 12, which denies a referee jurisdiction to grant an injunction to stay the proceedings of a court or officer of the United States or of a state. *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251.

A referee has no power to grant an injunction staying a proceeding in a state court, and such an order is void. *In re Siebert*, (D. C. N. J. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348.

Power to set aside transfers and incumbrances.—Where the property concerned, the *res*, is in the possession of the court, the referee has full power to deal with its status, and can set aside any transfers or incumbrances. This doctrine results necessarily from the basic principle that power to deal with property which is itself in the possession of the bankruptcy court rests exclusively in that court, and, therefore, at least concurrently with the district judge, in the referee. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10. And see generally sections 23b, 60b, 67c, and 70e.

Questions arising out of applications for compositions or discharges are expressly required to be originally presented to the court, and are withheld from the referee. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305; *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378; *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

So, also, it has been held that a referee in bankruptcy, acting as a special master in hearing objections to a bankrupt's discharge, has no legal right to consider evidence which has been previously taken before him as referee; but must be governed entirely by the

admissible evidence produced on the hearing of the application and objections. *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700.

But, although section 38a (4) excepts from the referee's jurisdiction all questions arising out of an application for composition, there may be further proceedings required after a composition has been confirmed which involve no such question. Thus it has been held that no such question would be involved in the receipt and allowance or disallowance of a creditor's claim, not barred by section 57n, even if presented after the confirmation. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

Costs—Authority to tax.—A referee sitting as a court of bankruptcy has authority to award costs in proceedings before him; and may either tax the costs himself or order their taxation by the clerk of the District Court. *Matter of Scott*, (D. C. Mass. 1902) 7 Am. Bankr. Rep. 710.

Imposition of costs on claimant of property.—Where a controversy between a trustee and a third person respecting the right to certain property was submitted to a referee, it was held that the claimant, who was unsuccessful, might properly be taxed with the costs of the reference, including a reasonable fee for the referee, a docket fee for the trustee's attorney, and the fee of a stenographer employed on the application of the trustee. *In re Todd*, (S. D. N. Y. 1901) 109 Fed. 265, 6 Am. Bankr. Rep. 88.

(5) [*Authorize employment of stenographers.*] upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings. [(1898) 30 Stat. L. 555.]

Employment and payment of stenographers.—Except where a stenographer is employed on the application of the trustee, as provided by section 38a (5), or there has been a stipulation of the parties, or money has been deposited for the expense as provided by general order in bankruptcy No. 10, the referee cannot be allowed for such employment. *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651.

The receiver or creditor applying for the examination will be compelled to approve of the stenographer's bill, and to certify that all

of the examination was necessary. The bills can then be passed upon in settling the receiver's accounts, and close scrutiny should be given, with a view to preventing the unnecessary prolongation of such examination. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

Hearings before special commissioner.—Section 38a (5) does not apply to hearings on the examination of the bankrupt before a special commissioner. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

SEC. 39. DUTIES OF REFEREES.—a [*What referees shall do.*] Referees shall [(1898) 30 Stat. L. 555.]

(1) [*Declare dividends.*] declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; [(1898) 30 Stat. L. 555.]

The declaration and payment of dividends has been considered under the several subdivisions of section 65.

(2) [*Examine schedules and lists.*] examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; [(1898) 30 Stat. L. 555.]

Cross-reference: As to

Duty of bankrupt to prepare, verify, and file his schedules, see section 7a (8), *supra*, p. 520.

Examination of schedules.—By section 39a (2) the referee is required to examine all schedules of property and lists of credit-

ors filed by bankrupts and cause such as are incomplete or defective to be amended. This provision is mandatory. It is the duty of the referee to make the examination and to order an amendment in case of defects or omissions, even though no interested party may move in the matter. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

(3) [*Furnish information.*] furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; [(1898) 30 Stat. L. 555.]

Courts do not furnish copies of proceedings pending before them; and referees, as such, are not required to, but only, by section 39a, clause 3, to furnish such information as may

be requested by parties in interest. *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632.

(4) [*Give notices.*] give notices to creditors as herein provided; [(1898) 30 Stat. L. 555.]

Cross-reference: As to

Notice to creditors generally, see the several subdivisions of section 58, *infra*, p. 715.

Notice to creditors.—The referee must prepare suitable notices and place them in the mails, as a part of his duties. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446.

Notice of special meetings.—It is the duty of the referee to send out the notices of a special meeting, called upon the petition of a

creditor, under general rule No. 21. *In re Stoeber*, (E. D. Pa. 1900) 105 Fed. 355, 5 Am. Bankr. Rep. 250.

A district rule authorizing referees to order notice to creditors of the application for the bankrupt's discharge, and to fix the date of hearing, is void as being in conflict with form No. 57, which requires that such notice shall be ordered, and the date of hearing be fixed, by the court. *In re Johnson*, (W. D. Ark. 1903) 158 Fed. 342, 19 Am. Bankr. Rep. 814.

(5) [*Make up records.*] make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; [(1898) 30 Stat. L. 555.]

Making up records.—The duty to make up records, under section 39a (5), and transmit them to the judge, is for the purpose of reviewing the referee's decisions, and has been generally considered under section 38a, note heading *Mode of Review*, p. 655, *supra*.

The clear purpose of section 39a (5), set out above, is to avoid, as far as possible, the sending of the original proofs to the judge, and to substitute therefor, where the ends of

justice will permit, a summary thereof; and to effectuate this object is the purpose of the general order No. 27. But it is undoubtedly within the competency of the judge, at the request of either party, to direct the filing of all or any part of the original documents or proofs which are on file with the referee. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, 4 Am. Bankr. Rep. 195.

(6) [*Prepare schedules and lists.*] prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; [(1898) 30 Stat. L. 555.]

Cross-reference: As to

Bankrupt's duty to prepare, verify, and file schedules, see section 7a (8), *supra*, p. 520.

(7) [*Preserve and transmit records.*] safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; [(1898) 30 Stat. L. 556.]

Cross-reference: As to

Records of referees generally, and manner of keeping them, see the several subdivisions of section 42, *infra*, p. 676.

Referees are their own filing and recording officers in proceedings before themselves, and are so recognized by rule No. 2 of the general orders in bankruptcy. *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Referees must attend to details. — It was

intended referees should do the detail work in bankruptcy causes, and the district judge should review their action on exceptions thereto. *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373.

Individual schedules in partnership cases. — In proceedings in bankruptcy against a partnership, the individual schedules of the partners are not a part of the record nor can they be considered as such. *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422.

(8) [*Transmit papers to clerks.*] transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; [(1898) 30 Stat. L. 556.]

Cross-reference: As to

Transmission of record of proceedings, see section 42c, *infra*, p. 677.

(9) [*Preserve evidence.*] upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and [(1898) 30 Stat. L. 556.]

Preservation of evidence. — It is the duty of examiners, masters, referees, and the court, taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Lipset*, (S. D. N. Y. 1902) 119 Fed. 379, 9 Am. Bankr. Rep. 32; *In re Sturgeon*, (C. C. A. 2d Cir. 1905) 139 Fed. 608, 14 Am. Bankr. Rep. 681; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *In re Goldstein*, (S. D. N. Y. 1907) 155 Fed. 695, 19 Am. Bankr. Rep. 96; *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, 21 Am. Bankr. Rep. 270; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

The remedy for a refusal of a referee to take and preserve such evidence is an application to the District Court, and, failing there, to the Circuit Court of Appeals, for an order that it be taken and preserved. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

Referee not obliged to certify questions

during pendency of proceedings. — A referee is not required to stop the proceedings before him, and to certify to the court for decision questions raised on objections to evidence. *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206.

Evidence which need not be preserved. — From the general rule above stated, which necessitates the taking of evidence even though it be excluded by the referee, there are certain exceptions; thus the referee need not receive or preserve evidence which is plainly privileged, or the testimony of a privileged witness, or evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or the power of the court to compel its production or permit its introduction. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, 21 Am. Bankr. Rep. 270.

Cost of perpetuating testimony. — Where a trustee in bankruptcy has no funds in his hands, and the bankrupt is without means, the referee will not compel the trustee to pay for the stenographer's minutes, referee's fees, and disbursements in taking the testimony which the bankrupt desires to introduce in opposition to that offered by the trustee, in a proceeding to compel the bankrupt to turn over property; it being within the discretion of the referee to determine how the bankrupt's testimony should be taken and preserved, in order that he may not be in contempt. *In re Goldstein*, (S. D. N. Y. 1907) 155 Fed. 695, 19 Am. Bankr. Rep. 96.

(10) [*Obtain papers.*] whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. [(1898) 30 Stat. L. 556.]

b [*What referees may not do.*] Referees shall not [(1898) 30 Stat. L. 556.]

Cross-reference: As to

Offenses by referees, see the several subdivisions of section 29c, *supra*, p. 652.

(1) [*Act if interested.*] act in cases in which they are directly or indirectly interested; [(1898) 30 Stat. L. 556.]

"Interest" as disqualification of referee. — The interest which will disqualify the referee is an interest either in the proceedings in bankruptcy or in the estate of the bankrupt. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

Judge may revoke reference because of referee's interest. — The judge, on being apprised of the fact that the referee is a debtor of the bankrupt, may, in his discretion, re-

voke the order of reference, and send the case to another referee. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

Interest in compensation immaterial. — Section 39b does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends. *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

(2) [*Practice as attorneys.*] practice as attorneys and counselors at law in any bankruptcy proceedings; or [(1898) 30 Stat. L. 556.]

(3) [*Purchase from estate.*] purchase, directly or indirectly, any property of an estate in bankruptcy. [(1898) 30 Stat. L. 556.]

SEC. 40. COMPENSATION OF REFEREES. — a [*Fee and commissions.*] Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. [(Amended 1903) 32 Stat. L. 799.]

Referee's commissions. — A referee is entitled, under section 40a, as amended by the Act of Feb. 5, 1903, to a one per centum commission on all moneys disbursed to creditors by the trustee in estates which have been administered before them; or a commission of one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. *In re Sanford Furniture Mfg. Co.*, (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 15; *In re Anders Push Button Telephone Co.*, (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643; *In re Iowa Falls Mfg. Co.*, (N. D. Ia. 1905) 140 Fed. 527, 15 Am. Bankr. Rep. 384; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *Bray v. Johnson*, (C. C. A. 4th Cir. 1908) 166 Fed. 57, 21 Am. Bankr. Rep. 383.

Prior to the amendment of 1903 referees were paid one per centum commissions on the sums paid out as dividends and commissions in cases which were administered before them, and one-half of one per centum on the amount paid to creditors upon the confirmation of a composition. *In re Ft. Wayne Electric Corp.*, (D. C. Ind. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 707; *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 900, 3 Am. Bankr. Rep. 135; *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Hinckel Brewing Co.*, (N. D. N. Y. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; *In re Sabine*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 322; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *In re Gerson*, (E. D. Pa. 1899) 2 Am.

Bankr. Rep. 352; *In re Muhlhauser Co.*, (N. D. Ohio 1902) 9 Am. Bankr. Rep. 80.

Statute covers all lawful disbursements.—The language of section 40a covers, and evidently was intended to include, all moneys lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured, unsecured, or having priority, or to other persons. If to creditors, it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends, or in satisfaction of a lien or liens on the fund. If the money comes lawfully into the hands of the trustee, as such, and if he in the performance of his duty as such is required to protect, preserve, and care for it, and eventually disburse it pursuant to the order of the court, and does so, there is no reason why he should not have his commissions, if the court allows them, even if the funds are subject to a lien which in law and equity the court is required to recognize and enforce. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

Referee entitled to commissions on moneys which should have been paid through trustee.—The referee, under the law, is entitled to commissions on all moneys which are disbursed to creditors by the trustee; and it has been held that this means all sums which should have been paid through the trustee but for outside agreement between parties and attorneys. Thus when property, subject to liens, is sold by consent of the parties holding such liens, the referee is entitled to his commissions on the purchase price in full. When sold free from incumbrances, the money is constructively paid to the trustee, even when purchased by the party holding such incumbrance, and the referee is entitled to commissions thereon as if it were actually paid. Having used the process of the court to accomplish their purpose, to wit, to sell the property by the trustee in bankruptcy, the incumbrancers have received benefits and services for which the officers of the court are entitled to pay. *In re Sanford Furniture Mfg. Co.*, (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414. See also *In re Sabine*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 322; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *In re Barber*, (D. C. Minn. 1899) 3 Am. Bankr. Rep. 306.

Liens must abate for referee's commissions.—When the bankruptcy court lawfully takes hold of and administers the estate of a bankrupt and has the funds in its possession for that purpose, it may direct, and it is its duty to direct, that the lawful fees and commissions of its officers and expenses of such administration be paid therefrom; and when necessary, in such cases, liens on such funds must abate for this purpose. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

But see *In re Anders Push Button Telephone Co.*, (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643, wherein it was held that a court of bankruptcy has no power to require a creditor, secured by a valid lien, to pay commissions on the amount realized thereon to the referee, although by stipula-

tion the property is sold by the trustee, because the proceeds of the property, so far as necessary to satisfy the lien, are no part of the estate, from which all commissions are made payable.

See also *In re Iowa Falls Mfg. Co.*, (N. D. Ia. 1905) 140 Fed. 527, 15 Am. Bankr. Rep. 384, wherein it was held that the proceeds of mortgaged property, arising from the sale thereof by the sheriff, should be excluded from the amount upon which the referee may compute his commissions, and the amount actually disbursed by the trustee to creditors will form the basis of such computation.

Where a referee authorized the continuance of the bankrupt's business in order to complete certain government contracts, and for that purpose there was raised and paid out \$480,000 during a period of eighteen months, and some \$30,000 distributed to creditors, it was held that the referee was only entitled to a percentage on the latter sum. *Bray v. Johnson*, (C. C. A. 4th Cir. 1908) 166 Fed. 57, 21 Am. Bankr. Rep. 383.

Extra compensation.—A referee in bankruptcy cannot be allowed, for his services, any compensation other than that provided for by the bankruptcy law, or the general orders pertaining thereto. *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597; *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241. And see the annotation under section 72.

But see *Matter of Hart*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 137, wherein it was held that a referee performing services not within his statutory duties, but of value to the conduct of a bankrupt estate as a going concern, may receive compensation therefor out of the funds of the estate.

A special allowance to a referee for services performed, in addition to the fees fixed by the Bankruptcy Act, cannot be made, even with the consent of the attorneys for the parties in interest. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

Clerical services rendered by referee.—The referee is not entitled to charge for his own services in making copies of the petition for discharge, but it may be necessary in some cases for the referee to employ clerical assistance in giving such notices, and then the expense actually incurred by him for such assistance would be a charge against the bankrupt or his estate; but the referee is not entitled to make any charge for clerical services rendered by himself in cases pending before him. *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675.

Extra compensation for giving notices.—Under general order in bankruptcy No. 35 (2), providing for compensation to the referee for expenses necessarily incurred in giving notices, he cannot, in case of re-examination of a claim, be allowed for notices to creditors other than the one provided for

by order No. 21 (6), to the creditor whose claim is to be re-examined; nor can the referee be allowed for notices on distribution of money to preferred creditors; or for notice of protest against confirmation of sale, none being required by the Act or general orders. *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651.

Referee's expenses.—The only allowance which can be made to a referee, in addition to the fees and commission, is for expenses necessarily incurred, a detailed account of which must be kept and returned to the court, verified by the oath of the referee, and accompanied by vouchers when they can be procured. *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675; *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446. And see generally the annotation under section 62 as to expenses of administration.

Services of referee as special master.—There is no authority for converting a referee in bankruptcy into a special master, nor for allowing him compensation as such. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866.

Where the statutory fees received by a referee are sufficient to compensate him liberally for all services rendered in a case, he will not be given a further allowance on account of an extra service rendered as special master in connection with a composition. *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617.

But prior to the amendment of 1903 which, by the addition of section 72 to the statute, prohibited the payment of extra compensation to referees and other officers, it was held that where a referee performed services beyond those required of him in his official capacity as, for instance, those of special master, he might be allowed additional compensation therefor. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510.

Allowance of referee's fees reviewable.—The allowance by a referee in bankruptcy of fees to himself is reviewable by the court. *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101. See the annotation under section 38a, *supra*, p. 655, as to review generally.

b [Division between two referees.] Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees. [(1898) 30 Stat. L. 556.]

c [Where reference revoked.] In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. [(1898) 30 Stat. L. 556.]

SEC. 41. CONTEMPTS BEFORE REFEREES. — *a* A person shall not, in proceedings before a referee, [(1898) 30 Stat. L. 556.]

Statute not limited to punishment of bankrupt.—The statute does not limit contempt proceedings to the bankrupt only, but includes any person; and section 2 (16) empowers the court to punish persons for con-

tempts committed before referees. The same power is conferred upon the court by Rev. Stat. sec. 725, 4 Fed. Stat. Annot. 534. *In re Bronstein*, (S. D. N. Y. 1910) 182 Fed. 349.

(1) [Disobedience.] disobey or resist any lawful order, process, or writ; [(1898) 30 Stat. L. 556.]

Disobedience as contempt.—The disobedience of any lawful order, process, or writ, in proceedings before a referee, constitutes a contempt under section 41a (1), which may be punished as provided in subdivision b of the same section. The proceeding is quasi-criminal, and should be exercised with caution. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, 7 Am. Bankr. Rep. 224; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421, *affirming Sinsheimer v. Simonson*, (C.

C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537; *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113; *In re Purvine*, (C. C. A. 5th Cir. 1899) 96 Fed. 192, 2 Am. Bankr. Rep. 787; *In re Tudor*, (D. C. Colo.) 96 Fed. 942, 2 Am. Bankr. Rep. 808; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Schlesinger*, (S. D. N. Y. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342, *affirmed* (2d Cir. 1900) 102 Fed. 119, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; *In re Mayer*, (E. D. Wis. 1900) 98 Fed.

839, 3 Am. Bankr. Rep. 533; *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Deuell*, (W. D. Mo. 1900) 100 Fed. 633, 4 Am. Bankr. Rep. 60; *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153, reversing (E. D. Mo. 1899) 96 Fed. 305, 2 Am. Bankr. Rep. 746; *Ripon Knitting Works v. Schneider*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Schlesinger*, (C. C. A. 2d Cir. 1900) 102 Fed. 117, 4 Am. Bankr. Rep. 361; *In re Anderson*, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 291; *In re Krinsky*, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535; *In re Levin*, (S. D. N. Y. 1901) 113 Fed. 498, 6 Am. Bankr. Rep. 743; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Taylor*, (D. C. Colo. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410; *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393; *In re Hausman*, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 10 Am. Bankr. Rep. 64; *In re Fortunato*, (S. D. N. Y. 1903) 123 Fed. 622, 9 Am. Bankr. Rep. 630; *Ew p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196; *In re Leinweber*, (D. C. Conn. 1904) 128 Fed. 641, 12 Am. Bankr. Rep. 175; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 10 Am. Bankr. Rep. 163; *In re Lacov*, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 200; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 170; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 789; *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *In re Bronstein*, (S. D. N. Y. 1910) 182 Fed. 349; *In re Friedman*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 301; *In re Ogles*, (W. D. Tenn.) 2 Am. Bankr. Rep. 514; *Turrentine v. Blackwood*, (1900) 4 Am. Bankr. Rep. 338, 125 Ala. 436, 28 So. 95; *In re Geiser*, (D. C. Mont. 1904) 12 Am. Bankr. Rep. 208.

Disobeying an injunction order constitutes a contempt under section 41a (1). *In re Fortunato*, (S. D. N. Y. 1903) 123 Fed. 622, 9 Am. Bankr. Rep. 630.

Service of a copy of an injunction issued by a bankruptcy court, restraining an assignee for creditors of a bankrupt and others from disposing of his property, is unnecessary in order to put them in contempt for a violation thereof, where they were otherwise advised of its issuance. *In re Krinsky*, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535.

Order for payment of expenses.—A court of bankruptcy may enforce an order requiring petitioning creditors to pay the expenses of a receivership procured by them, by proceedings in contempt. *In re Lacov*, (C. C.

A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 290.

Refusal to turn over books and papers.—Where a bankrupt, for whose estate a receiver was appointed by the bankruptcy court on the filing of an involuntary petition against him, neglected and refused to turn over to the receiver his books of account, or notes and mortgages owned by him, but concealed the same, and also disregarded an order of the court commanding him to appear and show cause why he should not be punished for contempt for so doing, leaving the state after the order was served upon him, it was held that he was guilty of contempt. *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612.

Failure to file schedules.—In *Matter of Schulman*, (D. C. N. Y. 1908) 20 Am. Bankr. Rep. 707, it was said: "Many bankrupts pay no attention to their duty to file their schedules, and motions to punish them for contempt for not filing schedules have become very frequent. Hereafter, as a general rule, whenever such motions are made, bankrupts will be fined a sufficient sum to compensate the attorneys for their trouble in making the motion, and, if such fines do not prove sufficient to put a stop to the delay in filing schedules, punishment by imprisonment for contempt will be imposed."

Fraud.—Contempt proceedings cannot be employed to punish for frauds committed by the bankrupt against the Bankruptcy Act; nor can they be used to coerce the bankrupt, or transferees, to make restitution of money or property previously transferred in fraud of the act. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

Contempt for failure to turn over assets.—It is well settled that the bankrupt may be punished for contempt in failing to comply with an order requiring him to turn over to his trustee assets of the estate which are in his possession or under his control, providing that he have the present ability to do so. *In re Schlesinger*, (S. D. N. Y. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342, affirmed (2d Cir. 1900) 102 Fed. 119, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Deuell*, (W. D. Mo. 1900) 100 Fed. 633, 4 Am. Bankr. Rep. 60; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re Shachter*, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *In re Gerstel*, (S. D. Ill. 1903) 123 Fed. 166, 10 Am. Bankr. Rep. 411; *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 360; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643; *In re Alphin*, etc., Cotton Co., (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194; *In re Sax*, (E. D. Pa. 1905) 141 Fed. 223, 15 Am. Bankr. Rep. 455;

Samel v. Dodd, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; *In re Lutfy*, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re Lesaius*, (M. D. Pa. 1908) 163 Fed. 614, 21 Am. Bankr. Rep. 23; *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; *In re Berman*, (E. D. Pa. 1908) 165 Fed. 383, 21 Am. Bankr. Rep. 139; *In re Stavrah*, (C. C. A. 2d Cir. 1909) 174 Fed. 330, 23 Am. Bankr. Rep. 168; *In re Greenberg*, (E. D. N. Y. 1910) 179 Fed. 413; *In re Pottelger*, (E. D. Pa. 1910) 181 Fed. 640; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 715; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912; *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501; *In re Lippman*, (E. D. N. Y. 1910) 184 Fed. 551; *In re Smith*, (E. D. N. Y. 1911) 185 Fed. 983.

The authority of the referee to make an order for the turning over of property to the trustee has been considered under section 38a (4), supra, p. 659.

It is the court's duty to exercise its power to punish for contempt where there is sufficient evidence to satisfy the judge that the bankrupt has the property in his possession or control. *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612.

Object of proceeding.—It is not the object of contempt proceedings against a bankrupt for his failure to turn over money or property in his possession, to punish him for concealing assets from his trustees or for frauds or delinquencies of which he may appear to be guilty; but the sole purpose is to reach, and to compel the surrender of, property belonging to the estate in the actual control or possession of the bankrupt. *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *In re Alphin*, etc., *Cotton Co.*, (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194.

Failure to turn over after-acquired property.—The failure of the bankrupt to turn over property in compliance with an order of the referee may be punished as a contempt although the order had reference to after-acquired property. *In re Tudor*, (D. C. Colo.) 96 Fed. 942, 2 Am. Bankr. Rep. 808.

Effect of pendency of indictment.—It has been held that the court will refuse to punish a bankrupt for contempt in disobeying an order to turn over property, where it appears that an indictment is pending against him in a state court for the embezzlement of the identical property. In such case the contempt proceedings cannot be taken until after he has been tried under the indictment. *In re Hooks Smelting Co.*, (E. D. Pa. 1906) 146 Fed. 336, 17 Am. Bankr. Rep. 141.

Bankrupt must account for money traced into his hands.—In proceedings against a bankrupt for contempt for failure to turn over to his trustee, on order of the referee, money traced into his hands, it is not a sufficient accounting by him for such money

to say that he gave it to his wife, who has spent it for the benefit of himself and family. *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478.

Where a bankrupt, having been ordered by the referee to pay over to his trustee a sum of money alleged to be in his possession and to belong to his estate in bankruptcy, denies his present possession of the money, and attempts to explain its loss by a story which, though difficult to believe, is not impossible, nor an obvious fabrication, he may be ordered before the judge for further examination as to whether or not he has made a full disclosure of the facts; and if satisfied that his story is false, the court will order commitment. *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340.

Failure to appeal from order to turn over.—In a proceeding for contempt in a District Court against a bankrupt for failure to comply with an order of the referee to turn over money or property to the trustee, such order, not appealed from, is conclusive of the fact that at the date of its entry the bankrupt had the money or property in his possession or under his control. *In re Frankel*, (S. D. N. Y. 1911) 184 Fed. 539.

Property must be capable of identification.—A summary order directing the respondent upon pain of imprisonment to surrender certain goods of which he is said to be holding fraudulent custody, the property still belonging to the bankrupt, should not be made unless the goods can be followed and sufficiently identified to enable the marshal to take them into his possession. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720.

And a finding that a bankrupt had in his possession or under his control goods, merchandise, etc., of a certain value, which he withheld, secreted, and concealed, but which failed to describe more specifically the property, or to state where any of the goods were, was held to be insufficient to justify an order requiring its surrender under penalty of commitment for contempt. *In re Rogowski*, (N. D. Ga. 1908) 166 Fed. 165, 21 Am. Bankr. Rep. 553.

Contempt dependent on ability to comply with order.—Whether a bankrupt is guilty of contempt in failing to comply with a referee's order directing him to pay over funds alleged to have been withheld, to his trustee, depends on the bankrupt's present ability to comply therewith. *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 464, 11 Am. Bankr. Rep. 360; *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338; *In re Eddleman*, (W. D. Ky. 1907) 154 Fed. 160, 19 Am. Bankr. Rep. 45; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577; *In re Marks*, (E. D. Pa. 1910) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794; *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501; *In re Cummings*, (E. D. Pa. 1911) 186 Fed. 1020.

"The powers vested in courts of bank-

ruptcy, to accomplish the general purpose of the bankrupt law, to wit, to segregate the estate of the bankrupt and provide for its equitable distribution amongst the creditors, are plenary and far-reaching. The court may, by summary order, direct the delivery and turning over to the trustee by the bankrupt, or by any third person holding the same under his order and control, any property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. For disobedience of such order, the court in bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply. This power, however, is far-reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in a compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty." *Per* Gray, C. J., in *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, 61 C. C. A. 342, *quoted with approval* in *In re Cummings*, (E. D. Pa. 1911) 188 Fed. 767.

Money paid out by bankrupt.—A bankrupt cannot be adjudged in contempt for failure to turn over to his trustee, pursuant to order of the referee, money which, before the proceedings were begun, had been paid out by him to creditors. *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 363.

Payment to wife.—Where a bankrupt, within a few days prior to the filing of the petition in bankruptcy against him, sells property, and pays the proceeds to his wife, she will be regarded as holding the same as his agent, and such facts will justify an order requiring him to pay the money over to his trustee; but he cannot be adjudged in

contempt for a failure to obey such order with respect to certain of the money which his wife is affirmatively shown to have paid out to a third person prior to the bankruptcy. *In re Eddleman*, (W. D. Ky. 1907) 154 Fed. 180, 19 Am. Bankr. Rep. 45.

Bankrupt's control nominal.—The court will not punish a bankrupt for contempt in not turning over property in compliance with an order, where it appears that he is in nominal rather than actual control of the business, the scheme of fraud being arranged and carried out by others. *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338.

Inability occasioned through fault of bankrupt.—A court cannot by contempt proceedings undertake to compel the performance of something which the respondent is wholly unable to perform, even though he became so through his own fault, where it arose through a mere misconception of his legal rights. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

Bankrupt may prove his inability to comply with order.—Before punishing a bankrupt for contempt because of his failure to comply with an order, the court should give him an opportunity to prove his inability to do so. *In re Hausman*, (C. C. A. 2d Cir. 1903) 121 Fed. 984.

Mere denial of ability insufficient.—It is well settled that the bankrupt's mere denial, under oath, that he is able to comply with an order directing him to turn over property or money is not conclusive; and if there is sufficient evidence to show that it is in his possession or under his control, he may be ordered to produce it, and a violation of the order will subject him to punishment for contempt. *Schweer v. Brown*, (8th Cir. 1904) 130 Fed. 328, 64 C. C. A. 574; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501; *In re Cummings*, (E. D. Pa. 1911) 186 Fed. 1020.

Thus it has been held that an order requiring a bankrupt to turn over money or property should not be made when the bankrupt absolutely denies that he has the property or money, and the evidence that he has it is only inferential, if there can be any reasonable doubt of his ability to comply with the order, because if disobeyed it involves his imprisonment. *In re Friedman*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 301.

And where the bankrupt claims that his property has been stolen, but it appears that at the time of the alleged theft he made statements that practically nothing had been taken, the court will be justified in punishing him for contempt on his failure to turn the property over in obedience to an order to do so. *In re Levin*, (S. D. N. Y. 1901) 113 Fed. 498, 6 Am. Bankr. Rep. 743.

Evidence should be clear and convincing.—The evidence in a proceeding to compel a bankrupt to turn over assets to his trustee must be clear and convincing before it will justify an order for contempt for failure to comply therewith. *In re Purvine*, (5th Cir.

1899) 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577.

Before a bankrupt can be punished for the failure to obey an order to turn over property to the trustee, not only must it be proven that the money or property ordered to be turned over is a part of his estate, but it must also be established that such money or property is in the possession or under the control of the bankrupt. *In re Adler*, (E. D. Okla. 1908) 170 Fed. 634, 21 Am. Bankr. Rep. 371; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577.

Power not exercised in doubtful cases.—The power of a court of bankruptcy to order a bankrupt or other person to turn over money or property found to belong to the bankrupt estate, under penalty of imprisonment for contempt, should not be exercised in doubtful cases. *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 16 Am. Bankr. Rep. 163.

And where it is sought to punish a bankrupt for the failure to obey an order to turn over property to the trustee, and it appears that the amount claimed to be withheld depends on mere estimates on one side or the other, it is only where there are great discrepancies which cannot be explained except on the basis that the bankrupt has made away with his property that the matter can be laid hold of by a summary order. *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986.

So, too, where the referee simply finds that the bankrupt had goods in stock a short time before bankruptcy proceedings were instituted, and that the goods have since disappeared without any satisfactory explanation by the bankrupt concerning their disappearance, but the report entirely fails to locate any of the missing goods, an order of the referee to turn over the property to the trustee is not, under the circumstances, sufficient to base contempt proceedings upon in the event of a failure to obey the order. *In re Rogowski*, (N. D. Ga. 1908) 166 Fed. 165.

Bankrupt entitled to benefit of reasonable doubt.—It has been held in several cases that, to justify an order requiring a bankrupt to turn over money or property under penalty of imprisonment for contempt, the court must be satisfied beyond a reasonable doubt that he has such money or property in his possession or under his control. *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Switzer*, (D. C. S. C. 1905) 140 Fed. 976, 15 Am. Bankr. Rep. 468; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577; *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23

Am. Bankr. Rep. 660; *In re Nisenon*, (D. C. N. J. 1910) 182 Fed. 912.

The burden of accounting for property, shown to be in his possession, rests upon the bankrupt; but in assuming such burden he, because of the drastic means that may be invoked to enforce the order to turn over (imprisonment for contempt), is entitled to the benefit of the reasonable doubt. *In re Nisenon*, (D. C. N. J. 1910) 182 Fed. 912.

Improper interference with assets.—Any wilful interference with the estate of the bankrupt, any wilful attempt to injure it, to withdraw it from the custody of the court, or to conceal it from the court, or any of its officers whose duty it is to administer it, is a defiance of the power and an affront to the dignity of the court, which may be punished by a judgment for contempt. *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385; *In re Potteiger*, (E. D. Pa. 1910) 181 Fed. 640; *In re Lutfy*, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

Thus where attorneys for the sellers of personal property to a bankrupt had knowledge of the bankruptcy adjudication against the buyer at the time they sued out writs of replevin, under which they took the property from the possession of the sheriff who was holding it under attachment which had been vacated by the bankruptcy adjudication, and such attorneys, claiming that their clients were entitled to rescind the sales for fraud, shipped the property out of the state and the jurisdiction of the bankruptcy court, it was held that they were guilty of contempt, equally with their clients, which could be purged only by their returning the property, paying its value to the trustee, or executing bonds to pay such value, on its finally being determined that the trustee was entitled to the property. *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

A mere threat by a judgment creditor of a bankrupt to levy execution on his property, pending the bankruptcy proceedings, does not constitute a contempt of the court of bankruptcy or its process. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

Effect of advice of counsel.—The advice of counsel, sought and acted upon in good faith, will palliate, if it does not entirely excuse, a failure to comply with an order of the referee, where such noncompliance was pursuant to the advice so sought and received. *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *Orr v. Tribble*, (S. D. Ga. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Strobel*, (E. D. N. Y. 1908) 163 Fed. 380, 20 Am. Bankr. Rep. 754.

Thus it has been held that where a witness, under examination in bankruptcy, refuses to

produce books called for by the summons, and to answer questions relating thereto, but does so under the direction of counsel, who in good faith advises him to pursue that course, and professes his readiness to submit to an examination if the court should hold it

proper, he will not be punished as for a contempt, but the court will simply order the examination to proceed. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

(2) [*Misbehavior.*] misbehave during a hearing or so near the place thereof as to obstruct the same; [(1898) 30 Stat. L. 556.]

The use of coarse and insulting language by witnesses before a referee is not compatible with the dignity of the court, or with a due regard for orderly procedure; and such con-

duct should be certified by the referee to the court for consideration under section 41b. *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919.

(3) [*Withholding documents.*] neglect to produce, after having been ordered to do so, any pertinent document; or [(1898) 30 Stat. L. 556.]

The neglect to produce pertinent documents or books, when ordered to do so, is punishable as a contempt under section 41a (3), in the absence of a reasonable excuse for such failure. *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re Alper*, (S. D. N. Y. 1907) 162 Fed. 207, 19 Am. Bankr. Rep. 612; *Matter of Sorkin*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 637.

But the alleged bankrupt, or members of his family, cannot be held in contempt of court for a refusal to surrender property, or books and papers, to one claiming to repre-

sent the receiver, but who produces no written evidence of his authority. *Skubinsky v. Bodek*, (C. C. A. 3d Cir. 1909) 172 Fed. 340, 22 Am. Bankr. Rep. 699.

Necessity of subpoena duces tecum and tender of fees.—A witness before a referee in bankruptcy, whose examination had been concluded except that he had refused to voluntarily produce a document, is not in contempt for a failure to appear at an adjourned hearing on a subsequent day, where he was not tendered fees for such appearance, nor served with a subpoena duces tecum to produce the document. *In re Johnson, etc., Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50.

(4) [*Refusal to appear, take oath, or be examined.*] refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: [(1898) 30 Stat. L. 556.]

Contempt by witnesses.—The refusal to appear as a witness when duly subpoenaed, or to testify, or be examined according to law, constitutes a contempt under section 41a (4); and it has been held that this provision includes, as contempts, the intentional swearing falsely, vaguely, evasively, and contradictorily, notwithstanding the fact that such conduct may also be punishable as a criminal offense. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Johnson, etc., Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50; *Ex p. Bick*, (S. D. N. Y. 1907) 155 Fed. 908, 19 Am. Bankr. Rep. 68; *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *Matter of Schulman*, (S. D. N. Y. 1909) 167 Fed. 237, 21 Am. Bankr. Rep. 288; *In re Gordon*, (S. D. N. Y. 1909) 167 Fed. 239, 21 Am. Bankr. Rep. 290; *In re Kretsch*, (S. D. N. Y. 1909) 172 Fed. 523, 22 Am. Bankr. Rep. 284; *In re Singer*, (E. D. Pa. 1909) 174 Fed. 208, 23 Am. Bankr. Rep. 28; *In re Bronstein*, (S. D. N. Y. 1910) 182 Fed. 349.

Giving false testimony.—The judge of a bankruptcy court has jurisdiction to sum-

marily punish, for contempt, misbehavior of the bankrupt and the giving of false testimony. *In re Shear*, (W. D. N. Y. 1911) 188 Fed. 677.

Where a bankrupt on his examination was guilty of contumacious conduct and false swearing, it was held that the scope of the bankruptcy court's jurisdiction to punish him depended on the interference with the exercise of the court's jurisdiction, and not on the injury to the public welfare and morals, which is the basis of punishment for perjury. *In re Wiesebrock*, (E. D. N. Y. 1911) 188 Fed. 757.

Evasive testimony.—Where a bankrupt, after being sworn before the referee, in an examination concerning his property, by answers of "I don't remember," and "What do you mean?" etc., evinced a deliberate purpose to conceal the truth and prevent the trustee from learning the facts which would lead to a recovery of the missing property, it was held that the referee was not bound to continue the examination, but was justified in instituting contempt proceedings against the bankrupt prior to the conclusion of his testimony, and before he had been cross-examined. *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, 23 Am. Bankr. Rep. 809.

Refusal to answer improper questions.— It has been held that an attorney who has been adjudged bankrupt may raise any question of law which could have been raised had he been represented by another. General order No. 4 gives him the right to represent

himself, and where his objections to his examination are *bona fide* and well founded, there is no contempt in his declining to answer. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

[*When tender of mileage necessary.*] *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him: [(1898) 30 Stat. L. 556.]

Attendance not compulsory.— One cannot be compelled to attend a reference in bankruptcy within the state of his residence but at a distance of more than one hundred miles

from where he resides. *In re Hemstreet*, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760.

b [*Contempt proceedings — penalty.*] The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. [(1898) 30 Stat. L. 556.]

Proceedings before referee for contempt.— The referee exercises a judicial office, and, while he cannot himself punish for contempt, he may take the needful preliminary steps to bring the bankrupt's conduct to the attention of the court; and he need not give notice of his intention so to do. The contempt is committed in his presence; and in asking that the court investigate the matter further, he is acting on his official responsibility. The court will then give the bankrupt notice of the proceeding, and will afford him an opportunity to be heard. If, however, the referee does not choose to act upon his own motion, the situation is on a different footing. It is then an ordinary dispute between the party presenting the petition and the bankrupt, and the usual course of notice and a hearing should be followed. *In re Magen*, (E. D. Pa. 1910) 179 Fed. 572.

Proceedings before judge — Proceeding based on referee's certificate.— A court of bankruptcy has no power to commit any person for a contempt committed before a referee, except strictly in accordance with the provisions of section 41b, which requires that the proceedings shall be based on a certificate of the referee. *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113.

But the referee's failure to certify disobedience of a proper order to the court for action, while an irregularity, is not a jurisdictional defect in proceedings to punish the person guilty of such disobedience as for contempt, so as to subject the commitment to collateral attack by habeas corpus. U. S. v. Henkel, (S. D. N. Y. 1911) 185 Fed. 553.

Formal proceedings.— The trustee should file a formal proceeding setting forth the alleged contempt of which he claims the bank-

rupt to be guilty; and if he fails to do so, there is no error in dismissing the proceedings. *McNeil v. McCormack*, (5th Cir. 1910) 182 Fed. 808, 105 C. C. A. 240.

But it has been held that contempt proceedings against a bankrupt are not required to be formal, but may be instituted by a petition sufficient to notify the bankrupt of the charge made against him, which may be established by affidavits. *In re Cole*, (C. C. A. 1st Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761.

A rule requiring a bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him during his examination before the referee is sufficient although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, from which they fully appear. U. S. v. Goldstein, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

Wilful disobedience must be alleged.— It has been held that a bankrupt cannot be punished for contempt merely on an allegation that he disobeyed an order directing him to turn over property to the trustee. It must be alleged that the disobedience was wilful and not the result of inability to comply therewith. *In re Cole*, (1st Cir. 1908) 163 Fed. 180, 90 C. C. A. 50, 20 Am. Bankr. Rep. 761.

Common-law rules applicable.— The statute permits the application of the common-law rules applicable to a proceeding for contempt in whatever way it arises. *In re Goodrich*, (C. C. A. 1st Cir. 1910) 184 Fed. 5.

Defensive pleading.— It is often advantageous to set out the defense in a definite manner so that the court may pass on it in-

telligently with a view of bringing the issues clearly before the appellate tribunal; but unnecessary and dilatory pleading should not be permitted. *In re Goodrich*, (C. C. A. 1st Cir. 1910) 184 Fed. 5.

A party to an order made by a referee in bankruptcy cannot ignore the order until the referee certifies his disobedience to the judge, and then, on the summary hearing for which the statute provides, set up in defense matters contested before the referee, unless they show want of jurisdiction to make the order. *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

Notice of proceedings necessary.—Before a bankrupt can be punished for contempt he must have notice of the proposed action, and an opportunity to contest the questions of fact and of law involved. *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338; *In re Stavrahn*, (2d Cir. 1909) 174 Fed. 330, 98 C. C. A. 202; *McNeil v. McCormack*, (5th Cir. 1910) 182 Fed. 808, 105 C. C. A. 240; *In re Banzai Mfg. Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 298.

A court of bankruptcy is without power, on an oral motion by counsel for a receiver, to make an order requiring a person, not a party to any proceeding before it, to appear before a referee and produce a document, where he was not brought before the court by the service of any notice, process, or rule to show cause, and did not enter an appearance; and such an order is void, and its disobedience is not a contempt. *In re Johnson, etc.*, *Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50.

And it has been held that the record should show that the bankrupt had an opportunity to be heard, before the order punishing him for contempt is made. *In re Cole*, (1st Cir. 1908) 163 Fed. 180, 90 C. C. A. 50, 20 Am. Bankr. Rep. 761.

Hearing.—The hearing in proceedings for the punishment of a contempt committed before a referee must be had before a judge of the District Court; the referee has no jurisdiction over such proceeding. *In re Tudor*, (D. C. Colo.) 96 Fed. 942, 2 Am. Bankr. Rep. 808; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Duell*, (W. D. Mo. 1900) 100 Fed. 634, 4 Am. Bankr. Rep. 60; *In re Miller*, (N. D. Ia. 1900) 105 Fed. 57, 5 Am. Bankr. Rep. 184; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 291; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393; *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 466, 11 Am. Bankr. Rep. 360; *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep.

785; *In re Switzer*, (D. C. S. C. 1905) 140 Fed. 976, 15 Am. Bankr. Rep. 468; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818; *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919; *In re Cole*, (C. C. A. 1st Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, 23 Am. Bankr. Rep. 809; *McNeil v. McCormack*, (C. C. A. 5th Cir. 1910) 182 Fed. 808; *Magen v. Campbell*, (C. C. A. 3d Cir. 1911) 186 Fed. 675.

Hearing de novo.—In *McNeil v. McCormack*, (C. C. A. 5th Cir. 1910) 182 Fed. 808, it appears that the District Court, in reviewing a contempt proceeding against the bankrupt, ordered the counsel for the trustee, in compliance with the proper practice, to file a proceeding before the court, setting forth the alleged contempt with which the bankrupt was charged, and to give him an opportunity to be heard thereon, in the nature of an investigation *de novo*, before the court would adjudge him guilty of contempt and impose a penalty upon him; and thereupon counsel for the trustee declared their inability to furnish the evidence to support such charges, and stated that they would be obliged to rely solely upon the report of the testimony taken before the referee, and that they were unable to proceed otherwise, and on the strength of this statement the proceedings were dismissed, and it was held that such dismissal was not error.

But see *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501, wherein it appears that a bankrupt ignored an order of the referee directing him to pay to his trustee certain withheld assets, and that such order became final for want of a petition to review, and it was held that the court, on an application to punish the bankrupt for contempt, would not review the referee's finding of fact, which was the basis of the finding that the bankrupt had in his possession the assets which he was ordered to pay over.

Contemnor not entitled to jury trial.—It has been held that a bankrupt is not entitled to a trial by jury on a petition by the trustee to punish him for contempt. *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299, *affirmed* (9th Cir. 1900) 104 Fed. 1006, 43 C. C. A. 682.

Evidence.—*The testimony of the officers of a bankrupt corporation*, taken under either section 7a (9) or section 21a, and reduced to writing, is admissible against them in a subsequent proceeding by the trustee to require them to surrender money or property of the estate alleged to be in their possession or under their control. *In re Alphin, etc.*, *Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

Testimony taken at creditors' meetings.—In a proceeding to compel a bankrupt to pay over money alleged to be still in his hands, the stenographer's notes of the testimony of

the bankrupt taken at a creditors' meeting, called for the general purpose of inquiring into the bankrupt's affairs, is admissible; but the testimony given by other witnesses at such meetings is incompetent. *In re Wiesen*, (E. D. Pa. 1905) 135 Fed. 442, 14 Am. Bankr. Rep. 347.

Order of commitment.—An order of commitment of a bankruptcy court, directing that a person be imprisoned until he complies with an order made in a proceeding in equity under the Bankruptcy Act, is not invalid because it does not run in the name of the United States. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

The bankrupt cannot be ordered to turn over the property within a specified time or, failing to do so, be held guilty of contempt, as this would leave the question of his default and consequent contempt of court to be determined by the marshal. *In re Baum*, (8th Cir. 1909) 169 Fed. 410, 94 C. C. A. 632.

And where an order to turn over property to the trustee is made, it is error also to enter in substance a judgment for contempt accompanying an alternative order for committal, as the bankrupt is not in contempt until he has disobeyed the order. *In re Cole*, (1st Cir. 1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302, reversing on other grounds (D. C. Me. 1905) 135 Fed. 439, 14 Am. Bankr. Rep. 389.

In so far as it relates to a commitment to jail, it will not be presumed that the court intended to issue a commitment before judgment of contempt had been pronounced. *O'Connor v. Sunseri*, (C. C. A. 3d Cir. 1911) 184 Fed. 712.

Punishment.—In contempt proceedings against a bankrupt for the failure to turn over money or other property, the court is not authorized to imprison the bankrupt indefinitely, especially when it is not certainly known that he has the money or property which he is called upon to surrender. *In re Taylor*, (D. C. Colo. 1901) 114 Fed. 607, wherein the court ordered the bankrupt to

be discharged after he had served one month in jail for the failure to obey an order to turn over property to the trustee.

Section 41 does not invest the bankruptcy court with any broader powers in the matter of punishment for contempt than are possessed by other federal courts. *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393.

Commitment for failure to turn over assets not imprisonment for debt.—The obligation of a bankrupt to surrender to his trustee property in possession belonging to his estate is not an obligation to pay a debt, the title to such property being in the trustee; nor can the bankrupt, by refusing to comply with an order of court requiring him to make such surrender, convert himself into a debtor, so as to render his commitment therefor an imprisonment for debt. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Schlesinger*, (C. C. A. 2d Cir. 1900) 102 Fed. 117, 4 Am. Bankr. Rep. 361; *Schweer v. Brown*, (C. C. A. 8th Cir. 1904) 130 Fed. 329, 12 Am. Bankr. Rep. 178; *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 16 Am. Bankr. Rep. 163; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818.

Contempt proceedings do not bar recourse to other remedies.—A contempt proceeding does not prevent the trustee from pursuing any other remedies given for the collection of a judgment from an insolvent debtor. *In re Cole*, (C. C. A. 1st Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761.

In a habeas corpus proceeding to obtain relief from imprisonment for contempt, the petitioner is entitled to supplement the record by alleging such additional facts as tend to show that his misbehavior was not a contempt. *Ex p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196.

SEC. 42. RECORDS OF REFEREES.—*a* [*Manner of keeping.*] The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States. [(1898) 30 Stat. L. 556.]

Records should be complete.—The records in a bankruptcy matter at the time of the final closing of the estate should be full and complete, so that any one interested may at any time ascertain from them all the facts in regard to any given transaction, without extrinsic explanation; and until such a record is made by the officers chargeable with that duty, showing a compliance with the requirements of the statute and the rules of the court, a final settlement will not be ordered.

In re Carr, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

Upon final settlement of a bankrupt estate, a clear balance sheet should be presented, and proper vouchers should be filed, and the balance shown by such sheet should correspond with that shown by the statement of the depository, in which, by statute and rules, all funds of the estate are required to be deposited. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

b [*Books and papers.*] A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case. [(1898) 30 Stat. L. 556.]

c [Become part of court records.] The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court. [(1898) 30 Stat. L. 557.]

SEC. 43. REFEREE'S ABSENCE OR DISABILITY. — *a*. [Filling vacancy.] Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy. [(1898) 30 Stat. L. 557.]

Cross-reference: As to
Reference of cases to referees generally,
see section 22, *supra*, p. 593.

Absence or disability of referee. — When the referee to whom a case in bankruptcy would regularly be referred is absent or dis-

qualified, the judge may appoint a special referee and refer the case to him. This may be done before the answer of the alleged bankrupt is filed, and does not require the consent or approval of the respondent or his attorney. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

SEC. 44. APPOINTMENT OF TRUSTEES. — *a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so. [(1898) 30 Stat. L. 557.]

Appointment by creditors. — The bankrupt's creditors have the primary right to appoint the trustee for the bankrupt estate; and such right may be exercised at their first meeting or an adjournment thereof, or for the purpose of filling a vacancy, at any subsequent time. *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 391; *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Newton*, (C. C. A. 8th Cir. 1901) 107 Fed. 429, 6 Am. Bankr. Rep. 52; *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Nice*, (E. D. Pa. 1903) 123 Fed. 987, 10 Am. Bankr. Rep. 639; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 529; *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, *reversing* 19 Am. Bankr. Rep. 33; *In re Wright*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 497; *In re Rung*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 620; *Fowler v. Jenks*, (Minn. 1903) 11 Am. Bankr. Rep. 255; *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

Substantial right. — The right of creditors to select a trustee is a substantial one.

In re Malino, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

Creditors should have reasonable time to appoint. — The spirit of the act is in favor of giving the creditors every reasonable opportunity to exercise their undoubted power to choose a trustee. *In re Nice*, (E. D. Pa. 1903) 123 Fed. 987, 10 Am. Bankr. Rep. 639.

While the selection of a trustee cannot be tied up indefinitely by obstructive tactics, which are obviously for the purpose of delay (*In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123), and in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected, nevertheless the proceeding should not be so summary as to exclude the consideration of all objections. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

Prompt action essential. — But it is essential to the expeditious administration of the estate that the trustee should be appointed without undue delay, and the creditors will not be encouraged by allowing unusual or unnecessary postponements of the appointment; nor will such appointment be deferred because of dilatory tactics. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155; *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662; *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174; *In re Evening Standard*

Pub. Co., (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

Thus it has been held that whether the referee will or will not postpone the election of a trustee where claims are objected to is a matter of sound discretion; and if such a number of claims are duly objected to that an election by a majority in number and amount cannot be had, then, if the circumstances demand it, he may and should himself appoint the trustee. *In re Evening Standard Pub. Co.*, (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

And where, at the first meeting of the creditors of a bankrupt, there was a contest over the election of trustee, and oral objections were made by the attorneys for one party to practically all of the duly proved claims of the other party, in support of which no proof was presented or offered, it was held that such objections were not sufficient to require the referee to adjourn the meeting until they could be tried, before proceeding with the election of the trustee. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174.

Creditors must be present at election.—Claims of creditors who are not present at the meeting at which the appointment is made are not to be considered in choosing a trustee, even though such claims have been allowed. *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669.

If the majority of the creditors are present at all, they are present for all purposes. If they are not present, then the minority creditors who were present have the right to conduct the meeting, and where their candidate for trustee receives the votes of the majority in number and value of the creditors present, the referee is without power to disregard that result. *In re Kaufman*, (W. D. Ky. 1910) 179 Fed. 552. See also *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662.

Appointment unnecessary in absence of assets.—In a case of voluntary bankruptcy, if no substantial assets are disclosed by the schedules, or discovered *aliunde*, the appointment of a trustee is not indispensable. *In re Levy*, (E. D. Wis. 1900) 101 Fed. 247.

Appointment on vacancy.—If a person chosen as trustee by the creditors is disapproved by the court, or declines to act, or fails to qualify, there is a vacancy in the office, and a new election must be had by the creditors, if that is practicable. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299.

Where a trustee in bankruptcy absconded after embezzling the funds of the estate, such conduct amounts to an abandonment of his office, which is thereby vacated; and a new trustee may be appointed without notice to the absconder or a hearing for his removal. *Scotfield v. U. S.*, (C. C. A. 8th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

Appointment on discovery of assets.—In a case of voluntary bankruptcy, where no trustee was appointed for the reason that the schedule showed no assets, and no creditors attended the first meeting, if the referee afterwards learns that property of the

bankrupt has been found, which creditors claim as assets of the estate, a trustee should then be appointed, according to general order No. 15. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

Appointment on reopening.—Where an estate has been reopened after the trustee has been discharged, it devolves upon the creditors to appoint a new trustee. *In re Newton*, (8th Cir. 1901) 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52; *Fowler v. Jenks*, (Minn. 1903) 11 Am. Bankr. Rep. 255.

Creditors' appointment subject to approval.—The selection of a trustee by the creditors is subject to the approval of the referee or the district judge, but where, for good cause shown, the referee or judge disapproves the appointment, the creditors should be permitted to select another person as trustee. *In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 25; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611; *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 533; *In re Van De Mark*, (W. D. N. Y. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760. And see the annotation under section 45, *infra*, p. 680.

Selection of creditors usually permitted to stand.—The right to elect a trustee for a bankrupt being given to the creditors, their election should be permitted to stand, unless it clearly appears that, in conducting it, some principle of law intended to secure the administration of the bankrupt's estate in the interest of his creditors has been violated. *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 529.

The selection by a bankrupt's creditors of a trustee is not to be interfered with by the court unless it clearly imperils the fair and efficient administration of the estate. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

Review by judge.—The action of the referee, in the approval or disapproval of the trustee chosen by the creditors, may be reviewed by the judge of the District Court. *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545.

It is discretionary with the district judge to vacate the appointment of a trustee, by the referee, whose election has been improperly influenced. *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545.

Review of evidence.—On a petition by creditors for a review of an order appointing a trustee, if the creditors desire a review of the evidence, they should either have the evidence before the referee taken down stenographically, and by him certified to the judge, or should specifically point out to the

referee the testimony which they wish summarized, and should ask him to certify specific findings of fact. *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

Improper or irregular vote for trustee.—The selection of a trustee by creditors may, and usually will, be set aside where the meeting at which the selection was made was improperly or irregularly conducted, to such an extent that it cannot be said that the trustee appointed was fairly chosen. So also the selection will be set aside where persons, disqualified for this purpose, were allowed to vote, where it appears that the selection made was the result of such voting. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Anson Mercantile Co.*, (N. D. Tex. 1911) 185 Fed. 993. See also cases cited under sec. 56, *infra*, p. 698.

Selection in interest of bankrupt.—As to the availability of an objection that the trustee is favorable to, or chosen in the interest of, the bankrupt, see the annotation under section 45, *infra*, p. 680.

Effect of subsequent allowance of excluded claims.—Where claims, offered for proof and allowance at a meeting of creditors of a bankrupt, which are excluded from voting in the election of the trustee, being postponed for future consideration or disallowed, are afterwards allowed on hearing or on appeal, the court may set aside the election, and order a new vote to be taken, if it is made to appear that the result would be changed by allowing votes to be cast on such claims, but not otherwise. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695.

Votes cast on improperly procured proxies.—Creditors represented by proxies whose powers of attorney do not lawfully authorize them to participate in the meeting, because of having been obtained by the bankrupt to be voted for a trustee of his choice, will not be counted as present and necessary for the choice of trustee. *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155.

Effect of failure to object at creditors' meeting.—An objection that the claim of a creditor is defective in that it was verified by his attorney without any statement of a reason therefor, while good if interposed at the creditors' meeting before the vote was taken for trustee, when, in the discretion of the referee, it could have been amended in time to permit the creditor to vote, is unsustainable when not interposed until after the appointment and qualification of the trustee. *In re Stradley*, (N. D. Ala. 1911) 187 Fed. 285.

Vote for ineligible person.—Votes voluntarily cast for a trustee by creditors of a bankrupt, acting in their own behalf, cannot be rejected and ignored because the person voted for was one who could not be approved by the court. *In re Machin*, (E. D.

Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449.

A stockholder, director, or employee of a bankrupt corporation, if also a creditor, is entitled to vote for trustee. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174; *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545, 24 Am. Bankr. Rep. 252; *In re Stradley*, (N. D. Ala. 1911) 187 Fed. 285.

When court may appoint trustee.—Where the creditors fail to appoint a trustee within a reasonable time, the court may do so, under the express terms of the statute. *In re Kuffler*, (S. D. N. Y. 1899) 97 Fed. 187, 3 Am. Bankr. Rep. 162; *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Brooke*, (E. D. Pa. 1900) 100 Fed. 432, 4 Am. Bankr. Rep. 50; *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662; *In re Machin*, (E. D. Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449, *distinguishing In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218; *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

Where the vote results in a failure to select a trustee by the requisite number of creditors and amount of claims, and no request for a second election is made, the referee is authorized to make the selection himself. *In re Machin*, (E. D. Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449, *distinguishing In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218.

When the creditors in attendance cannot make a selection, as where a majority in number vote for one person, and a majority in amount for another, the referee may appoint the person favored by a majority of the creditors. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631.

Where validity of claims could not be promptly passed upon.—Where, at the first meeting of the creditors of a bankrupt, the referee found it impracticable to pass on the validity of the claims there presented, because a large number of them were attacked by other creditors, and therefore continued the consideration thereof, it was held that, it being impossible to select a trustee in the ordinary manner, it was proper for the referee to appoint one of his own selection. *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

But an appointment cannot be made by the court unless the creditors neglect or fail to make a choice upon opportunity afforded them, when practicable, so to do. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr.

Rep. 366; *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

Court cannot appoint on disapproval.—A referee has no authority to appoint merely because he disapproves the appointment made by the creditors; but in such case another meeting of creditors must be called to make the appointment. *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303.

Court cannot appoint third trustee, where only two were chosen by creditors.—Where the creditors of a bankrupt elected two trustees at the first meeting, instead of three, the referee has no power to fill the vacancy in the office of the third trustee, unless the creditors, after the calling of another meeting by the referee, have themselves failed to do so. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

Irregular appointment by court not subject to collateral attack.—But where a trustee in bankruptcy absconded, and was removed, it was held that the appointment of a new trustee by the court, without calling a meeting of the creditors for an election, was at most an irregularity, and that the legality of the appointment could not be questioned collaterally. *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

Appointment of attorney for trustee.—The general rule is that the trustee has the right to select his own attorney, subject only to the control of the court. *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272; *In re Rusch*,

(E. D. Wis. 1900) 105 Fed. 607, 5 Am. Bankr. Rep. 565; *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 525, 9 Am. Bankr. Rep. 406; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

Court will not instruct as to attorney's selection.—The court will not undertake to give any direction in advance to a trustee in bankruptcy in the matter of the employment of an attorney; the trustee must exercise his own judgment, in the first instance, as to the necessity for such employment. *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272.

Error to allow creditors to select attorney for trustee.—It is error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

Where there are disagreements between factions of creditors as to the manner of administering a bankrupt estate, the court will not approve the selection by the trustee of an attorney who also represents and continues to act for certain of the creditors. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

But it has been held that the creditors should appoint the trustee's attorney in the same manner as the trustee himself was chosen. *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

And in *In re Arnett*, (W. D. Tenn. 1901) 112 Fed. 770, 7 Am. Bankr. Rep. 522, it was held that, under circumstances warranting it, the court will appoint counsel to act for the trustee.

SEC. 45. QUALIFICATIONS OF TRUSTEES. — a Trustees may be [(1898) 30 Stat. L. 557.]

(1) [*Individuals.*] individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or [(1898) 30 Stat. L. 557.]

Competency of trustee.—A trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independence and responsibility. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Rekersdres*, (S. D. N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 129 Fed. 622, 12 Am. Bankr. Rep. 94; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

A bankrupt who has not been discharged is not a proper person to act as trustee of the estate of another bankrupt. *In the Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

Alien may be trustee.—A person is not disqualified from acting as a trustee in bankruptcy because he is an alien, if he is competent to perform the duties, and resides or has an office in the district, and is duly chosen by the creditors. *In re Coe*, (S. D. N. Y. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715.

One who advised commission of act of bankruptcy may be selected as trustee.—The fact that one who is chosen by the creditors as a trustee in bankruptcy advised the voluntary assignment under the state law which constituted the act of bankruptcy, does not render him incompetent as trustee. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

Mere allegations of hostility and bias immaterial.—When one of the bankrupt's creditors has been chosen as trustee by the unanimous vote of a large body of the creditors present at the meeting, and nothing appears

to impugn his competency or integrity, his election will not be set aside by the court, at the instance of the bankrupt, on allegations by the latter of hostility and bias against him on the part of such trustee, especially where such animosity, if it exists, may have been caused by the bankrupt's own fault. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299.

Stockholder in creditor corporation.—It has been held that the mere fact that a trustee is a stockholder in a corporation having a claim filed amounting to nearly one-half of the bankrupt's entire indebtedness, and that it might become the trustee's duty to move to have such claim expunged or reduced, did not render such trustee ineligible to act. *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31.

Director of corporation as its trustee.—Where three trustees were elected for a bankrupt corporation, it has been held that it is no ground of objection that one of them is a director of such corporation. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174.

Stockholder and attorney.—But where a trustee chosen to administer the assets of a bankrupt corporation, by a majority of the creditors, was not only a stockholder in the corporation, but had been closely associated as attorney for those who had previously been in control, and whose management was not only the subject of criticism but might call for action on the part of the trustee to hold them personally responsible, such trustee, though unobjectionable personally, should not be permitted to act over the objections of a minority. *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 129 Fed. 622, 12 Am. Bankr. Rep. 94.

Where an attorney accepts the office of trustee, he surrenders for the time his standing in the court of bankruptcy as an attorney for creditors. *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

Trustee chosen in interest of bankrupt.—The decisions are unanimous to the effect that the appointment of a trustee will be disapproved where his selection was brought about by the bankrupt, or by others in the interest of the bankrupt. *In re Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 115; *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 156; *In re Rekersdres*, (S. D.

N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305; *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Day*, (S. D. N. Y. 1909) 174 Fed. 164, 23 Am. Bankr. Rep. 56; *In re Van De Mark*, (W. D. N. Y. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760; *In re Sitting*, (N. D. N. Y. 1910) 182 Fed. 917, 25 Am. Bankr. Rep. 682; *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

A question as to whether there is any collusion with the bankrupt is one which should be definitely disposed of before the appointment; and, if there appears to be reasonable cause to believe that such collusion exists, the referee should decline to receive the collusive votes. *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85.

But where an attorney's retainer for a bankrupt was limited to the filing of the bankrupt's petition, and the latter paid him no fee, it was held that the attorney was not disqualified to accept claims from creditors sent to him thereafter without his solicitation or the procurement of the bankrupt, and to vote on such claims for the election of a trustee. *In re Cooper*, (E. D. Pa. 1905) 135 Fed. 196, 14 Am. Bankr. Rep. 320.

Friendly trustee.—There are instances, however, where a "friendly" trustee may be chosen; harmony of action between an honest bankrupt and an honest trustee tends to promote the creditors' interests, and there is no law against the election of a person as trustee merely because he is acceptable to the bankrupt. *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

Trustee's Residence.—The phrase "reside or have an office" has reference to the actual presence of the trustee within the judicial district, rather than a legal or voting residence. *In re Seider*, (E. D. N. Y. 1908) 163 Fed. 139, 20 Am. Bankr. Rep. 708.

Residence where assets are situated unnecessary.—Where a majority of the creditors in number and in amount of claims have voted for one person for trustee, the referee is not justified in refusing to ratify his election solely because he does not reside in the county where the assets are situated, and in appointing another person trustee. *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728.

(2) [*Corporations.*] corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. [(1898) 30 Stat. L. 557.]

SEC. 46. DEATH OR REMOVAL OF TRUSTEES. — a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor. [(1898) 30 Stat. L. 557.]

Removal of trustee.—Under general order No. 13, the power to remove a trustee is vested in the judge only. *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

Referee cannot remove trustee.—An order of the referee purporting to remove a trustee in bankruptcy is void. *In re Berree*, (E. D. Pa. 1911) 185 Fed. 224.

Ground for removal.—The joining of the trustee with the bankrupt to effect a composition to the detriment of creditors, by means of false representations as to the as-

sets, is ground for the trustee's removal. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

Change of residence immaterial.—A trustee in bankruptcy, who at the time of his appointment resided in the district of his appointment, and who then had and still has an office therein, is not subject to removal because he has changed his legal residence to another district, provided that such change does not interfere with the performance of his duties, nor render it difficult for persons interested to communicate with or serve notices upon him. *In re Seider*, (E. D. N. Y. 1908) 163 Fed. 138, 20 Am. Bankr. Rep. 708.

SEC. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively [(1898) 30 Stat. L. 557.]

(1) [*Account and pay over.*] account for and pay over to the estates under their control all interest received by them upon property of such estates; [(1898) 30 Stat. L. 557.]

(2) [*Reduce property to money—close up estate.*] collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; [(Amended 1910) 36 Stat. L. 840.]

Cross-references: As to

Avoidance of preferences, see section 60b, *infra*, p. 739.

Avoidance of fraudulent transfers, see sections 67e and 70e; see also section 70a (4).

Jurisdiction of referee, see section 38a (3) and (4), *supra*, p. 659.

Jurisdiction as to adverse claimants, see section 23 a and b, *supra*, pp. 594, 595.

The terms "property" and "estates" of bankrupts are used in section 47a (2) in the broadest sense, and are intended to include every species of property, not legally exempt, that can be made available for the benefit of creditors. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Collection and reduction of assets.—It is mandatory that the trustee should, as expeditiously as may be compatible with the best interests of the estate, collect and reduce to money all the assets thereof, in accordance with the statutory provision. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406; *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698; *In re Reinboth*, (C. C. A. 2d Cir. 1907) 157 Fed. 672, 19 Am. Bankr. Rep. 15; *In re Hecox*,

(C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *In re Munger Vehicle Tire Co.*, (C. C. A. 2d Cir. 1908) 168 Fed. 910, 21 Am. Bankr. Rep. 395; *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

A trustee in bankruptcy is bound to use due diligence to get in the assets of the estate, and may be charged in his account with the value of assets which never came into his possession if he failed in his duty; and where a prima facie case of negligence is shown, the burden rests on him to disprove it. *In re Reinboth*, (C. C. A. 2d Cir. 1907) 157 Fed. 672, 19 Am. Bankr. Rep. 15.

A bankrupt's trustee, representing not only the bankrupt but the general creditors, must realize from the estate all that he can for distribution. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

Assessment of stockholders.—A court of bankruptcy has power, in a proper case, to order an assessment on the stockholders of a bankrupt corporation for unpaid subscriptions, which constitute a trust fund for the benefit of its general creditors, and the stockholders are not necessary parties to an application for such an order. *In re Miller Electrical Maintenance Co.*, (W. D. Pa. 1901) 111 Fed. 515, 6 Am. Bankr. Rep. 701.

Trustee's right to collect assets.—Since the amendment of 1910 decisions holding that a trustee has no other right than belonged to

the bankrupt are no longer controlling. The trustee now has all the rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied. *In re Gehris-Herbine Co.*, (E. D. Pa. 1911) 188 Fed. 502.

In his representative capacity a bankrupt's trustee may assert claims, avoid preferences, and collect assets where the bankrupt, if there had been no bankruptcy, could not act. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

A trustee is not, like a receiver, a mere caretaker and manager of the estate to execute the orders of the court in the progress of administration, but he is the agent of the creditors, selected by them as a man of affairs to conduct the business of collecting the assets and distributing the proceeds among the creditors. The statute invests him with the title of the bankrupt, and makes him not only quasi owner, but the owner *pro hac* of all the property and rights of action belonging to the bankrupt. The management of the estate is committed to his discretion, and he is expected to exercise his powers and discharge his duties with the same intelligence that an owner would do, subject, of course, primarily, to the supervision of the creditors in their meetings called for the purpose, and the whole administration subject to the supervision of the court of bankruptcy. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

Right to possession.—On an adjudication in bankruptcy the trustee, on his appointment, is entitled to the possession of property of the bankrupt in the possession of a receiver appointed by a state court within four months; and if such right is not recognized it is competent for, and the duty of, the bankruptcy court to enforce it. *Hooks v. Aldridge*, (C. C. A. 5th Cir. 1906) 145 Fed. 865, 16 Am. Bankr. Rep. 658; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314.

Right to subrogation.—A bankrupt's trustee may pay out of the funds in his hands a debt secured by collateral in excess of the amount thereof, and claim subrogation to the rights of the creditor, for the benefit of the general creditors. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

A trustee in bankruptcy represents only creditors who were such at the time of the filing of the petition, and he cannot assert rights as the representative of creditors who were parties to a prior composition with the bankrupt which they have not sought to avoid. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

Actions by trustee.—**Scope of treatment.**—In the performance of his duties, under section 47a (2), a trustee in bankruptcy has the undoubted right to bring action in any suitable form for the purpose of recovering possession of the property of the bankrupt estate, or, as expressed in the Act, for the purpose of collecting and reducing the assets to money. This subject has necessarily been considered under several sections throughout the statute, and it would serve no useful pur-

pose to reiterate here such matters as are fully set out elsewhere; thus the jurisdiction of the referee to make an order to turn over property to the trustee in bankruptcy has been considered under section 38a (4), and also incidentally under section 23b; and the right to enforce such an order by proceedings for contempt has been treated generally under section 41a (1). The right to proceed against adverse claimants, and the jurisdiction of actions of that character, have been considered under section 23b; while actions in the Circuit Court (now the District Court), by or against adverse claimants, have been considered under section 23a. So, also, under section 60b, consideration has been given to actions for the recovery of voidable preferences; and the right of the trustee to recover property transferred in fraud of creditors within the four-months period is considered under section 67e; while his right to recover property transferred generally in fraud of creditors has been considered under section 70e, and the trustee's rights generally, as the owner of the property of the bankrupt estate, have been considered under the various subdivisions of section 70.

Trustee's duty to litigate questions, etc.—In *In re Baird*, (E. D. Pa. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 448, McPherson, J., said: "It is certainly not the duty of a trustee to litigate every question that may be called to his notice by the creditors, however frivolous or apparently lacking in support it may be. On the other hand, he should not be permitted, by requiring indemnity in every instance against the costs and expenses of a suit, to cast the risk of controversy upon the particular creditor who may request him to undertake it. A general rule upon this subject would be very difficult to lay down, and I shall not essay the enterprise. It may be safely said, however, that if a trustee bears in mind that he is the representative of the estate considered as a whole, is bound to be vigilant and attentive in advancing its interests, and is under obligation to seek to carry out in the strictest good faith the provisions of the Bankrupt Act where they seem to apply plainly to the estate committed to his charge, he is not likely to go far wrong in doing, or in refusing to do, what may be asked of him by the creditors. In doubtful cases the referee and the court will solve his perplexities."

But it has been held that the trustee will not be permitted to seek the advice of the court upon a mere question of law about which he should have consulted an attorney, or, if necessary, tested the question by an action at law. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

On an application of a trustee in bankruptcy to the court for advice as to whether he should file a petition to have the claim of a creditor expunged for fraud, the referee has no authority to hear and determine the subject-matter of such petition on the merits. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

Trustee should have probable cause for action.—The duty of the trustee to insti-

tute litigation does not mean that he should burden the assets of the estate with costs and expenses arising out of all manner of questions that may be presented for litigation. There should be probable cause at least for believing that a right of action exists before the bankrupt estate is so burdened. *In re Meadows*, (W. D. N. Y. 1910) 181 Fed. 911.

When trustee may abandon claims.—It is not the privilege of a trustee in bankruptcy to use the estate committed to his charge to settle questions of law which may arise; and if success is doubtful in case of a claim alleged to be due the estate, and the result, if successful, will not enhance the value of the estate after paying the expense, it is his duty as a general rule to abandon the claim, unless at least a substantial majority of the creditors desire the litigation to proceed. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

Suit against corporation of which trustee is director.—Where one of three trustees of a bankrupt corporation is also one of its directors, an action against all of the directors may be maintained by the other trustees. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 174.

Trustee cannot sue on agreement with state receiver.—A bankrupt's trustee has no right to sue on an agreement made between state receivers of the bankrupt and one of its creditors. *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171.

If the trustee has an adequate remedy at law, a bill in equity cannot be maintained in any court. Whatever equitable jurisdiction may have been conferred upon the District Court by the Bankruptcy Act is confined to controversies relating to a bankrupt estate. Within this limited area whether or not a bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law. *Sessler v. Nemcof*, (E. D. Pa. 1910) 183 Fed. 658.

Sales of property—Court has discretionary control of sales.—As respects trustees, and their proceedings in selling the property of bankrupts, section 47a (2) vests the bankruptcy court with complete discretionary power of control. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481. And see also the annotation under section 70b.

Court may entertain proposition to purchase assets.—The court has full power to entertain, and in its discretion to accept, a proposition to buy the assets of the estate; and when it does so and the contract raised by such judicial determination has been in part executed, but not wholly so, the matter remains in process of administration by the court of bankruptcy, and cannot be disturbed or changed without seriously impeding the enforcement of the act interfering with the administration of the estate. In such case there can be little doubt of the power of the court to restrain by injunction any proceeding

which will have a damaging effect. *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549.

Sale must be for fair consideration.—The trustee has no power or authority to divest himself of title to any portion of the estate, except for full and fair consideration. *In re Nunn*, (S. D. Ga.) 2 Am. Bankr. Rep. 664.

May sell remainder interest.—The bankruptcy court has jurisdiction to sell a remainder interest of the bankrupt in certain real property, and pay off a judgment lien thereon if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the general creditors, but the judgment lien and all rights accruing therefrom must be respected. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

Court may control selection of auctioneer.—In the exercise of the direction of section 47a (2), the court may, if it sees fit, in a particular case, disapprove the selection of an auctioneer to sell the property, which the trustee has made, and order him to select another designated by the court. And it seems that the court may make orders concerning the selection of an auctioneer even before the appointment of one by the trustee. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481.

Court may compel payment.—A federal District Court, in which a bankruptcy proceeding is pending, has jurisdiction to compel the payment to the trustee of the proceeds of a sale of the bankrupt's assets by virtue of section 47a (2). *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714.

Bankrupt corporation cannot interfere with purchaser of its business, good will, and name.—In *S. F. Myers Co. v. Tuttle*, (S. D. N. Y. 1911) 188 Fed. 532, it appears that the S. F. Myers Company, doing a mail order jewelry business, became bankrupt, and its assets, including its good will and corporate name, were purchased by T. Thereafter the sons of Myers formed a corporation called the "S. F. Myers' Sons Company" and undertook to carry on a similar business at the same place occupied by the bankrupt corporation. This was enjoined, at the suit of T., and the new corporation was ordered either to change its name, so as not to produce confusion, or change its place of business; it also being enjoined from interfering with the business carried on by T. under the name of the old corporation. And it was held that the old corporation, having obtained a discharge in bankruptcy, but having no assets, was not entitled to enjoin T. from continuing to use the name of the old corporation; but such corporation could be restrained from interfering with the business of T. which he was carrying on under such name.

Trustee amenable to court.—While the Bankruptcy Act creates the office of trustee in bankruptcy, such trustee is a quasi officer of the court in a qualified sense. *McLean v. Mayo*, (E. D. N. C. 1901) 113 Fed. 106, 7 Am. Bankr. Rep. 115.

A trustee in bankruptcy is an officer of the court, and as such is subject to its direction

by order made in summary proceedings, in all matters concerning money or property which may have come into his possession by virtue of his office. *In re Howard*, (N. D. Cal. 1904) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

Trustee entitled to protection.—The bankruptcy court will protect the trustee in the discharge of his quasi-official duties. *McLean*

v. Mayo, (E. D. N. C. 1901) 113 Fed. 106, 7 Am. Bankr. Rep. 115.

The trustee in bankruptcy is not liable to an action in the state court as for trespass, trover, or conversion, when he follows the order of the court in disposing of property in its possession. *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

(3) [*Deposit money.*] deposit all money received by them in one of the designated depositories; [(1898) 30 Stat. L. 557.]

Deposits.—It is the duty of the trustee to deposit all funds of the estate in a designated depository to the credit of the court or judge, designating the estate to which they belong. *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 572, 9 Am. Bankr. Rep. 58; *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574; *In re Hoyt*,

(E. D. N. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349.

To deposit the funds of a bankrupt estate in any bank other than a designated depository renders the officers making such deposit liable. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

(4) [*Disburse money.*] disburse money only by check or draft on the depositories in which it has been deposited; [(1898) 30 Stat. L. 557.]

Disbursements.—Funds can only be paid out on checks countersigned by the judge, or some person designated by him. The paying out of funds in any other manner is irregular. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202; *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635; *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574; *In re Hoyt*, (E. D. N. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

Payment to attorney for client.—Checks issued by a trustee in payment of dividends, if made payable to attorneys, should designate them as such, and they must also, in compliance with the rules, state the account on which they are drawn, to constitute proper vouchers corresponding with the dividend sheet. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635 (decided under a local rule).

Checks must correspond with dividend sheet.—Checks payable to persons whose names do not appear on the dividend sheet, and which do not show the particular claims covered thereby, or the authority of the payee to receive them, will not be approved as proper vouchers. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635 (decided under a local rule).

Opportunity for appeal should be given.—Trustees in bankruptcy should not execute orders of referees on contested claims for the payment of money until opportunity for appeal or review has been given. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

The irregular payment of funds, under rule 10 of the District Court for the eastern district of North Carolina, subjects both trustee and depository to liability on their bonds, and to attachment for contempt. *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202; *In re Hoyt*, (E. D. N. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784.

(5) [*Furnish information.*] furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; [(1898) 30 Stat. L. 557.]

Information concerning the estate must be furnished by the trustee to all parties in interest. *In re Saur*, (S. D. N. Y. 1903) 122 Fed. 101, 10 Am. Bankr. Rep. 353.

A creditor is a "party in interest," within section 47a (5), even though he has not formally proved his claim. *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

(6) [*Keep accounts.*] keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; [(1898) 30 Stat. L. 557.]

(7) [*Make detailed statement.*] lay before the final meeting of the creditors detailed statements of the administration of the estates; [(1898) 30 Stat. L. 557.]

(8) [*Make final reports.*] make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; [(1898) 30 Stat. L. 557.]

The duty to file final accounts will be enforced by the court when necessary. *O'Conner v. Sunseri*, 26 Am. Bankr. Rep. 1.

(9) [*Pay dividends.*] pay dividends within ten days after they are declared by the referees; [(1898) 30 Stat. L. 557.]

(10) [*Report condition of estate.*] report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and [(1898) 30 Stat. L. 557.]

(11) [*Set apart exemptions.*] set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment. [(1898) 30 Stat. L. 557.]

Cross-reference: As to

Exemptions generally, see section 6, *supra*, p. 508.

Setting apart exemptions.—The trustee is bound, as soon as he conveniently can, to set apart the bankrupt's exemptions, and to report the items and value thereof to the court. *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160; *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Lynch*, (S. D. Ga. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 263; *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613; *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Gordon*, (D. C. Vt. 1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; *In re Soper*, (D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868; *In re Wishnefsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Maynard*, (N. D. Ga. 1910) 183 Fed. 823; *In re Nunn*, (S. D. Ga. 1899) 2 Am. Bankr. Rep. 664; *Bell v. Dawson Grocery Co.*, (Ga. 1904) 12 Am. Bankr. Rep. 159; *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of Cotton*,

(S. D. Ga. 1909) 23 Am. Bankr. Rep. 586; *In re Cotton*, 25 Am. Bankr. Rep. 532.

General order No. 17 prescribes the procedure to be pursued by the trustee in setting apart exempt property, and the time and manner in which exceptions may be taken to his report. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

Provisions as to exemptions are mandatory.—The provisions of the bankruptcy law requiring the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, are mandatory, and these duties cannot be performed by any one else. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160.

A payment to a bankrupt by his trustee of a sum claimed as an exemption, from the funds of the estate, will not be allowed on settlement of the estate, where it does not appear that the exemption was set aside by the trustee as required by the Bankruptcy Act. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

Trustee acts ministerially.—In setting apart the property claimed by a bankrupt as exempt, after its appraisal, the trustee acts ministerially. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

Exemption should be set aside promptly.—It is the duty of the trustee to set apart the bankrupt's exemptions as soon as practicable after his appointment, without waiting until such exemptions shall have been allowed and set apart by state officers according to the procedure prescribed by the laws of the state. *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165.

Trustee not entitled to indemnity bond.—A trustee in bankruptcy has no right to de-

mand from the bankrupt, as a condition upon his delivery to him of the property claimed as exempt and appraised for that purpose, a bond of indemnity. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

Trustee should deliver possession to bankrupt, in absence of objection.—It is the duty of a trustee in bankruptcy, who has set apart for the bankrupt the personal property selected by him as exempt, pursuant to an order of the referee, and reported the same, to which report no exception was taken, to deliver possession of such property to the bankrupt. *In re Soper*, (D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

Allowing exemption prior to appointment of trustee.—The determination of a bankrupt's claim to a homestead exemption by the referee before the appointment of a trustee, although informal, and not in accordance with the regular course of procedure, may be sanctioned by the court in the exercise of its equity powers, where it appears that the bankrupt has no property except that involved in the claim; so that, if the exemption should be allowed, there would be no occasion for the appointment of a trustee. *In re Allen*, (W. D. Va. 1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518.

Exemption from proceeds of sale.—Where property claimed by a bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale. *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432.

Exemption in lands without jurisdiction.—A court of bankruptcy is without jurisdiction to allot to a bankrupt, domiciled within its district, a homestead in lands situated in another district. *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472.

Trustee's action not final.—While it is the duty of the trustee to set apart the exemption of the bankrupt, his action is not final, but the courts of bankruptcy are expressly given jurisdiction by section 2 (11) to determine all claims to exemptions. *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613.

The fact that a bankrupt accepted the benefit of an order of a referee allowing him certain personal property exemptions does not preclude him from appealing from a part of the same order relating to his homestead exemption. *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506.

The trustee has the right to refuse to set apart the exemptions claimed in the bankrupt's schedules, where the bankrupt is not entitled to them, even if the claim is correct in form. *In re Ellis*, (N. D. Ohio 1903) 10 Am. Bankr. Rep. 754.

But it must be for some gross fault that a claim to exemption should be disallowed. *In re Tollett*, (6th Cir. 1901) 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, 5 Am. Bankr. Rep. 404; *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486,

14 Am. Bankr. Rep. 31; *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (C. C. A. 3d Cir. 1909) 174 Fed. 642, 23 Am. Bankr. Rep. 487.

Effect of setting apart of exempt property—Jurisdiction of bankruptcy court ceases.

—When the exempted property has been duly set apart to the bankrupt by the trustee, in accordance with the statutory mandate, the jurisdiction of the bankruptcy court thereover ceases. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160; *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re Gordon*, (D. C. Vt. 1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411.

Exemption cannot be restored to former status.—After exempt property has been set aside, the court of bankruptcy will not, on the petition of a creditor claiming a lien on such property by virtue of a chattel mortgage, order the bankrupt to restore the property to the trustee, in order that it may be sold by the latter for the benefit of the mortgagee. *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349.

The trustee cannot administer on exempt property; nor can he determine the rights of creditors asserting waivers against it. After it has been set apart he loses all power and control over it. *Bell v. Dawson Grocery Co.*, (Ga. 1904) 12 Am. Bankr. Rep. 159.

General creditor's interest ceases on setting apart of exemptions.—Where property claimed by a bankrupt as exempt has been set apart and delivered to him by the trustee, it passes out of the possession and control of the court of bankruptcy, and the trustee has no right or title thereto, nor the general creditors any interest or equity in such property. *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349.

Rights of lienholder.—Setting aside property as exempt does not affect the rights of a lienholder, nor does it in any wise prevent a creditor, whose claim is not avoided by the discharge in bankruptcy, from proceeding against the property in the hands of the bankrupt, just as though he had not been adjudged a bankrupt. *In re Hartsell*, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177.

Enforcement of claim against exemption.

—Where a trustee in bankruptcy retains out of the proceeds of the sale of the bankrupt's property a certain sum for the benefit of any liens or claims that might be established against the property, a state court has jurisdiction to hear and determine an action brought against such trustee to enforce a chattel mortgage executed by the bankrupt, and to recover the amount due on a note which the mortgage was given to secure, if the bankruptcy court does not enjoin the prosecution of such action. *Skilton v. Codrington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

Estimating value of exemption.—The bankrupt may make his claim for exemptions, but the trustee must set it apart and estimate its value. *In re Osborn*, (W. D.

N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Manning*, (E. D. Pa. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571.

Valuation by sale.—It has been held that a practical method for the determination of disputes arising from the valuation of property claimed to be exempt is to order the property in question sold, the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state laws. *In re Lynch*, (S. D. Ga. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 263. See, also, *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111.

Where a trustee finds the homestead property of the bankrupt, which exceeds in value the homestead exemption, indivisible, he may apply to the referee for an order of sale. *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Agreement as to conclusiveness of appraisal.—An agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final and not subject to exception, is void; and an order made by the referee, by consent of parties in the terms of such agreement, will be set aside. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

Revaluation will be directed when necessary.—Where a trustee in bankruptcy, in setting apart to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers fifteen years before, when it was allotted to the bankrupt as a homestead under process of a state court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the state, the court of bankruptcy will direct the trustee to revalue the property, and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

Deduction from amount allowed as exempt—Where property is sold at bankrupt's request.—Where personal property which the bankrupts were entitled to claim as exempt was sold at the bankrupt's request that cash be allowed them instead of the property, the bankrupts should be charged with their percentage of the difference between the proceeds of the property and its appraised value, as against the amount of their exemptions. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

Storage charge deducted.—It has been held that if the trustee has no cash in hand with which to pay storage charges to a landlord whose property he has occupied for the storage of the bankrupt's goods, he may be ordered to sell sufficient personal property for that purpose; and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

Fees of court officers.—The exemptions allowed by the statute were not intended to exonerate the bankrupt from the payment of the fees provided for the court officers. *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27.

Where the bankrupts converted a sum of money which was derived from the sale of goods between the time of the filing of the petition for adjudication and the time when the property was taken into custody by the deputy marshal, it was held that such sum should be deducted from the bankrupts' exemptions. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

And where the bankrupts failed to make a full disclosure of their personal property, but the amount of the concealment could not be ascertained, it was held that the trustee should not allow their personal property exemptions until all of the personal property had been accounted for, except on the orders of the court. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

The court cannot order a trustee in bankruptcy to pay rent, overdue at the time of the adjudication, out of the property to be set apart to the bankrupt as exempt, although the bankrupt had so agreed with the landlord before the commencement of the proceedings. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

Costs and expenses.—In *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114, it was held that where the bankrupt has properly claimed his exemption, it cannot be diminished by, or put aside in favor of, the costs and expenses made in the proceedings, even where these have been incurred in steps taken to preserve the property, as by a sale of it by a receiver as perishable.

Objections to trustee's report.—Any creditor may object to the report of the trustee as to the bankrupt's exemptions, with respect to either their allowance, valuation, or other matter affecting the creditor's interest. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586; *In re Cotton*, 25 Am. Bankr. Rep. 532.

The bankrupt may also except to the trustee's report on exemptions. *In re Ellis*, (N. D. Ohio 1903) 10 Am. Bankr. Rep. 754.

Issue arises when report is filed.—No issue as to the bankrupt's right to the exemption arises until the trustee's report is filed; issue may then be taken by exceptions thereto which cast the burden of proving all facts essential to the right upon the bankrupt. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

The question of the status of a particular chattel claimed by the bankrupt as exempt, and by a creditor as assets of the estate, cannot properly come before the court for determination until a trustee has been appointed and has made his report of the articles set apart by him as exempt. Exceptions to the trustee's action may then be

heard by the referee, and certified by him to the judge for final determination. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

Process unnecessary.—A creditor is not precluded from objecting to the allowance of exemption to a bankrupt because he is not armed with process; the bankruptcy proceedings themselves being in effect a seizure of all the debtor's property. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

Verification of objections.—While an exception to the report of a trustee setting apart the bankrupt's exemptions is in some sense a pleading in that it makes an issue, it is doubtful if it need be verified, and in any event the lack of verification is not jurisdictional; and where not objected to on the hearing before the referee, objections cannot be made on a review of his decision by the court. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

Time to object.—Objections to a trustee's report setting apart the bankrupt's exemption must, by general order in bankruptcy No. 17, be filed within twenty days after the filing of the report. *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of*

Cotton, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586, 25 Am. Bankr. Rep. 332.

Where the last day comes on Sunday, a creditor has until the following day in which to file objections. *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804.

A creditor desiring to object to the trustee's report setting apart the bankrupt's exemption should file all of his objections within the time fixed by law, and cannot come in after the expiration of that time and add new and additional grounds to his objections already of file; but it is otherwise as to the enlargement or amplification of grounds originally taken. *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 190, 25 Am. Bankr. Rep. 532.

Burden of proof.—One objecting to the allowance of a bankrupt's exemption must show affirmatively that the bankrupt was not entitled to claim the property. *In re Ripa*, (S. D. Fla. 1909) 180 Fed. 603. See also *In re Grimes*, (W. D. N. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332.

The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt. *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549.

b [Concurrence of two out of three.] Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate. [(1898) 30 Stat. L. 557.]

c [File certified copy of decree of adjudication.] The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. [(Inserted 1903) 32 Stat. L. 799.]

SEC. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS: (a) *[Fee and commissions of trustee.]* Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. [(Amended 1903 and 1910) 32 Stat. L. 799 and 36 Stat. L. 840.]

Trustee's compensation. — The statute fixes the trustee's compensation, and its provisions in this respect must be strictly adhered to. *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Hinekel Brewing Co.*, (N. D. N. Y. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; *In re Sanford Furniture Mfg. Co.*, (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414; *In re Cambridge Lumber Co.*, (D. C. Mass. 1905) 136 Fed. 983; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 430; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Screws*, (S. D. Ga. 1906) 147 Fed. 989, 17 Am. Bankr. Rep. 269; *In re Kirkpatrick*, (6th Cir. 1906) 148 Fed. 811, 78 C. C. A. 501; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Shiebler*, (C. C. A. 2d Cir. 1909) 174 Fed. 336, 23 Am. Bankr. Rep. 162; *In re Muhlhauser*, (N. D. Ohio 1902) 9 Am. Bankr. Rep. 80; *Matter of Hart*, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 480; *Matter of Pequod Brewing Co.*, (S. D. N. Y. 1907) 18 Am. Bankr. Rep. 352.

Commissions on payments to lienholders. — There can now be no question of the right of the trustee to commissions on money turned over to lienors, such commissions having been expressly provided for by the amendment of 1910; prior to that enactment, however, the question presented a conflict of opinion. See *In re Anders Push Button Telephone Co.*, (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643; *In re Cramond*, (N.

D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 746; *In re Morse Iron Works, etc., Co.*, (E. D. N. Y. 1906) 154 Fed. 214, 18 Am. Bankr. Rep. 846; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

A trustee cannot be compelled to serve without compensation; and where there are no assets, if creditors insist upon the appointment of a trustee they must advance the statutory fee or otherwise arrange for the trustee's compensation. *In re Levy*, (E. D. Wis. 1900) 101 Fed. 247.

Extra compensation. — A court of bankruptcy is without authority to allow compensation to a trustee in excess of that fixed by section 48, notwithstanding the fact that such trustee has given his personal time and attention to the business of the estate, and by reason of his business ability he has realized from the bankrupt's assets far more than would ordinarily have been obtained. *In re Epstein*, (W. D. Ark. 1901) 109 Fed. 878, 6 Am. Bankr. Rep. 191. See also *In re George Halbert Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399; *Devries v. Orem*, (1906) 17 Am. Bankr. Rep. 876, 104 Md. 648, 65 Atl. 430. And see the annotation under section 72.

A trustee who is also an attorney at law is not entitled to extra compensation for legal services rendered by him to the estate. *In re George Halbert Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399.

(b) [*Where more than one trustee.*] In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. [(1898) 30 Stat. L. 558; (1910) 36 Stat. L. 840.]

(c) [*Withholding compensation.*] The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause. [(1898) 30 Stat. L. 558; (1910) 36 Stat. L. 840.]

Effect of trustee's negligence. — Where a receiver or trustee has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions. *In re Schoenfeld*, (C. C. A. 3d Cir. 1910) 183 Fed. 219.

Where a bankrupt's trustee was allowed to

resign to avoid the odium of removal because of his friendly attitude to the bankrupts, and his apathy to proceedings instituted to compel the bankrupts to turn over property which they had withheld, it was held that his claim for compensation should be at least partially denied. *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

(d) [*Compensation of receivers and marshals appointed under section 2 (3).*] Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in

excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: [(*Inserted 1910*) 36 Stat. L. 840.]

Compensation for preserving estate.—The appointment of receivers is authorized only when absolutely necessary for the preservation of estates, and their compensation should be measured by that provided for trustees for similar services. *Dunlap Hardware Co. v. Huddleston*, (C. C. A. 5th Cir. 1909) 167 Fed. 433, 21 Am. Bankr. Rep. 731.

Authority to compensate receiver appointed in another district.—Where, pending action on an involuntary petition, which was subsequently dismissed by the court, a receiver was appointed, who remained in possession of the property when defendants were adjudicated bankrupts in another district, it was held that the authority to compensate the receiver passed to the court making the adjudication, which took exclusive jurisdiction of the estate. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

Irregular and improper receivership.—Where, immediately on the filing of a bankruptcy petition by a dry goods merchant, certain lawyers, by purchasing a claim and having the same assigned to a clerk in the office of one of them, obtained the appointment of one of them as receiver on false representations to the judge, and further secured other associated lawyers to be appointed as appraisers who made no proper appraisal, and then sought, but failed, to obtain an order for the immediate sale of the assets which was unnecessary, it was held that such receivership and the proceedings thereunder were irregular, and improper, and of no value to the estate; and hence an allowance would not be made for the services of the receiver or his attorney, or those of the appraisers. *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 992.

Receiver's expenses.—*Court may order expenses paid out of assets in first instance.*—After jurisdiction has attached in a bankruptcy proceeding, and a receiver has been appointed to take charge of the assets of the alleged bankrupt, the court has power in the first instance to direct that the needful expenses and compensation of the receiver be paid out of the property in his hands, though the proceedings are subsequently dismissed; it being no part of the receiver's duty to move to recover such expenses and compensation against the petitioning creditors. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

Court may compel petitioners to pay receiver's expenses.—A court of bankruptcy has authority, under its general equity powers, to order the petitioning creditors to pay the expenses of a receivership, where the receiver was appointed on their application on the filing of their petition, which was subsequently dismissed as unfounded. *In re Lacov*, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 290.

Unnecessary expenses.—A temporary receiver of a bankrupt is not entitled to charge for an expert examination of the bankrupt's books, nor for printing claim vouchers. *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

Attorney services.—A receiver in bankruptcy being required to stand independent of the parties to the litigation, he will not be allowed to charge the estate for services rendered him by the attorney for either party during the continuance of such relation. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528. See also *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

Where a receiver in bankruptcy was afterwards appointed trustee, and the receiver's counsel also acted as counsel for the trustee, it was held that the settlement of the receiver's fees and those of his counsel would be determined in connection with the claim for commissions and fees for services rendered to the estate as a whole. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

Exceptions to the account of a receiver in bankruptcy should be verified; but the omission of a verification is a defect which is amendable. *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719.

Marshal's compensation and expenses.—Where the court of bankruptcy, upon the filing of a petition in involuntary proceedings, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services, under such order, in addition to the costs and expenses incurred. *In re Adams Sartorial Art Co.*, (D. C. Colo. 1900) 101 Fed. 215, 4 Am. Bankr. Rep. 107.

Fees for services.—In *In re Damon*, (W. D. N. Y. 1900) 104 Fed. 775, 5 Am. Bankr. Rep. 133, it was held that the marshal is entitled to a reasonable fee for the service of papers in bankruptcy proceedings.

A deputy marshal appointed to take charge of the store of the bankrupt in a town other than that in which he resided, and to inventory the stock of general merchandise contained therein, will be allowed compensation at the rate of \$2.50 per day, together with his actual and necessary expenses, but not including the cost of his board and lodging. *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625.

Such a deputy may also hire a watchman if he has reason to apprehend danger to the property; and a charge in his accounts of one dollar per day for the services of such watchman will be allowed by the court as expenses. *In re Scott* (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625.

[*On confirmation of composition.*] *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: [(*Inserted 1910*) 36 Stat. L. 841.]

[*When acting as mere custodian.*] *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: [(*Inserted 1910*) 36 Stat. L. 841.]

[*Notice to creditors.*] *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act. [(*Inserted 1910*) 36 Stat. L. 841.]

(e) [*Compensation for conducting business.*] Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: [(*Inserted 1910*) 36 Stat. L. 841.]

No additional compensation can be allowed beyond that provided for in section 48e. See section 2 (5), *supra*, p. 475, and see also the annotation under section 72.

Prior to the amendment of 1910, however, it was customary to allow additional compensation for conducting the business of the bankrupt. *In re Shiebler*, (C. C. A. 2d Cir. 1909) 174 Fed. 336, 23 Am. Bankr. Rep. 162; *Matter of Pequod Brewing Co.*, (S. D. N. Y. 1907) 18 Am. Bankr. Rep. 352.

Effect of transfer of proceedings.—Where, on the filing of a petition in involun-

tary bankruptcy, a receiver is appointed and authorized to continue the debtor's business, but a second petition is afterwards filed in another district, where an adjudication is made, and to which the proceedings are transferred, under general order No. 6, as being the district of his domicile, the court in the other district has jurisdiction to fix the compensation of its receiver and his counsel, although payment can only be made on order of the court having custody of the estate. *In re Isaacson*, (C. C. A. 2d Cir. 1909) 174 Fed. 406, 23 Am. Bankr. Rep. 98.

[*On confirmation of composition.*] *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: [(*Inserted 1910*) 36 Stat. L. 841.]

[*Notice to creditors.*] *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act. [(*Inserted 1910*) 36 Stat. L. 841.]

SEC. 49. ACCOUNTS AND PAPERS OF TRUSTEES. — *a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest. [(1898) 30 Stat. L. 558.]

SEC. 50. BONDS OF REFEREES AND TRUSTEES. — *a* [Referees' bonds.] Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties. [(1898) 30 Stat. L. 558.]

The manifest purpose of Congress in requiring trustees, referees, and designated depositories to give bonds was to protect estates in bankruptcy from (among other acts on the part of these officers of the court) paying out funds otherwise than the law and rules permit. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

b [Trustees' bonds.] Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. [(1898) 30 Stat. L. 558.]

c [Creditors fixing amount of trustee's bond.] The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. [(1898) 30 Stat. L. 558.]

d [Sureties' qualification.] The court shall require evidence as to the actual value of the property of sureties. [(1898) 30 Stat. L. 558.]

e [Two sureties.] There shall be at least two sureties upon each bond. [(1898) 30 Stat. L. 558.]

f [Value of property of sureties.] The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. [(1898) 30 Stat. L. 558.]

g [Corporations as sureties.] Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. [(1898) 30 Stat. L. 558.]

h [Filing of and suit upon bonds.] Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions. [(1898) 30 Stat. L. 558.]

Action on trustee's bond — Jurisdiction. — A District Court of the United States has jurisdiction of an action brought by a trustee in bankruptcy, in the name of the United States, on the bond of a former trustee to recover the value of property for which he has

failed to account. *U. S. v. Union Surety, etc., Co.*, (S. D. N. Y. 1902) 118 Fed. 482, 9 Am. Bankr. Rep. 114.

Manner of bringing action. — An action for breach of condition upon the bond of a trustee in bankruptcy may be maintained only in the name of the United States, and leave of court is not necessary for the bringing of such an action. *Alexander v. Union Surety, etc., Co.*, (1903) 11 Am. Bankr. Rep. 32, 89 App. Div. 3, 85 N. Y. S. 282.

Fugitive trustee not necessary party. — In an action upon the bond of a defaulting trustee in bankruptcy, who is a fugitive from justice, he is a proper but not a necessary party. *Alexander v. Union Surety, etc., Co.*, (1903) 11 Am. Bankr. Rep. 32, 89 App. Div. 3, 85 N. Y. S. 282.

Order directing trustee to account, as prerequisite to action on bond. — Where a bankrupt's trustee had not absconded without settling his accounts, but his account rendered had been allowed, showing the expenditure of the amount demanded by the bankrupt in the administration of the estate, it was held that an order directing that the trustee should account was a necessary prerequisite to an action on his bond to recover property belonging to the estate. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

But where a trustee in bankruptcy absconded, and his whereabouts are unknown, an order directing him to account is not a necessary prerequisite to an action on his bond to recover funds of the estate embezzled by him. *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

Effect of settlement and allowance of trustee's account. — Where, after confirmation of a bankrupt's composition, the referee entertained an application to settle and allow the trustee's account, and allowed the same and discharged the trustee without any objection or appeal by the bankrupt, it was held that the referee could not thereafter disregard or dispute such allowance in a suit on the trustee's bond to recover the amount in his hands at the time the composition was confirmed. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

Surety's liability. — The liability of the trustee's surety extends to the necessary expenditure of the funds of the bankrupt estate as the immediate result of an embezzlement by the trustee; but it does not include the premium on the bond of the new trustee. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

i [*Trustees' personal liability.*] Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees. [(1898) 30 Stat. L. 558.]

j [*Joint trustees.*] Joint trustees may give joint or several bonds. [(1898) 30 Stat. L. 558.]

k [*Vacancy by failure to give bond.*] If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office. [(1898) 30 Stat. L. 558.]

l [*Limitation of suits on referees' bonds.*] Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond. [(1898) 30 Stat. L. 558.]

m [*Limitation of suits on trustees' bonds.*] Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed. [(1898) 30 Stat. L. 558.]

Suits may be brought on a trustee's bond at any time within two years after the estate has been closed. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

The trustee's bond does not become void

on the first recovery, but continues in force for two years after the estate is closed, unless the amount thereof is previously exhausted. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

SEC. 51. DUTIES OF CLERKS. — a Clerks shall respectively [(1898) 30 Stat. L. 558.]

(1) [*Account for fees.*] account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; [(1898) 30 Stat. L. 558.]

(2) [*Collect fees.*] collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; [(1898) 30 Stat. L. 558.]

Necessity of paying filing fee.—A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the filing of the petition. *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31.

The exemptions allowed by the Act do not excuse the payment from them of the fees of the bankruptcy court. *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

Thus it has been held that the bankrupt may be ordered to pay such fees out of pension money remaining in his hands at the time of the filing of the petition. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27.

But a voluntary bankrupt whose petition is accompanied by an affidavit of inability cannot subsequently be required to pay such fees out of property set apart to him as exempt, or out of money earned by him after the filing of the petition. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529.

Necessity of soliciting loan to pay fee.—It has been held that a proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit gifts or loans from his friends for that purpose. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

But see *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27, where it was said that a fair construction of section 51 indicates that it was the intention of the Act to allow voluntary bankrupts to file their petition without the payment in advance of the fees therefor, only in case they did not have, and could not obtain, the money with which to pay such fees. In other words, if the bankrupt was absolutely without money or effects of any kind, but was able

to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees.

Filing in forma pauperis.—Upon presentation of a voluntary bankrupt's petition and schedules, accompanied by an affidavit that he is without, and cannot obtain, the money necessary to pay the filing fees, the clerk must file such petition. *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182; *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Plimpton*, (D. C. Vt. 1900) 103 Fed. 775, 4 Am. Bankr. Rep. 614; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

Pauper affidavit not conclusive.—In *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182, it was held that an affidavit of inability by the petitioner to pay the fees is not conclusive of his poverty; and if circumstances appear casting doubt upon the truth of the affidavit, the question may be sent to the referee, to investigate and report the facts as to petitioner's ability to deposit the fees.

Payment of filing fee as condition for discharge.—Where a petition was placed on file, and an adjudication made, without payment of the filing fee, it was held that an objection to such filing might be raised on the application for a discharge, and action on such application stayed until the filing fee was paid. *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31.

But in such case the referee has no authority to require the payment of the statutory fee as a condition to the granting of the discharge, as such power is given to the court alone, under general order No. 35 (4), and is to be exercised only on proof of the ability to pay such fee. *In re Plimpton*, (D. C. Vt. 1900) 103 Fed. 775, 4 Am. Bankr. Rep. 614.

(3) [*Delivery and return of papers.*] deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; [(1898) 30 Stat. L. 559.]

(4) [*Pay referee's and trustee's fee.*] and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition. [(1898) 30 Stat. L. 559.]

SEC. 52. COMPENSATION OF CLERKS AND MARSHALS. — *a* [*Clerks' filing fee.*] Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt. [(1898) 30 Stat. L. 559.]

Cross-reference: As to

Clerk's duty to collect and account for fees, see section 51a (1) and (2), *supra*, pp. 694, 695.

The fees provided by law to be paid the clerk are not debts, but are presumably for services for the benefit of the bankrupt. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

Fees for reference of petitions. — A clerk of a federal District and Circuit Court is entitled to his statutory *per diem* compensation for the days on which he refers, to the referee in bankruptcy, voluntary petitions in

bankruptcy filed during the absence of the judge from the district, though such references are made without written orders to open the court for that or any other purpose. *U. S. v. Marvin*, (1909) 212 U. S. 275, 29 S. Ct. 297, 53 U. S. (L. ed.) 510, 22 Am. Bankr. Rep. 717.

Fees for notifying creditors. — Clerks are not entitled to charge a fee of twenty-five cents for each notice sent to creditors on a petition for discharge, but are only entitled to the actual items of expense thereon for postage, stationery, and clerical work. *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1905) 134 Fed. 997, 14 Am. Bankr. Rep. 186.

b [*Marshals' fees.*] Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals. [(1898) 30 Stat. L. 559.]

Cross-reference: As to

Compensation of the marshal, see section 48 *a* and *e*, *supra*, p. 690 *et seq.*

SEC. 53. DUTIES OF ATTORNEY-GENERAL. — *a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important. [(1898) 30 Stat. L. 559.]

SEC. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS. — *a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so. [(1898) 30 Stat. L. 559.]

CHAPTER VI.

CREDITORS.

SEC. 55. MEETINGS OF CREDITORS. — *a* [*Place and time.*] The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest.

If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. [(1898) 30 Stat. L. 559.]

Time of holding first meeting.—The first meeting of creditors cannot be held until after the adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

But see sec. 12a, *supra*, p. 540, whereby the bankrupt is authorized to offer composition to his creditors either before or after the adjudication. The right to offer composition before adjudication was inserted by the amendment of June 25, 1910, which also provides for the calling of a meeting for the purpose of taking action thereon. Technically, however, that meeting may not be considered such a "first meeting of creditors" as is contemplated by section 55a.

Referee may refuse to call meeting until petition and schedules are amended.—It is within the jurisdiction and discretion of a referee in bankruptcy to order amendments to be made in the petition and schedule of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors until such amendments be made. *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318.

Notice of meetings.—All known creditors are entitled to ten days' notice of the first and of all other meetings of the creditors; such notice must be given by the referee. *In*

re Stein, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

An objection by an involuntary bankrupt to the regularity of a first meeting of his creditors, and to the validity of proceedings had thereat, on the ground that the notices of such meeting were prepared by the referee before the bankrupt's own list of creditors was filed, whereby it resulted that some of the creditors were not notified, will not be sustained when it appears that the bankrupt's list of creditors was not filed within the time limited by the law, and was incomplete and imperfect. *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704.

Presence of creditors at meeting.—Creditors are not to be counted as present simply because their claims have been allowed. In order to be present they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not. *In re Kaufman*, (W. D. Ky. 1910) 179 Fed. 552.

Bankrupt's presence at meeting.—It is not mandatory that the bankrupt be present at the first meeting of creditors unless so directed by the court or a judge thereof. *In re Parker*, (D. C. Kan. 1899) 1 Am. Bankr. Rep. 615.

b [*Presiding officer — duties.*] At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. [(1898) 30 Stat. L. 559.]

Cross-references: As to Examination of bankrupt, see section 7a (9), *supra*, p. 524. Proof and allowance of claims, see the several subdivisions of section 57, *infra*, p. 700.

Allowance of claims.—Claims cannot be allowed without a meeting of creditors. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

c [*Creditors' duty.*] The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act. [(1898) 30 Stat. L. 559.]

d [*Subsequent meetings of creditors.*] A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. [(1898) 30 Stat. L. 559.]

e [*Meeting at call of court.*] The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the

court shall call such meeting at such place within thirty days after the date of the filing of the request. [(1898) 30 Stat. L. 560.]

The word "whenever," in section 55e, should be construed to mean "whenever after the first meeting," previously required to be held by section 55a, which can only be held not less than ten nor more than thirty days

after adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

f [Final meeting.] Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered. [(1898) 30 Stat. L. 560.]

Necessity of final meeting.—An estate cannot be closed without a final meeting of the creditors. *In re Stein*, (D. C. Ind. 1899)

94 Fed. 124, 1 Am. Bankr. Rep. 662; *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665.

SEC. 56. VOTERS AT MEETINGS OF CREDITORS. — *a* [Method of voting.] Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. [(1898) 30 Stat. L. 560.]

Cross-references: As to

Claims which may be proved and allowed, see the several subdivisions of section 63, *infra*, p. 753.

Proof and allowance of claims generally, see the several subdivisions of section 57, *infra*, p. 700.

Voting for trustee, see section 44, *supra*, p. 677.

Matters which may be submitted. — Section 56a confers no authority to submit to creditors the decision of matters which the statute has otherwise made provision for. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

A majority of the creditors cannot, by vote at a special meeting, compel a trustee to effect a compromise desired by them. *In re Meadows*, (W. D. N. Y. 1910) 181 Fed. 911.

Manner of voting. — All creditors, except those having secured or priority claims, who are present at a creditors' meeting are entitled to vote according to the amount of their allowed claims. *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 3 Am. Bankr. Rep. 738; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155, affirming *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re Rekersdres*, (S. D. N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Beck*, (D. C. Mass. 1901) 110 Fed. 140, 6 Am. Bankr. Rep. 554; *In re Messengill*, (E. D. N. C. 1902) 113 Fed. 366, 7 Am. Bankr. Rep. 669; *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, reversing (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 25 and 109 Fed. 861, 6 Am. Bankr. Rep. 305; *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85; *In re Mackellar*, (M. D. Pa. 1902) 116

Fed. 547, 8 Am. Bankr. Rep. 669; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *In re Lazoria*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611; *In re Ogles*, (E. D. Tenn.) 2 Am. Bankr. Rep. 514; *Clendening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245; *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585; *In re Milne*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 248.

The vote turns, not on the number of creditors present and the amount represented by them, but on the number and amount of allowed claims present before the referee at the time of the vote. *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

A single interest should vote as a single interest, and not otherwise. *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

Defective claims. — The absence of the date to a creditor's claim in bankruptcy is a fatal defect, which will prevent his participation in the creditors' meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

But the mere fact that at the head of the proof of a claim in bankruptcy the title of the court is not given as required by general order 21 and form No. 31 is not sufficient to vitiate the proof so as to prevent the creditor's participation in the meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

Assigned claims. — Where a claim has been assigned, the assignee is the real owner, and he alone can vote thereon at a creditors' meeting. *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Messengill*, (E. D. N. C. 1902) 7 Am. Bankr. Rep. 669.

Thus where one of the partners in a bankrupt firm has a claim against the firm,

which he has assigned to a third person as collateral security for a debt, the holder cannot prove the claim nor vote on it, not being the owner of the claim; and, for a similar reason, the bankrupt partner cannot prove it. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695.

Presence at meeting.—Claims allowed are not to be counted where the creditor is not present, and the power of attorney of his proxy is insufficient. *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, reversing (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

An attorney, agent, or proxy may cast the vote of a creditor whom he represents, upon the presentation of proper authority so to do; but such authority should be in writing, duly executed, and filed by the referee as a part of the record. *In re Sugenhimer*, (S. D. N. Y. 1899) 91 Fed. 744; *In re Blankfein*, (S. D. N. Y. 1899) 97 Fed. 191, 3 Am. Bankr. Rep. 165; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695; *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re Gasser*, (C. C. A. 8th Cir. 1900) 104 Fed. 537, 5 Am. Bankr. Rep. 32; *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 3 Am. Bankr. Rep. 738; *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Cooper*, (E. D. Pa. 1905) 135 Fed. 196, 14 Am. Bankr. Rep. 320; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Lloyd*, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96; *In re Pauly*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 333; *Matter of Law*, (S. D. Ill. 1905) 13 Am. Bankr. Rep. 650.

Voting by attorney.—The mere relation of attorney for the creditors of a bankrupt does not authorize such attorney to vote in behalf of his clients at the election of trustee. *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31.

Therefore it is proper for a referee to require a letter of attorney before allowing another to vote on the claim of a creditor. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631.

Where a power of attorney authorizing its holder to represent a creditor at a meeting of a bankrupt's creditors is mislaid, and not produced until the meeting is over, the attorney is properly refused the right to participate. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

In bankruptcy proceedings, under general order No. 21, which requires that a letter of attorney executed on behalf of a partnership must show that the person executing it is a member of the firm, the fact that such statement is contained in the proof of debt accompanying the letter, though absent from the letter itself, is sufficient to entitle the attorney to represent the creditor in the creditors' meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

An attorney should not be permitted to vote any claim which has come to him through the instrumentality of the bankrupt; but the fact that he so received claims is not sufficient ground for excluding his vote on claims which came to him unsolicited. *In re Lloyd*, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96.

A power of attorney from a creditor of a bankrupt, running jointly to one of the bankrupt's attorneys and another, does not entitle either to vote on such claim at a creditors' meeting. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

Effect of objection to claim.—*Generally.* Claims should not be voted where duly verified legal objections are filed thereto; but the referee may proceed to take proof, and if the objecting party cannot produce sufficient evidence to sustain the objections the claim may be allowed. If, however, the objecting party shows legal cause for delay for the purpose of producing evidence not at hand, the reference may in some cases allow the claim for voting purposes. *In re Evening Standard Pub. Co.*, (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

But it does not rest in the discretion of the referee to allow claims as a voting basis when objections are made which are apparently genuine. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

While the mere filing of objections to a claim should not exclude the creditor from voting on the election of a trustee, it has been held that such action by the referee will not be reviewed when no objection is made to the election, and no facts are presented on which to raise the question of the rights of creditors in such case. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

Objecting creditors and the bankrupt are entitled to a hearing upon the objections for the purpose of determining, at least, whether they are honestly made and there is reasonable ground for their consideration; and if these facts are established the claims should not be allowed for the purpose of voting. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

b [Voting by secured creditors.] Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such

claims exceed the values of such securities or priorities, and then only for such excess. [(1898) 30 Stat. L. 560.]

Cross-reference: As to Voting power of secured and priority claims, see section 57, subdivisions e, g, and h, *infra*, p. 704 *et seq.*

Secured and priority creditors are entitled to vote at creditors' meetings to the extent only that their claims have been allowed as being in excess of the securities held by them; but if the securities have been surrendered such creditors become unsecured claimants, and may so vote. *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 924, 3 Am. Bankr. Rep. 249; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Malino*, (S. D. N. Y. 1902) 118 Fed.

368, 8 Am. Bankr. Rep. 205; *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

Where objections are filed to a claim, on the ground that the claimant has received a preference, he should not be permitted to participate in creditors' meetings until the matter has been heard and determined. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

SEC. 57. PROOF AND ALLOWANCE OF CLAIMS. — a [Of what to consist.] Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. [(1898) 30 Stat. L. 560.]

Cross-references: As to Claims which may be proved, see the several subdivisions of section 63, *infra*, p. 753. Claims for expenses of administration, see section 62, *infra*, p. 749.

Necessity and manner of proving claim. — All claims against a bankrupt's estate must be proved by a statement in writing, under oath, setting forth all the information required by section 57a, and also all the facts in connection therewith which are essential to the clear understanding of the claim made. *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Rosenberg*, (E. D. Pa. 1906) 144 Fed. 442, 16 Am. Bankr. Rep. 465; *In re Girvin*, (N. D. N. Y. 1908) 160 Fed. 197, 20 Am. Bankr. Rep. 490; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918; *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443; *In re Lough*, (C. C. A. 2d Cir. 1910) 182 Fed. 961; *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787; *In re Scott*, (N. D. Tex. 1899) 1 Am. Bankr. Rep. 553; *In re Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 538.

While strict rules of pleading do not apply, it is nevertheless necessary that the claim and its consideration should be so set forth as to enable the trustee and the creditors to make proper investigation as to its fairness and legality, without undue trouble or inconvenience. *In re Scott*, (N. D. Tex. 1899) 93 Fed. 418; *In re Stevens*, (D. C. Vt. 1901) 107 Fed. 243; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 517; *In re Griffin*, (D. C. Mass. 1910) 188 Fed. 339.

A claim against a bankrupt is "proved" and entitled to allowance only when it is properly verified and states "the consideration" therefor, and contains the other statements required by section 57a. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

Effect of failure to prove. — If the proof of claim against a bankrupt's estate does not comply with section 57a, it is not entitled to allowance; and if allowed, the trustee when appointed may have it expunged unless it is corrected by amendment or established by proof. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

A claim against a bankrupt is not entitled to consideration unless proved in accordance with the provisions of the Act, and the forms prescribed thereunder. *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147.

Failure of bankrupt to controvert proof of claim. — An allegation in a petition in involuntary bankruptcy that a petitioner is a creditor of the bankrupt to an amount stated, and the failure of the bankrupt to answer and controvert the allegation does not make the fact of such indebtedness *res judicata* as to

the creditors or the trustee; but such petitioner must still file and prove his claim, which may be contested by the trustee or any creditor. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

Taxes need not be proved.—Since taxes, assessed against the property of a bankrupt during the administration of his estate, are matters of public record, they need not be proved as a claim against the bankrupt's estate in order to be allowed. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680. And see also the annotation under section 64a, *infra*, p. 766.

Statement of consideration.—In a proof of debt in bankruptcy, the statement of the consideration must be sufficiently full and specific to enable the trustee and the creditors to pursue proper and legitimate inquiries as to the fairness and legality of the claim. *In re Scott*, (N. D. Tex. 1899) 93 Fed. 418; *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 325, 5 Am. Bankr. Rep. 11; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 543.

Proof of claims against a bankrupt's estate, reciting generally that there was a consideration for the debt, does not comply with the requirement that the proof must state "the consideration." *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

Amendment of proofs.—As in all other equitable proceedings, the proof of a claim in bankruptcy, required by section 57a, may be amended so as to cure defects and irregularities therein, and to supply omissions; and such amendment relates back to the date of the original filing of the proof of claim. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135; *In re Myers*, (D. C. Ind. 1900) 99 Fed. 691, 3 Am. Bankr. Rep. 760; *In re Roeber*, (C. C. A. 2d Cir. 1903) 127 Fed. 122, 11 Am. Bankr. Rep. 464; *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, 12 Am. Bankr. Rep. 182; *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626; *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 169 Fed. 624, 20 Am. Bankr. Rep. 260; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 179 Fed. 929; *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501; *In re Fisk*, (S. D. N. Y. 1911) 185 Fed. 974; *In re Salvator Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522; *Matter of Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 538; *In re Schiebler*, (E. D. N. Y. 1908) 21 Am. Bankr. Rep. 309.

As to the amendment of proofs of claims subsequent to the time allowed for proving the original claim, and the effect of such sub-

sequent amendment, see the annotation under subdivision n of this section, *infra*, p. 712.

Amendment to avoid objection on ground of usury.—Where a creditor of a bankrupt sought to prove a note drawing usurious interest, and the claim was disallowed on account of such usury, the creditor is entitled to amend his original proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use. *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

Amendment of claim declared fraudulent disallowed.—Where a claim of lien under a mortgage had been declared fraudulent, it was held that the claimants were not entitled to amend so as to prove such claim as a general claim against the bankrupt's estate. *In re Vogt*, (E. D. N. Y. 1911) 188 Fed. 764.

Amendment to obtain undue advantage disallowed.—The court should not permit a creditor to alter his position materially for the express purpose of obtaining an advantage over other creditors, to which he would not otherwise be entitled. *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717.

Who may prove claims—Creditors.—Any creditor whose claim is provable in bankruptcy may make the proof required by section 57a. As to what constitutes provable claims, see the several subdivisions of section 63, *infra*, p. 753.

But a creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid. *In re Gerson*, (E. D. Pa. 1901) 105 Fed. 893. See also *In re Wiener, etc., Shoe Co.*, (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

And where, under the law of the state, the assignee of a nonnegotiable judgment note takes it subject to all equities and defenses available against it in the hands of the assignor, he will not be entitled to prove it as a claim against the estate of the maker in bankruptcy, unless the assignor could have done so. *In re Wiener, etc., Shoe Co.*, (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

Proof by attorney.—The attorney for a creditor may, in behalf of his client, make the proof required by the statute; but in such case the reason for the making of proof by the attorney, and the fact that he has the requisite information for that purpose, should be made to appear. *In re Kimball*, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *Matter of Fils*, (D. C. N. J. 1907) 19 Am. Bankr. Rep. 215.

It is not improper for the attorneys of a bankrupt's trustee to make out and present formal proof of the claim of a creditor, where nothing appears to indicate that such attorneys did anything for the creditor that would in any way prejudice the interests of the bankrupt or his estate. *In re McKenna*, (N.

D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4.

Proof by attorney in fact.—A corporation may make proof of its claim by agent or attorney in fact, when there is a sufficient reason why it should be so made, but not otherwise. *Matter of Fila*, (D. C. N. J. 1907) 19 Am. Bankr. Rep. 215.

Proof by assignee.—It is the settled practice in bankruptcy that chooses in action which have been assigned before a petition is filed are to be proved by the assignee as being the substantial party in interest. *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229.

The form by which a claim against a bankrupt was transferred is immaterial, and cannot affect the right of the assignee to prove the claim, where it is sufficient to estop the original holder from asserting a right to it. *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100.

A receiver appointed for an insolvent debtor may prove a claim against the bankrupt's estate for a debt due such insolvent debtor. *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585.

An executor may make a proof of claim against the estate of a bankrupt, under section 57a, for a debt due to the estate which such executor represents. *In re Woods*, (D. C. Pa. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

Proof by legatee.—Where an executor refuses to prove a claim due his decedent's estate, the legatees should be allowed to do so. *In re Lough*, (C. C. A. 2d Cir. 1910) 182 Fed. 961.

Proof by relative of bankrupt.—The fact that one presenting a claim against a bankrupt is closely related to him, justifies a more rigid scrutiny than would otherwise be required, but does not of itself warrant its rejection. *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919; *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

An undischarged bankrupt should be allowed to prove against the estate of another bankrupt a claim which accrued subsequent to the filing of his own petition. *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

Effect of proving claims—Proof binds claimant.—A claimant who makes proof of his claim and secures its allowance is, in the absence of inadvertence, fraud, or mistake,

bound thereby, because, when a creditor makes proof of his claim against a bankrupt's estate, he stands in the position of a plaintiff at law, and becomes a party to the suit. *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 195.

Proof fixes status as creditor.—One who has filed a formal proof of claim against a bankrupt's estate has a *prima facie* status as a creditor, which cannot be collaterally attacked, but continues, unless his claim is objected to and disallowed either when first presented or on reconsideration. *In re Roanoke Furnace Co.*, (E. D. Pa. 1907) 152 Fed. 846, 18 Am. Bankr. Rep. 661.

Acquiescence in adjudication.—A creditor, by filing its claim in bankruptcy, acquiesces in the adjudication. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

Proof does not waive right of action.—The filing of a proof of claim in bankruptcy is not a waiver of a right of action on the claim in another court. *In re Buchan's Soap Corp.*, (S. D. N. Y. 1909) 169 Fed. 1017, 22 Am. Bankr. Rep. 382; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349.

Toll of limitation period.—Where a written statement of claim, duly verified, is filed with the referee within the year, such filing is sufficient to take the claim out of the statutory limitation. *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825.

Withdrawal of proof of claim.—A creditor who has filed a proof of claim against a bankrupt estate may be permitted to withdraw it. *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265; *In re Strickland*, (S. D. Ga. 1909) 167 Fed. 867, 21 Am. Bankr. Rep. 734; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

Withdrawal as matter of right.—It has also been held that the withdrawal or abandonment of a claim is a matter of right in the creditor, and not a matter of discretion with the referee or judge. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

Withdrawal to proceed in state court.—A creditor may properly be permitted to withdraw his claim and intervention in order to prosecute his remedy in the state court. *In re Strickland*, (S. D. Ga. 1909) 167 Fed. 867, 21 Am. Bankr. Rep. 734; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

b [When claim founded upon writing.] Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. [(1898) 30 Stat. L. 560.]

Failure to file a written instrument, which is the basis of a claim against a bankrupt's estate, or to attach the same to the proof of claim, does not raise a presumption against the existence of the writing. *In re Dresser*,

(C. C. A. 2d Cir. 1905) 135 Fed. 495, 13 Am. Bankr. Rep. 747.

Where it did not appear that original notes and a mortgage, which were the basis of a claim against a bankrupt, were attached

to the claim as required by the bankruptcy law, but no objection was urged on that ground, it was presumed that such original securities were present at the trial and not attached, or that their presence was waived. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

c [Filing claims.] Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred. [(1898) 30 Stat. L. 560.]

Filing essential.—It has been held that a claim is not proved until it has been filed. *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512.

Sufficient filing.—The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of section 57c, when read in connection with general order in bankruptcy No. 21, which provides that proofs of debt received by any trustee shall be delivered to the referee to

Withdrawal of instrument.—After the proof and allowance of a claim, the referee may permit the withdrawal of the original note, on which the claim was based, on leaving a copy thereof on file. *In re Loden*, (N. D. Ga. 1910) 184 Fed. 965.

whom the cause is referred. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

d [When claims allowed.] Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. [(1898) 30 Stat. L. 560.]

Allowance of claims—Effect of formal proof.—If the formal proof of claim, made in accordance with the requirements of section 57a, sufficiently sets out a provable claim, it will be deemed to be *prima facie* evidence of the claim so asserted; and, in the absence of objection thereto, such claim will be allowed. *Whitney v. Dresser*, (1906) 200 U. S. 532, 26 S. Ct. 316, 50 U. S. (L. ed.) 584, 15 Am. Bankr. Rep. 326; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385; *In re Castle Braid Co.*, (S. D. N. Y. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825; *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, 24 Am. Bankr. Rep. 1; *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881; *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922; *In re Criblier*, (D. C. Conn. 1911) 184 Fed. 338.

The "proof" and the "allowance" of claims are separate and distinct steps. *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825.

Formal proof shifts burden.—A proof of claim in bankruptcy which complies with section 57a establishes the claim and entitles it to allowance in the first instance; the burden of overthrowing it is then on the trustee when appointed, and on the creditors

of the bankrupt if they contest. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

But where a claimant does not stand on his formal proof of claim, but offers evidence thereof, he cannot thereafter insist on the rule that the formal proof had the probative force of a *prima facie* case. *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, 24 Am. Bankr. Rep. 1.

Allowance may be made without prejudice to others.—The referee has full power, both by his order and his subsequent control over the administration of the estate, to safeguard all interests from any prejudice because of the allowance of claims. *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881.

Refusal of claim by referee.—The act of a referee in bankruptcy in refusing to accept a claim is not a judicial act, requiring an order and petition of review; but the creditor may move to compel him to accept proof thereof. *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922.

Where an order of a referee in bankruptcy, sustaining the motion of a trustee to disallow a claim on the *prima facie* case made by the claimant, is reversed, the matter should be sent back to the referee if the trustee desires to submit evidence in opposition to the claim. *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385.

Objections to allowance—Who may object.—The trustee, or any creditor, may object to the allowance of claims presented against the estate. *In re Little River Lumber Co.*,

(W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *McDaniel v. Stroud*, (C. C. A. 4th Cir. 1901) 106 Fed. 486, 5 Am. Bankr. Rep. 685; *In re Talbot*, (D. C. Mass. 1901) 110 Fed. 924, 7 Am. Bankr. Rep. 29; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Lewensohn*, (C. C. A. 2d Cir. 1903) 121 Fed. 538, 9 Am. Bankr. Rep. 368; *In re Lafferty*, (E. D. Pa. 1903) 122 Fed. 558, 10 Am. Bankr. Rep. 290; *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566; *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257; *In re Cannon*, (E. D. Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 783, 14 Am. Bankr. Rep. 739; *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 956, 16 Am. Bankr. Rep. 513; *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33; *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 398; *In re Bailey*, (E. D. Pa. 1907) 18 Am. Bankr. Rep. 226.

An unsecured creditor of a bankrupt is a "party in interest" and may, as well as the trustee, object to the allowance of claims against the estate. *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470. See also *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

Where both a bankrupt and his assignee of exemptions claimed an interest in a fund derived from the sale of certain of his assets, it was held that they were both entitled to contest the allowance of the claim against it. *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

The term "parties in interest" applies only to those who have an interest in the *res* which is to be administered and distributed in the proceeding, and does not in-

clude those who are merely debtors or alleged debtors of the bankrupt. *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123.

Effect of objection.—Section 57d intends that if objection to a claim is interposed, or if the court is not satisfied with the *prima facie* case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced of the validity of the claim. *In re Summer*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966. And see annotation under subdivision f of this section, *infra*, p. 706.

Objection barred by laches.—Where creditors were informed of the pendency of a claim, and made no objection to its allowance for more than eight months after the filing of the order, of which their attorney had notice, it was held that they were barred by laches from obtaining a petition for review. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

Form of objection.—While there is nothing in the Act or the general orders in bankruptcy directing the form of objections, they should, nevertheless, be in writing, and the specifications should be sufficiently explicit to indicate to the claimant the nature and character thereof. *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 258.

But it has been held that although, as a rule, objections to a claim by a trustee should be filed in writing prior to the hearing thereon, such practice is not imperative; and an oral statement of the objections may be permitted by the referee, in his discretion. *In re Cannon*, (E. D. Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114.

Pleadings.—On the presentation of claims of creditors against a bankrupt, no pleadings are authorized except the claim duly verified, and such objections as the trustee or any creditor may interpose to the allowance thereof. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

e [Claims of secured creditors.] Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities. [(1898) 30 Stat. L. 560.]

Cross-reference: As to

What are priority claims, see the several subdivisions of section 64, *infra*, p. 766.

Allowance of secured and priority claims.—In accordance with the statutory provision, the claims of secured and priority creditors may be allowed for the purpose of enabling them to participate in creditors' meetings; but such allowance shall only be made for the sums appearing to be due in

excess of the value of the security held by such creditor. *In re Headley*, (W. D. Mo. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763, 9 Am. Bankr. Rep. 419; *Fenley v. Poor*, (C. C. A. 6th Cir. 1903) 121 Fed. 739, 10 Am. Bankr. Rep. 377; *In re Ball*, (D. C. Vt.

1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564; *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720; *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, 11 Am. Bankr. Rep. 506; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 11 Am. Bankr. Rep. 264; *In re Matthews*, (E. D. N. C. 1904) 132 Fed. 274, 13 Am. Bankr. Rep. 91; *Gorman v. Wright*, (C. C. A. 4th Cir. 1905) 136 Fed. 164, 14 Am. Bankr. Rep. 135; *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 362; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *In re Meredith*, (N. D. Ga. 1906) 144 Fed. 230, 16 Am. Bankr. Rep. 331; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Beaumont First Nat. Bank v. Eason*, (C. C. A. 5th Cir. 1906) 149 Fed. 204; *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881; *In re Cale*, (D. C. Minn. 1910) 182 Fed. 439; *Matter of Kenney*, (D. C. Mass. 1903) 10 Am. Bankr. Rep. 452; *Kohout v. Chaloupka*, (Neb. 1903) 11 Am. Bankr. Rep. 265.

Subdivisions "a" and "c" of section 57, as to the proof and allowance of secured claims, have reference to the allowance of secured claims for the purpose of fixing the sum on which a dividend from the general estate is to be paid; and also for the limiting of the voting power or voice of the secured creditor, or creditor having a priority, at creditors' meetings. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

The separate proof of an unsecured claim does not debar a creditor of a bankrupt from subsequently proving a balance due on a secured claim, after the security has been exhausted. *In re Ball*, (D. C. Vt. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564.

"Secured" defined.—In order to be "secured" within the meaning of section 57e, a creditor must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security. *Gorman v. Wright*, (4th Cir. 1905) 136 Fed. 164, 69 C. C. A. 76, *reversing* (E. D. N. C. 1904) 132 Fed. 274.

Proof of claim must state facts.—The proof of a preferred or priority claim must state facts which show the claim to be entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or is a "preferred claim." *In re Dunn*, (N. D. N. Y. 1910) 181 Fed. 701.

Proof of secured claim not obligatory.—While the Bankruptcy Act contemplates that a secured creditor shall prove his claim, he may, notwithstanding, decline to make proof, and he does not thereby waive or lose his lien upon the property pledged. *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

Effect of proving secured claim—Waiver of security.—The filing of a claim against a bankrupt's estate and the receipt of dividends thereon is a waiver of the creditor's

security, and this whether the claims to security arise in a bankruptcy court or out of it. *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382, *affirming* (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135; *In re Fisk*, (S. D. N. Y. 1911) 185 Fed. 974; *Kohout v. Chaloupka*, (Neb. 1903) 11 Am. Bankr. Rep. 267.

Proof by mistake.—But it has also been held that a lien creditor of a bankrupt, who inadvertently or by mistake proves his claim as an unsecured debt, may be permitted to amend his proof so as to save the benefit of his lien. *In re Falls City Shirt Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437.

Security unaffected as to exempt property.—There seems to be no reason why a creditor holding a waiver note should not participate in bankruptcy proceedings and also assert, in a court of competent jurisdiction, his peculiar claim against exempt property. *In re Loden*, (N. D. Ga. 1910) 184 Fed. 965. See also *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.

No waiver where proof has been withdrawn.—The lien of a judgment on exempt property, which under the law of the state remains in force notwithstanding the bankruptcy of the defendant, is not affected by the fact that the creditor proved his judgment in the bankruptcy proceedings, where he was allowed by the court to withdraw such proof without prejudice. *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.

Proof does not waive right of rescission.—A creditor of a bankrupt, for the price of goods sold, by proving his debt as one without security, does not waive his right as a vendor to assert a rescission of the sale under the state law. *Sessler v. Paducah Distilleries Co.*, (C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

Express waiver of security.—A secured creditor may, if he wishes to do so, waive the security held by him and prove his claim as an unsecured debt. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 735; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239; *In re Havens*, (E. D. N. Y. 1911) 186 Fed. 583; *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 16 Am. Bankr. Rep. 198.

Waiver binds creditor.—A claimant who has waived a right to claim a preference is not thereafter entitled to leave to amend his claim, after the time for filing claims had expired, so as to claim such preference. *In re Havens*, (E. D. N. Y. 1911) 186 Fed. 583.

And where an execution of a judgment creditor on a judgment waiving exemptions was set aside as an unlawful preference under the bankruptcy law, and the creditor thereafter filed his claim, waiving any lien he might have acquired under said execution, it was held that he was estopped from afterwards claiming a preference against the exempt property. *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

f [Objections to claims.] Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit. [(1898) 30 Stat. L. 560.]

Hearing should be prompt.—Where an objection is made to the allowance of a claim presented at a meeting of the creditors of a bankrupt, the question of its allowance should be heard as soon as feasible. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695. See also *In re Quinn*, (C. C. A. 8th Cir. 1908) 165 Fed. 144, 21 Am. Bankr. Rep. 264.

Evidence—Order of proof.—In proceedings to establish a claim against a bankrupt's estate, it is not necessary that the referee should adhere to any prescribed order of proof. *In re Montgomery*, (N. D. Tex. 1911) 185 Fed. 955.

Exclusion of immaterial evidence.—Where upon the hearing of a claim, testimony offered by objecting creditors is so clearly and affirmatively incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its reception, the testimony should be excluded upon objection that it is wholly immaterial to the determination of the matter in issue, where no request is made that the testimony be taken notwithstanding the objection and no foundation is laid showing its pertinency and materiality. *Matter of Clark*, (S. D. Cal. 1909) 21 Am. Bankr. Rep. 776.

When evidence may be disregarded.—While positive and uncontradicted testimony on a hearing in bankruptcy should not be disregarded arbitrarily, it may be disregarded if it is grossly or inherently improbable. *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966.

Production of books and papers.—Proceedings in bankruptcy to require a claimant of the bankrupt to produce instruments on the hearing of his contested claim are summary, and must be complied with. *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

But the claimant may not be compelled, in violation of his constitutional rights, to produce books for the purpose of disclosing business transactions with persons other than the bankrupt. *Matter of Clark*, (S. D. Cal. 1909) 21 Am. Bankr. Rep. 776.

Determination.—On the hearing of a contested claim, the formal proof thereof must be accepted as a *prima facie* establishment of the claim presented thereby, and as casting upon the contestants the burden of proving their specifications of objection; and when such formal proof has been fairly met, the proceeding rests on the same basis as

other actions in so far as proof is concerned. The decision of the referee on conflicting evidence is entitled to great weight and will not be overturned except for manifest error. *Whitney v. Dresser*, (1906) 200 U. S. 532, 26 S. Ct. 316, 50 U. S. (L. ed.) 584, 15 Am. Bankr. Rep. 326; *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695; *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 811, 3 Am. Bankr. Rep. 192; *Hill v. Levy*, (E. D. Va. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 780, 6 Am. Bankr. Rep. 499; *In re Clark*, (E. D. Wash. 1901) 111 Fed. 893, 7 Am. Bankr. Rep. 96; *In re Hickey*, (N. D. Ia. 1901) 112 Fed. 287, 7 Am. Bankr. Rep. 282; *In re B. H. Douglass, etc., Co.*, (D. C. Conn. 1902) 114 Fed. 772, 8 Am. Bankr. Rep. 113; *In re Lansaw*, (D. C. Mo. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *In re Wilde*, (S. D. N. Y. 1904) 133 Fed. 562, 13 Am. Bankr. Rep. 217; *In re Cannon*, (E. D. Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114; *In re Dresser*, (C. C. A. 2d Cir. 1905) 135 Fed. 495, 13 Am. Bankr. Rep. 747; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385; *In re Castle Braid Co.*, (S. D. N. Y. 1905) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *In re Montgomery*, (N. D. Tex. 1911) 185 Fed. 955; *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260; *Matter of Rome*, (D. C. N. J. 1908) 19 Am. Bankr. Rep. 820.

Res judicata.—The decision on a contested claim is *res judicata* as to all questions necessarily decided therein. *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *Hargadine-McKittrick Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225, *affirming* (E. D. Mo. 1901) 111 Fed. 361, 6 Am. Bankr. Rep. 657; *In re Chase*, (D. C. Mass. 1904) 133 Fed. 79, 13 Am. Bankr. Rep. 294; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 778, 14 Am. Bankr. Rep. 739; *Clendening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245.

g [Preferred creditors.] The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. [(Amended 1903) 32 Stat. L. 799.]

Surrender essential.—A claimant who has received a preference, or a conveyance, transfer, assignment, or incumbrance, which is void or voidable under section 60b or section 67e, must surrender the same before his claim will be allowed against the bankrupt's estate. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 136, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790, 13 Am. Bankr. Rep. 552; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, 15 Am. Bankr. Rep. 336; *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, 17 Am. Bankr. Rep. 683; *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 924, 3 Am. Bankr. Rep. 249; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 735; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; *In re Rogers Milling Co.*, (W. D. Ark. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re Teslow*, (D. C. Minn. 1900) 104 Fed. 229, 4 Am. Bankr. Rep. 757; *In re Arndt*, (E. D. Wis. 1900) 104 Fed. 234, 4 Am. Bankr. Rep. 773; *In re Ryan*, (N. D. Ill. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396; *McKey v. Lee*, (C. C. A. 7th Cir. 1901) 105 Fed. 923, 5 Am. Bankr. Rep. 267; *In re Seckler*, (D. C. Kan. 1901) 106 Fed. 484, 5 Am. Bankr. Rep. 579; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; *In re Oliver*, (W. D. Mo. 1901) 109 Fed. 784, 6 Am. Bankr. Rep. 626; *In re Bashline*, (W. D. Pa. 1901) 109 Fed. 965, 6 Am. Bankr. Rep. 194; *In re Soldosky*, (D. C. Minn. 1901) 111 Fed. 511, 7 Am. Bankr. Rep. 123; *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726, 7 Am. Bankr. Rep. 186; *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, 7 Am. Bankr. Rep. 181; *In re Abraham Steers Lumber Co.*, (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332; *In re Thompson*, (E. D. Pa. 1902) 112 Fed. 651, 7 Am. Bankr. Rep. 214, *affirming* (E. D. Pa. 1901) 6 Am. Bankr. Rep. 663; *In re Greth*, (E. D. Pa. 1902) 112 Fed. 978; *In re Waterbury Furniture Co.*, (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 8th Cir. 1902) 114 Fed. 447, 7 Am. Bankr. Rep. 670; *Gans v. Ellison*, (C. C. A. 3d Cir. 1902) 114 Fed. 734, 9 Am. Bankr. Rep. 153; *In re Chaplin*, (D. C. Mass. 1902) 115 Fed. 162, 8 Am. Bankr. Rep. 121; *Kahn v. Cone Export, etc., Co.*, (C. C. A. 5th Cir. 1902) 115 Fed. 290, 8 Am. Bankr. Rep. 157, *affirming In re Southern Overall Mfg. Co.*, (N. D. Ga. 1901) 6 Am. Bankr. Rep. 633; *In re Meyer*, (N. D. Tex. 1902) 115 Fed. 997, 8 Am. Bankr. Rep. 598; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39;

In re Levi, (W. D. N. Y. 1903) 121 Fed. 198, 9 Am. Bankr. Rep. 176; *In re Thompson*, (E. D. Pa. 1903) 121 Fed. 607, 10 Am. Bankr. Rep. 288; *Fenley v. Poor*, (C. C. A. 6th Cir. 1903) 121 Fed. 739, 10 Am. Bankr. Rep. 378; *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316; *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315; *In re Privett*, (E. D. N. C. 1904) 132 Fed. 592, 13 Am. Bankr. Rep. 151; *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51, 15 Am. Bankr. Rep. 267; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 527; *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 143 Fed. 958, 16 Am. Bankr. Rep. 198; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 514, 21 Am. Bankr. Rep. 202; *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; *In re Kyte*, (M. D. Pa. 1910) 182 Fed. 166; *In re Feinberg*, (D. C. Mass. 1910) 187 Fed. 283; *In re Tanner*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 196; *Matter of Proctor*, (N. D. Ia. 1901) 6 Am. Bankr. Rep. 660; *Matter of Read*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 111; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316; *Matter of Beswick*, (N. D. Ohio 1900) 7 Am. Bankr. Rep. 395; *Matter of Bothwell*, (D. C. N. J. 1902) 8 Am. Bankr. Rep. 213; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *In re Watkinson*, (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 167.

Preferences or transfers, etc., which do not come within the language of section 60b or section 67e need not be surrendered under section 57g. *In re Levi*, (W. D. N. Y. 1903) 121 Fed. 198, 9 Am. Bankr. Rep. 176; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *In re Watkinson*, (E. D. Pa. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 38; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, 18 Am. Bankr. Rep. 766; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

Statutory requirement not penal.—The provision of section 57g for the surrender of preferences as a condition of allowing claims is not a penal requirement and need not be strictly construed. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

A creditor who holds a voidable preference has a claim that is provable in the sense that formal written proof of it may be made and filed, but he may not procure an allowance of it, nor vote at a creditors' meeting, nor obtain any advantage by his claim, under the bankruptcy law, until he has surrendered his preference. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

Surrender optional.—Where it appears

that a creditor who filed a claim against a bankrupt estate has received a preference, he has the option to surrender the preference or abandon his claim; but if he retains the preference he is not entitled to a dividend. *In re Privett*, (E. D. N. C. 1904) 132 Fed. 592, 13 Am. Bankr. Rep. 151.

But the trustee may recover a voidable preference if he wishes to do so. See section 60b and the annotation thereunder, *infra*, p. 739.

Compulsory surrender.—The fact that a claimant has retained a voidable preference, or a void or voidable transfer, until he has been compelled to surrender the same by legal proceedings, does not affect the provability or allowance of his debt after such surrender has been made. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51; *Barber v. Coit*, (C. C. A. 6th Cir. 1906) 144 Fed. 381, 16 Am. Bankr. Rep. 419; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922.

The word "surrender," as used in section 57g, includes a voidable preference of which a creditor is deprived by the judgment of a court, at the suit of the trustee, as well as a surrender by voluntary act. *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414.

A creditor, preferred by a conveyance constructively fraudulent, may, after the preference is set aside, nevertheless prove the debt so voidably preferred. *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790, 13 Am. Bankr. Rep. 552; *Barber v. Coit*, (C. C. A. 6th Cir. 1906) 144 Fed. 381, 16 Am. Bankr. Rep. 419.

Referee to fix time for surrender and allowance.—On a finding by a referee, on the hearing of objections to a claim, that the creditor has received a voidable preference, he should fix a reasonable time within which the creditor may surrender the preference and have his claim allowed. *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51, 15 Am. Bankr. Rep. 267.

Dividend allowable against order for surrender.—A court of bankruptcy, in entering judgment compelling a creditor to surrender an unlawful preference, should permit the creditor to prove his claim against the bankrupt estate, and deduct from the amount of the preference, which he is required to surrender, the dividend which the court finds is coming to him. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496.

Independent transactions.—There is a conflict of opinion as to whether or not a claim may be allowed without first surrendering a preference obtained by the claimant in connection with a separate and distinct transaction; the following cases hold that such a

preference must be surrendered before the claim can be allowed. *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726; *In re Seay*, (N. D. Ga. 1902) 113 Fed. 969; *In re Meyer*, (N. D. Tex. 1902) 115 Fed. 969; *In re Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Swartz v. Siegel*, (C. C. A. 8th Cir. 1902) 117 Fed. 13, 8 Am. Bankr. Rep. 689; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316.

Thus it has been held that a creditor who has several claims of the same class, upon one of which he has received a preference, must surrender the preference before any of his claims can be allowed. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

And in *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316, it was held that section 57g should be construed as dealing with the creditors and not with their claims; so that where a creditor has received a preference he is not entitled to segregate the bankrupt's indebtedness according to the notes by which it is evidenced, and apply the preference in payment of some of the notes, and prove the others as separate claims against the bankrupt's estate, without surrendering such preference.

But it has also been held that the allowance of a claim in bankruptcy is not affected by the receipt of a preference in connection with a separate and distinct transaction. *In re Abraham Steers Lumber Co.*, (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332, *affirming* (S. D. N. Y. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315; *In re Seay*, (N. D. Ga. 1902) 113 Fed. 969, 7 Am. Bankr. Rep. 700; *In re Bullock*, (E. D. N. C. 1902) 116 Fed. 667, 8 Am. Bankr. Rep. 646; *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

Thus where it appeared that a creditor received payment in full from his debtor within four months prior to the latter's bankruptcy, but without knowledge of his insolvency, and afterwards sold him another invoice of goods, which were not paid for at the time of the bankruptcy, it was held that the last sale created a new and separate debt, which was allowable without a surrender of the money received in payment of the previous debt. *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

It has also been held that a creditor who presents a claim upon which he has received no preference cannot be compelled to surrender an alleged preference upon an entirely settled and extinguished debt which is disconnected with the other. *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

And in *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218, it was held that the receipt of a preference on a separate and distinct transaction does not divest a creditor of his vested rights to property or the proceeds thereof.

h [Securities held by secured creditors.] The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. [(1898) 30 Stat. L. 560.]

Determining value of securities.—The value of securities held by a claimant must be determined by converting them into money pursuant to the agreement under which they are held; if the agreement does not fix the mode of ascertaining the value of such securities, then their value must be determined by one of the ways specified in the statute, as directed by the court. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *In re Browne*, (E. D. Pa. 1900) 104 Fed. 762, 5 Am. Bankr. Rep. 220; *In re Meredith*, (N. D. Ga. 1906) 144 Fed. 230, 16 Am. Bankr. Rep. 331; *In re Castle Braid Co.*, (S. D. N. Y. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Quinn*, (C. C. A. 8th Cir. 1908) 165 Fed. 144, 21 Am. Bankr. Rep. 264; *In re Davison*, (N. D. N. Y. 1910) 179 Fed. 750; *In re Brown*, (E. D. Pa. 1900) 5 Am. Bankr. Rep. 220.

The supervision of the court is confined to the ascertainment of value where the bankrupt and his creditor have themselves failed to deal with this subject. In such an event the court may direct how the value is to be ascertained, and may choose among the methods of agreement, arbitration, compromise, or litigation, supervising and controlling either form of proceeding. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *In re Browne*, (E. D. Pa. 1900) 104 Fed. 762, 5 Am. Bankr. Rep. 220.

If the value has been legally determined outside of the court of bankruptcy, it will be governed by that fact. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

The secured creditor cannot dispose of the securities to himself, at a price fixed by himself, under the pretense of a sale, public or private, and then say the value has been fixed by a public or private sale to himself, and that the court has nothing further to say regarding the transaction. *In re Mertens*, (N. D. N. Y. 1905) 134 Fed. 104, 14 Am. Bankr. Rep. 228.

Where bonds deposited as collateral to a corporation's note were simple promises, not secured, and had never been used by the bankrupt until delivered to secure the bankrupt's note, it was held that the creditor was not entitled to sell the bonds to realize funds with which to pay the note; since to do so would simply increase the corporation's indebtedness, to the prejudice of other creditors. *In re Matthews*, (S. D. N. Y. 1911) 188 Fed. 445.

But a creditor cannot be compelled to part with his securities for a debt, there being no preference, until the debt is paid in full, except in case the securities are sold or con-

verted into cash, and in such case he is entitled to the proceeds of the sale or conversion to apply on the debt. *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, 11 Am. Bankr. Rep. 506; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Davison*, (N. D. N. Y. 1910) 179 Fed. 750.

Statute applies only to bankrupt's property.—Where the property held as security is not that of the bankrupt, the provisions of section 57h do not apply. *In re Mertens*, (N. D. N. Y. 1905) 134 Fed. 104, 14 Am. Bankr. Rep. 226; *In re Graves*, (D. C. Vt. 1908) 163 Fed. 358, 20 Am. Bankr. Rep. 818.

Thus where a creditor was allowed to prove his claim as against a bankrupt indorser as an unsecured claim, it was held that he was not required to realize and credit the proceeds of collateral securities held by him against the maker of the obligation, who was the principal debtor, before being allowed to participate in the distribution of the estate of the indorser. *Gorman v. Wright*, (4th Cir. 1905) 136 Fed. 164, 69 C. C. A. 76, reversing (E. D. N. C. 1904) 132 Fed. 274.

A creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners, upon his claim against the partnership estate, but is entitled to the allowance of his debt in full against such estate, and to apply the securities upon his claim against the individual estate of the partner to whom the property belongs. *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362.

Hearing.—On a hearing as to the valuation of secured claims, both the claimant and the objecting creditors are entitled to be heard, and to adduce testimony; and the allowance can be reviewed only on a petition by the trustee or another creditor for a re-examination. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

Allowance for balance only.—A creditor who holds security cannot receive dividends from the bankrupt estate, except on the unpaid balance of his claim after the value of the security has been deducted. *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681. And see the annotations *supra*, p. 704, under section 57e, and *infra*, p. 781, under section 65a, where the cases to this effect are collected.

A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to

him. *Beaumont First Nat. Bank v. Eason*, (C. C. A. 5th Cir. 1906) 149 Fed. 204, 17 Am. Bankr. Rep. 593.

Right to interest.—*Interest and dividends accruing upon pledged securities*, after the filing of a petition in bankruptcy against the pledgor, may be first applied by the pledgees to the after-accruing interest upon the debt. *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, *reversing* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

i [*Claims secured by individual undertaking.*] Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. [(1898) 30 Stat. L. 560.]

Cross-references: As to

Liability of codebtors, see section 16, *supra*, p. 569.

Liability of officers and stockholders of bankrupt corporations, see section 4b, paragraph *Liability of Officers, etc.*, *supra*, p. 501.

Proof by surety.—A surety, to obtain his distributive share of the bankrupt's estate, must proceed in the manner pointed out by the bankruptcy law; that is, if the creditor fails to prove the claim, the surety must prove it in the name of the creditor, and he will then be permitted to participate in the distribution to the extent that he has discharged the obligation. *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796; *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 6th Cir. 1900) 101 Fed. 699, 4 Am. Bankr. Rep. 183; *In re Nickerson*, (D. C. Mass. 1902) 116 Fed. 1003, 8 Am. Bankr. Rep. 707; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Swarts v. Siegel*, (C. C. A. 8th Cir. 1902) 117 Fed. 13, 8 Am. Bankr. Rep. 689; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618; *Sessler v. Paducah Distilleries Co.*, (C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; *In re McCord*, (S. D. N. Y. 1909) 174 Fed. 72, 22 Am. Bankr. Rep. 204.

A surety may prosecute his claim in bankruptcy in the name of the principal creditor when subrogation takes place after proof of debt. *Sessler v. Paducah Distilleries Co.*,

But secured creditors of a bankrupt, selling their security after the filing of the petition in bankruptcy, and finding the proceeds insufficient to pay the whole amount of their claims, are not entitled to apply such proceeds first to interest accrued since the filing of the petition, then to the principal debt, and then prove for the balance. *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, *reversing* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

(C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

The words "if he discharge such undertaking," in section 57i, are not limited to the time before adjudication. *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63.

A surety succeeds to the creditor's rights cum onere; and where the creditor would be obliged to surrender a preference or fraudulent transfer prior to the allowance of his claim, the surety will also be under a like obligation. *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re Siegel Hillman Dry Goods Co.*, (E. D. Mo. 1901) 111 Fed. 980, 7 Am. Bankr. Rep. 351; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25; *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451.

Contingent claim not provable.—The contingent claim of a surety of a bankrupt principal is not provable; it being the creditor's claim only that is provable. *Insley v. Gar-side*, (C. C. A. 9th Cir. 1903) 121 Fed. 699, 10 Am. Bankr. Rep. 52.

Subrogation of bankrupt's wife to creditor's rights.—Where a bankrupt's wife signed notes and executed a mortgage on her separate property to secure money borrowed for the bankrupt and used by him in his business, it was held that the wife, on payment of the loan, was entitled to subrogation to the creditor's rights, or, in case the latter failed to prove the claim, to prove it in the creditor's name. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

Indorser.—Under the fundamental principles governing the law of mercantile paper a subsequent indorser may prove, as against the estate of a prior indorser, the amount paid by him on the obligation. *In re McCord*, (S. D. N. Y. 1909) 174 Fed. 72, 22 Am. Bankr. Rep. 204.

j [*Debts owing to United States, state, county, etc.*] Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss

sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. [(1898) 30 Stat. L. 561.]

Cross-reference: As to

Priority of debts due under federal and state laws, see section 64b (5), *infra*, p. 777.

Penalties imposed on a corporation for failure to return an increase of capital stock, file reports, etc., are not taxes within the meaning of any law, and are not entitled to priority under the Bankruptcy Act, and cannot be allowed except for the amount of the

pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes, the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

k [Reconsideration of claims.] Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. [(1898) 30 Stat. L. 561.]

Reconsideration allowable.—The court may, under section 57k, for good cause shown, permit the reconsideration of claims; and thereupon such claims may be allowed or rejected, in whole or in part. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72; *In re Howard*, (N. D. Cal. 1900) 100 Fed. 630, 4 Am. Bankr. Rep. 69; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 243, 4 Am. Bankr. Rep. 99; *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *Chatfield v. O'Dwyer*, (C. C. A. 8th Cir. 1900) 101 Fed. 797, 4 Am. Bankr. Rep. 313; *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 780, 6 Am. Bankr. Rep. 499; *In re Baird*, (E. D. Pa. 1902) 112 Fed. 980, 7 Am. Bankr. Rep. 448; *In re Hamilton Furniture Co.*, (E. D. Pa. 1902) 116 Fed. 115, 8 Am. Bankr. Rep. 588; *In re Lewensohn*, (C. C. A. 2d Cir. 1903) 121 Fed. 538, 9 Am. Bankr. Rep. 368; *In re Hinckel Brewing Co.*, (N. D. N. Y. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 958, 15 Am. Bankr. Rep. 510; *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123; *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; *In re Effinger*, (D. C. Md. 1910) 184 Fed. 724; *In re W. A. Paterson Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 629; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Doty*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 58; *In re Chambers*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 707; *In re Levy*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 56; *In re Lyon*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 61; *In re Linton*, (E. D. Pa. 1902) 7 Am. Bankr. Rep. 676.

Reconsideration in interest of third party.

—The right to have a re-examination of claims allowed against a bankrupt estate should not be denied to creditors who clearly have an interest therein, because they seek such re-examination chiefly or solely in the interest of a third party. *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123.

Reconsideration allowed to comply with authoritative ruling.—Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required, was sustained on a petition for review, and shortly thereafter the Circuit Court of Appeals, in another case, so construed the Bankruptcy Act that such claims would not have been barred, it was held that the claimants were entitled to a rehearing, though no appeal was taken. *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183.

Claim barred by limitation.—A claim duly proved and allowed against the estate of a bankrupt may be expunged, on motion, when it is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46.

Court may order return of assets as a condition upon which a claim will be allowed to stand.—A court of bankruptcy has jurisdiction, by a summary proceeding, to diminish or expunge an allowed claim unless the claimant pays to the trustee the value of the property of the bankrupt which he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy was filed. *In re W. A. Paterson Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 629.

Who may apply for reconsideration—Trustee.—After the appointment of a trustee in bankruptcy, he alone is authorized to institute proceedings for the reconsideration of claims. *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304.

In respect of opposing the allowance of

claims, and moving for their reconsideration after they have been allowed, the trustee is not bound to comply with every request preferred by objecting creditors, irrespective of its merits; nor is he clothed with absolute discretion to refuse. As the representative of the estate, he is bound to exercise his judgment and to act for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. He does not act judicially, but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name. *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 956, 16 Am. Bankr. Rep. 510.

Where no trustee has been appointed for the estate of a bankrupt, a motion for the re-examination and expunction of a claim, proved and allowed against his estate, may be made by the bankrupt himself. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72.

Pleadings — Petition for reconsideration. — The petition of a trustee, asking an order for the reconsideration of a claim which has been allowed, need not allege facts which, if proved, would defeat the claim, but is sufficient if it shows facts constituting a good cause for the re-examination. *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370.

Where a petition for the reconsideration and disallowance of a claim, proved against the estate of a bankrupt, does not aver the essential facts with sufficient particularity, the proper method of objecting to it is by a motion for a more specific statement, not by motion to strike out parts of the petition. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72.

Necessity of answering. — Under the provisions of general order in bankruptcy No.

37, which extend the equity rules to proceedings instituted for the purpose of carrying into effect the provisions of the Bankruptcy Act, the failure to file an answer to a petition seeking to expunge a claim justifies a decree *pro confesso*, under equity rule 18, carrying the ordinary incidents and consequences of such a decree. *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584.

Determination. — On an application to a referee to expunge a creditor's proof of claim, the referee has no power to do more than allow the petition, expunge or diminish the claim, or refuse to do either; he cannot render any affirmative judgment against the creditor. *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

Waiver of right to object to reconsideration. — A claimant who, on the hearing of a reconsideration of the allowance of his claim, appears and testifies before the referee without objection, thereby waives the right to object, after such hearing, that the petition for the reconsideration was not presented in due time. The failure to make such objection has the same effect as has the general appearance of a defendant sued out of his district, or the action of a plaintiff who without objection goes on with his case in the federal court to which the case had been removed by a defendant, although the petition for removal had not been filed in time. *In re Effinger*, (D. C. Md. 1910) 184 Fed. 724.

Reconsideration proceedings not a "suit." — An order of the court of bankruptcy rejecting a claim, and, in addition thereto, requiring the creditor to repay to the trustee the amount of a dividend theretofore received, is not made in a suit, within the meaning of the Bankruptcy Act, section 23b, relating to suits by the trustee. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

l [*Recovery of dividend by trustee.*] Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. [(1898) 30 Stat. L. 561.]

m [*Claims by one estate against another.*] The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. [(1898) 30 Stat. L. 561.]

n [*Time for proving claims.*] Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: [(1898) 30 Stat. L. 561.]

Time for proving claims — One-year limitation. — Section 57n has the effect of a statute of limitation, and, in accordance therewith, it has been held that claims against the

estate of a bankrupt must be proved within one year from the day of the adjudication; otherwise such proof will be barred. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96,

27 S. Ct. 195, 51 U. S. (L. ed.) 390; *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662; *Bray v. Cobb*, (E. D. N. C. 1900) 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982; *In re Rhodes*, (W. D. Pa. 1900) 105 Fed. 231, 5 Am. Bankr. Rep. 197; *In re Leibowitz*, (N. D. Tex. 1901) 108 Fed. 617, 6 Am. Bankr. Rep. 268; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re Moebius*, (E. D. Pa. 1902) 116 Fed. 47, 8 Am. Bankr. Rep. 590; *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601; *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re Brown*, (D. C. Colo. 1903) 123 Fed. 336, 10 Am. Bankr. Rep. 588; *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246; *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761; *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512; *In re Noel*, (D. C. N. H. 1906) 144 Fed. 439, 16 Am. Bankr. Rep. 457; *In re Rosenberg*, (E. D. Pa. 1906) 144 Fed. 442, 16 Am. Bankr. Rep. 465; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Bell Piano Co.*, (S. D. N. Y. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183; *Bennett v. American Credit Indemnity Co.*, (6th Cir. 1908) 159 Fed. 624, 86 C. C. A. 614; *In re Sanderson*, (D. C. Vt. 1908) 160 Fed. 278, 20 Am. Bankr. Rep. 396; *In re Peck*, (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629, *affirmed* (C. C. A. 2d Cir. 1909) 168 Fed. 48, 21 Am. Bankr. Rep. 707; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Strobel*, (E. D. N. Y. 1908) 163 Fed. 787; *In re Sampter*, (C. C. A. 2d Cir. 1909) 170 Fed. 938, 22 Am. Bankr. Rep. 357; *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452; *Matter of Prindle Pump Co.*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 405; *Matter of Pettingill*, (D. C. Mass. 1905) 14 Am. Bankr. Rep. 763; *Steinhardt v. National Park Bank*, (1907) 19 Am. Bankr. Rep. 72, 120 App. Div. 255, 105 N. Y. S. 23, *reversing* 18 Am. Bankr. Rep. 86.

Where an adjudication has been appealed from, and the appeal dismissed, the creditors are entitled to prove their claims within a year from the date of such dismissal. *In re Lee*, (E. D. Pa. 1909) 171 Fed. 266, 22 Am. Bankr. Rep. 820.

Statute strictly construed.—The provisions of section 57n are to be strictly construed against the creditor, in order to carry out the liberal spirit shown by other provisions of the Act towards the debtor. *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761.

Cannot allow claim nunc pro tunc.—Neither the court nor a referee has any discretionary power to permit the filing of proofs of claim after the expiration of one year, either *nunc pro tunc* or otherwise; nor is their power in that respect enlarged by the fact that proofs were delivered to the

trustee within the year. *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512.

Absence of notice immaterial.—A creditor cannot prove his debt against a bankrupt estate after the expiration of the year limited therefor, although he had no notice or knowledge of the proceedings during that time, and the estate is still undisturbed. *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761.

Accident or mistake afford no relief.—The court has no power to permit proof of a claim after the expiration of the time fixed, though the creditor's failure to make proof within such time arose solely through accident or mistake. *In re Sanderson*, (D. C. Vt. 1908) 160 Fed. 278, 20 Am. Bankr. Rep. 396.

The fact that a composition is effected does not extend the time given a creditor to prove his claim. *In re Brown*, (D. C. Colo. 1903) 123 Fed. 336, 10 Am. Bankr. Rep. 588. See also *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452.

Effect of fraudulent concealment of assets.—The provision that no claim shall be proved against a bankrupt estate subsequent to one year after adjudication has been repeatedly construed by the courts, and they are practically agreed that it is not only a limitation, but is prohibitory, and that the courts have no power or discretion to extend the time therein specified, or permit the proof of claims after the expiration of the year, even if the claimant has been misled by the fraudulent concealment of the assets of the bankrupt. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; *In re Peck*, (C. C. A. 2d Cir. 1909) 168 Fed. 48, 21 Am. Bankr. Rep. 707, *affirming* (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904.

But see *In re Towne*, (D. C. Mass. 1903) 122 Fed. 313, 10 Am. Bankr. Rep. 284, wherein it was held that if a creditor has been misled by the bankrupt's fraud, in the preparation of his schedules, in such a manner as to indicate that there were no assets, proof may be allowed after the expiration of the time limited by the statute.

Time of proving claims liquidated by litigation.—As provided in the statute, where a claim has been liquidated by litigation, and the final judgment therein is rendered thirty days before or after the expiration of the one-year limitation period, in such case the claim so liquidated may be proved within sixty days after the rendition of final judgment. *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 766; *In re Fagan*, (D. C. S. C. 1905) 140 Fed. 758, 15 Am. Bankr. Rep. 520; *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825; *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10, *reversing* (D. C. N. H. 1906) 16 Am. Bankr. Rep. 457; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Eldred*,

(E. D. N. Y. 1907) 155 Fed. 686, 10 Am. Bankr. Rep. 52; *In re Landis*, (E. D. Pa. 1907) 156 Fed. 318, 19 Am. Bankr. Rep. 420; *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183; *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916, 20 Am. Bankr. Rep. 22; *In re Peck*, (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629; *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1911) 186 Fed. 586; *Matter of Damon*, (W. D. N. Y. 1905) 14 Am. Bankr. Rep. 809.

The phrase "liquidated by litigation" is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of a claim after the expiration of a year by a creditor who, during that time, was engaged in litigation with the bankrupt's estate concerning its liability to him. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10.

The term "liquidated by litigation," as used in section 57n, permitting proof of claims after a year if liquidated by litigation, applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated, and thereafter attempts to prove as a general creditor. *In re Salvador Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522.

When the question litigated necessarily involves the determination of the net amount for which claims should be finally allowed, the claims are to be considered as "liquidated by litigation," within the meaning of section 57n. *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183.

The term "liquidation," as used in section 57n, is not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but it includes as well proceedings to ascertain the kind and character as well as the amount of the claim. *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1911) 186 Fed. 586.

Liquidation after one-year limitation.—Section 57n should be construed to mean that, if a final judgment be entered within thirty days before the expiration of the time specified, or at any time thereafter, the claim might be proved within sixty days after the rendition of the judgment. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10, followed *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623.

A proceeding to recover a preference or fraudulent transfer is within the phrase "liquidation by litigation;" and a defendant creditor, in such an action, may prove his claim against the estate within sixty days after the rendition of final judgment, even though it was not filed or proved prior to the expiration of the one-year limitation period. *In re Fagan*, (D. C. S. C. 1905) 140 Fed. 758, 15 Am. Bankr. Rep. 520; *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22

Am. Bankr. Rep. 414; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. See also *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 136, affirming (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228.

Thus it has been held that a creditor of a bankrupt, whose debt was paid within four months prior to the bankruptcy, but from whom the amount was recovered by the trustee by suit as a preference, is one holding a "claim liquidated by judgment," within the meaning of section 57n; and he may prove the same against the estate, within sixty days thereafter, although more than a year after the adjudication. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. Compare *In re Kemper*, (N. D. Ia. 1905) 142 Fed. 210, 15 Am. Bankr. Rep. 675, wherein it was held that a creditor who received a voidable preference which was subsequently recovered in a suit by the trustee cannot prove a claim therefor after the expiration of one year from the adjudication, either as an original claim or by way of amendment of a prior claim proved and allowed within the time limited.

Attachment suit by creditor as liquidation.

—A creditor, who at the time of the bankruptcy of his debtor has an attachment suit pending, is not required to prove his claim in bankruptcy until the termination of such suit; when, if defeated, he may prove the same, although more than a year has elapsed since the adjudication, as a claim liquidated by litigation. *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228.

On reopening of estate.—A creditor who has failed to prove his claim in the original proceedings cannot prove such claim on the reopening of the estate, where more than one year has elapsed. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

But where a bankrupt scheduled no assets, and in consequence thereof no claims were proved and no trustee was appointed, and the estate was formally closed and the bankrupt discharged, it was held that on the discovery of previously unknown assets, and the reopening of the estate, the court may permit the filing of claims for a year from the date of the order, although the year from the adjudication, to which the filing of claims is limited by section 57n, has expired. *In re Pierson*, (S. D. N. Y. 1909) 174 Fed. 160, 23 Am. Bankr. Rep. 58, wherein it was said that if, before the estate had been formally closed, there had been claims proved, and an actual administration of the estate, then only such claims could come in on the reopening.

Claims due United States.—Section 57n is a statute of limitations, and is not binding on the United States. *In re Stoeber*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345.

Tax claims need not be proved within the year's limitation fixed by section 57n. *In re*

Cleanfast Hosiery Co., (S. D. N. Y. 1900) 4 Am. Bankr. Rep. 702.

The right to use a claim as a set-off, as against the trustee in an independent action, is not affected by failure to prove it in the bankruptcy proceedings as required by section 57n. *Norfolk, etc., R. Co. v. Graham*, (C. C. A. 4th Cir. 1906) 145 Fed. 809, 16 Am. Bankr. Rep. 610.

Amendment after one-year period.—A proof of claim which is defective in some substantial particular is amendable subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that proof of claim is thereby effectively made after the year limited by section 57n. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, affirming (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382, practically overruling *In re Moeblus*, (E. D. Pa. 1902) 116 Fed. 47, 8 Am. Bankr. Rep. 590; *In re Roerber*, (C. C. A. 2d Cir. 1903) 127 Fed. 122, 11 Am. Bankr. Rep. 464; *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 159 Fed. 624, 20 Am. Bankr. Rep. 258; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Kessler*, (C. C. A. 2d Cir. 1910) 184 Fed. 51; *In re Horne*, (S. D. Miss. 1909) 23 Am. Bankr. Rep. 590.

Thus it has been held that although the creditors of a bankrupt did not file their claim within one year following the adjudi-

cation, as required by the statute, an assignment thereof, filed with the referee by the assignee within the year, may be treated as sufficiently presenting the claim to permit an amendment thereof after the year. *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 159 Fed. 624, 20 Am. Bankr. Rep. 258.

But a new or entirely different claim cannot be substituted by way of amendment after the expiration of the one-year period allowed for proving claims. *In re Stevens*, (D. C. Vt. 1901) 107 Fed. 243, 5 Am. Bankr. Rep. 806; *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re McCallum*, (E. D. Pa. 1904) 127 Fed. 768, 11 Am. Bankr. Rep. 447.

New claim on separate contract.—A creditor who has proved a claim against the estate of a bankrupt partnership, based on a promissory note made by the firm, cannot, by amendment after the expiration of the year allowed for filing claims, add a claim against the estate of one of the partners, based upon his indorsement of the note. *In re McCallum*, (E. D. Pa. 1904) 127 Fed. 768, 11 Am. Bankr. Rep. 447.

Creditor cannot amend withdrawn claim.—A claim filed against a bankrupt estate, after the expiration of the year fixed by the statute, cannot be allowed as an amendment of, or substitute for, a prior claim which was withdrawn without reservation ten months before. *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581.

[*Infants and insane persons.*] *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. [(1898) 30 Stat. L. 561.]

SEC. 58. NOTICES TO CREDITORS. (a) [*Ten days' notice.*] Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of [(1898) 30 Stat. L. 561; (1910) 36 Stat. L. 841.]

(1) [*Examinations.*] all examinations of the bankrupt; [(1898) 30 Stat. L. 561.]

Cross-references: As to

Examination of the bankrupt, see section 7a (9), *supra*, p. 524.

Examination of persons other than the bankrupt, see section 21a, *supra*, p. 589.

Where a claimant against a bankrupt had no notice, at the time the bankrupt and other witnesses were examined before the referee at meetings of creditors, that the evidence would be used on the hearing of his claim, it was held that such evidence was inadmis-

sible against him. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

When notice not required.—If the examination is limited to obtaining information on which to prepare the schedules, it is not essential to the validity of the proceeding that ten days' notice thereof by mail should have been given to the creditors. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244. See also *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44.

(2) [*Application for confirmation of composition.*] all hearings upon applications for the confirmation of compositions; [(1898) 30 Stat. L. 561; (1910) 36 Stat. L. 841.]

Cross-reference: As to Compositions generally, see sections 12 and 13, *supra*, pp. 540, 546.

The amendment of 1910 omitted from sec-

tion 58a (2) the words "or the discharge of bankrupts" which appeared in the original Act; the matter so omitted, however, was incorporated in subdivision (9) which was added to this section by the said amendment.

(3) [*Meetings.*] all meetings of creditors; [(1898) 30 Stat. L. 561.]

Cross-references: As to

Meetings of creditors generally, see the several subdivisions of section 55, *supra*, p. 696. Voters at creditors' meetings, see section 56, *supra*, p. 696.

(4) [*Sales.*] all proposed sales of property; [(1898) 30 Stat. L. 561.]

Cross-reference: As to

Sale of property generally, see sections 47a (2), *supra*, p. 682, and 70b, *infra*, p. 839; see also general order in bankruptcy No. 18, 1 Fed. Stat. Annot. 609.

Fisher, (C. C. A. 3d Cir. 1906) 143 Fed. 962, 16 Am. Bankr. Rep. 278.

Sale without notice.—It has been held that under a district rule based on general order No. 18 (2), the court or the referee has discretionary power to order a private sale of a bankrupt's property, with or without notice; and the action of a referee in directing such a sale ought not to be disturbed unless it clearly appears that his discretion was improvidently exercised. *In re Hawkins*, (W. D. N. Y. 1903) 125 Fed. 633, 11 Am. Bankr. Rep. 49.

Notice of new order of sale must be given.—Where the time fixed in an order by a referee, authorizing a private sale of the property of a bankrupt at a specified upset price, had expired without a sale having been made, it was held that notice to creditors and others interested was essential before the making of a new order of sale. *Allgair v.*

(5) [*Dividends.*] the declaration and time of payment of dividends; [(1898) 30 Stat. L. 561.]

Cross-reference: As to

Declaration and payment of dividends, see the several subdivisions of section 65, *infra*, p. 781.

(6) [*Final accounts.*] the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; [(1898) 30 Stat. L. 561.]

Cross-reference: As to

Trustee's duty to make final reports and accounts, see section 7a (8), *supra*, p. 520.

(7) [*Compromises.*] the proposed compromise of any controversy; [(1898) 30 Stat. L. 561; (1910) 36 Stat. L. 841.]

Cross-reference: As to

Compromising controversies, see section 27, *supra*, p. 645.

(8) [*Dismissal of proceedings.*] the proposed dismissal of the proceedings, and [(1898) 30 Stat. L. 561; (1910) 36 Stat. L. 841.]

Cross-references: As to

Dismissal of proceedings and notice required thereon, see sec. 59g, *infra*, p. 729.

When proceedings should be dismissed, see sec. 18 d, e, g, *supra*, p. 583 *et seq.*

Section 58a (8) and section 59g must be read and construed together, having in mind the rule that specific provisions relating to a particular subject must govern, in respect to that subject, as against general provisions, in other parts of the law, which might otherwise be broad enough to include it. *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962, 15 Am. Bankr. Rep. 294.

Notice of a proposed dismissal of the proceedings is indispensable, and an order of dismissal without notice is erroneous. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

Notice unnecessary where dismissal results from hearing.—The provision of section 58a (8) as to notice relates only to dismissals which withdraw the case without its having been submitted to the court for a decision on the merits, and not to dismissals which follow as the result of a trial or hearing. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

(9) [*Applications for discharge.*] there shall be thirty days' notice of all applications for the discharge of bankrupts. [(1910) 36 Stat. L. 841.]

Cross-reference: As to

Application for discharge generally, see the several subdivisions of section 14, *supra*, p. 547.

Notice essential.—The application for discharge, and the issuance, publication, and mailing of notices to creditors upon the application, constitute a step, and one of extreme importance to the bankrupt, in the administration of the estate. *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

Discharge and examination notice combined.—The notice to creditors to attend in opposition to the discharge should embrace

also a notice of the examination of the bankrupt. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419.

Mere irregularity immaterial.—The fact that the receiver for a creditor of a bankrupt did not receive the written notice of the bankrupt's application for discharge, owing to the fact that the creditor's address was not given in the schedules, although the receiver's name and address were disclosed by the proofs, is an irregularity merely, which is not sufficient ground for setting aside the order for discharge, where the notice was published as required, and in the absence of fraud. *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84.

b [*First meeting — publication of notice.*] Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. [(1898) 30 Stat. L. 561.]

Cross-references: As to

Creditors' meetings generally, see the several subdivisions of section 55, *supra*, p. 696.

Designation of newspapers, see section 28, *supra*, p. 646.

Notice must be published, as required by the statute, in a newspaper, and mailed by the clerk to the creditors. *In re Hatcher*,

(W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

Inability to obtain address of creditor must be shown.—Notice by publication to judgment creditors is insufficient to entitle a bankrupt to discharge, unless he shows that the addresses of such creditors cannot be ascertained after diligent search and inquiry. *In re Dvorak*, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66.

c [*Notices given by referee.*] All notices shall be given by the referee, unless otherwise ordered by the judge. [(1898) 30 Stat. L. 561.]

Cross-reference: As to

Duty of referee to give notice, see section 39a (4), *supra*, p. 664.

SEC. 59. WHO MAY FILE AND DISMISS PETITIONS. — *a* [*Voluntary bankrupt.*] Any qualified person may file a petition to be adjudged a voluntary bankrupt. [(1898) 30 Stat. L. 561.]

Cross-references: As to

Practice subsequent to filing of voluntary petition, see section 18g, *supra*, p. 586.

Who may be adjudged voluntary bankrupts, see section 4a, *supra*, p. 495.

Any qualified person may file a petition to be adjudged a voluntary bankrupt. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392; *In re Mussey*, (D. C. Mass. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Stegar*, (N. D. Ala. 1902) 113 Fed. 978, 7 Am. Bankr. Rep. 665; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *Hanover Nat. Bank v. Moyses*, (1902) 8 Am. Bankr. Rep.

1, 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113; *Matter of Carbone*, (D. C. Wash. 1904) 13 Am. Bankr. Rep. 55.

Corporations.—Municipal, railroad, insurance, and banking corporations are not entitled to the benefit of the statute as voluntary bankrupts. See section 4a, *supra*, p. 495, which, in this respect, was amended in 1910.

Filing voluntary petition not act of bankruptcy.—The filing of a voluntary petition in bankruptcy is not of itself an act of bankruptcy, but simply institutes a proceeding in which the court acquires jurisdiction to adjudicate bankruptcy, if the facts warrant such an adjudication. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Filing not obligatory.—There is nothing in the law requiring an insolvent person to

file a petition under any circumstances. He has the right to do so when he finds that he is unable to pay his debts and desires to make a surrender of his property, under the provisions of the Bankruptcy Act, distribute it equally among his creditors, and be relieved from further liability. The right to file a voluntary petition is a privilege extended by the law, to be exercised or not by a debtor as he may see proper. It is the right of the creditor to institute and prosecute involuntary proceedings, but he cannot, under any conditions, compel the debtor to take the initiative. *Richmond Standard Steel Spike, etc., Co. v. Allen*, (C. C. A. 4th Cir. 1906) 148 Fed. 657, 17 Am. Bankr. Rep. 583.

Creditors may set up want of jurisdiction. — Upon the filing of a voluntary petition in bankruptcy, and before an adjudication thereon, creditors may move to set the petition aside or dismiss it, on the ground that the court has no jurisdiction, the residence or domicile of the debtor being in another district; and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition according to the result. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

Effect of previous involuntary petition. — A debtor may file a voluntary petition in bankruptcy even though his creditors have previously filed a petition in involuntary proceedings against him; in such case, however, the creditors will be notified and such action taken as the court may deem best for the interests of the estate. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392; *In re Dwyer*, (D. C. N. D. 1902) 112 Fed. 777, 7 Am. Bankr. Rep. 532; *In re Stegar*, (N. D. Ala. 1902) 113 Fed. 978, 7 Am. Bankr. Rep. 665.

Effect of failure to apply for discharge in former proceedings. — Where the second proceeding is under a voluntary petition filed by the bankrupt, in which he brings into court no material assets for administration, and the sole purpose is to obtain a discharge from the debts involved in the former proceeding,

no ground of relief is presented, and the proceedings should be dismissed as futile; or, at least, further proceedings in the case should be stayed, or the bankrupt restrained and enjoined from filing a petition for discharge therein. *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513.

So, also, it has been held that where a bankrupt made no application for a discharge in original bankruptcy proceedings, a judgment subsequently perfected on a claim provable therein does not create a new debt which could form a basis for a subsequent proceeding in bankruptcy. *In re Schnabel*, (E. D. N. Y. 1909) 166 Fed. 383, 23 Am. Bankr. Rep. 22. And see to the same effect *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000, 13 Am. Bankr. Rep. 711; *In re Kuffler*, (2d Cir. 1907) 151 Fed. 12, 80 C. C. A. 508; *In re Kuffler*, (E. D. N. Y. 1907) 155 Fed. 1018; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588. And see also the annotation under section 14 a and b, *supra*, p. 547 *et seq.*

Where, however, new creditors are listed in the second proceeding, a different question arises. *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513.

The pendency of proceedings in insolvency, under a state law, on the debtor's voluntary petition, begun before the passage of the Bankruptcy Act, is not sufficient ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, even though he has contracted no new debts. *In re Mussey*, (D. C. Mass. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592.

Withdrawal of voluntary petition. — Where a bankrupt, having been discharged in voluntary proceedings on Jan. 17, 1902, filed another voluntary petition on Jan. 11, 1907, it was held that he would not be permitted to withdraw the same over the protest of his creditors because he could not, under section 14b (5), obtain a discharge within twelve months after adjudication. *In re Smith*, (E. D. N. Y. 1907) 155 Fed. 688, 19 Am. Bankr. Rep. 63.

b [Involuntary bankrupt.] Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. [(1898) 30 Stat. L. 561.]

Cross-references: As to

Acts of bankruptcy for which petition may be filed, see the several subdivisions of section 3a, *supra*, p. 481.

Practice generally subsequent to filing petition, see the several subdivisions of section 18, *supra*, p. 579.

Provable claims, see section 63 a and b, *infra*, p. 753 *et seq.*

Who may be adjudged, see sections 4 a and b, and 5a, *supra*, p. 495 *et seq.*

I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY, 718.

II. FORM, AVERMENTS, AND AMENDMENT OF PETITION, 722.

I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY.

Creditors having provable claims. — A petition in involuntary bankruptcy proceedings can only be filed by creditors, in the number

and amount specified in section 59b, who have provable claims against the debtor whose adjudication is sought. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Novak*, (N. D. Ia. 1900) 101 Fed. 800, 4 Am. Bankr. Rep. 311; *In re Gerson*, (E. D. Pa. 1901) 105 Fed. 891, 5 Am. Bankr. Rep. 89, *affirming* (C. C. A. 3d Cir. 1901) 6 Am. Bankr. Rep. 11; *Boyce v. U. S. Fidelity, etc., Co.*, (C. C. A. 6th Cir. 1901) 111 Fed. 138, 7 Am. Bankr. Rep. 6; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *Phillips v. Dreher Shoe Co.*, (M. D. Pa. 1902) 112 Fed. 400, 7 Am. Bankr. Rep. 326; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re Fishplate Clothing Co.*, (E. D. N. C. 1903) 125 Fed. 986, 11 Am. Bankr. Rep. 204; *Brake v. Callison*, (C. C. A. 5th Cir. 1904) 129 Fed. 201, 11 Am. Bankr. Rep. 797; *In re Rothenberg*, (S. D. N. Y. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Ellis*, (C. C. A. 6th Cir. 1906) 143 Fed. 103, 16 Am. Bankr. Rep. 221; *In re Brown*, (C. C. A. 9th Cir. 1908) 164 Fed. 673, 21 Am. Bankr. Rep. 123; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132; *In re Corwin Mfg. Co.*, (D. C. Mass. 1910) 185 Fed. 976; *In re Gillette*, (W. D. N. Y. 1900) 5 Am. Bankr. Rep. 119; *In re Penzanaky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

As to what claims are provable, see section 63 a and b, *infra*, p. 753 *et seq.*

If a debt is wholly wanting in existence, if it has been paid, for example, or if it has been fabricated for that purpose, the defendant should be allowed to show that fact in some form. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

An adjudication in involuntary proceedings is intended to be the result of the respective rights and obligations of the debtor and his creditors as they exist at the time of the commission of an act of bankruptcy, or of the filing of the petition; but such an adjudication does not concern any one with whom the debtor has never dealt. The court is not, in every case, bound by the mere words of the Act to recognize the holder of a provable claim for the time being as necessarily entitled to maintain an involuntary petition. *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 752, 22 Am. Bankr. Rep. 780.

Persons who have sold and assigned their claims against a debtor have no standing to petition that such debtor be adjudged a bankrupt. *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369.

The claim need not be proved; if it be a fair and honest claim of debt, which is provable in the sense that it is a claim that the court of bankruptcy after adjudication will hear and establish, if proved, the creditor should not be bound before the adjudication

to so prove and establish it, but should be allowed to rely upon its provable quality, *prima facie*, to support an involuntary petition in bankruptcy. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

The petitioner's claim need not be payable, that is, allowable, at the time of the filing of the petition. The mere fact that the claim is a provable one under section 63 is sufficient to warrant the creditors joining in the petition. *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re Rothenberg*, (S. D. N. Y. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485.

The Bankruptcy Act maintains throughout a clear distinction between the proof and the allowance of claims, and in section 59b the term "provable claims" is not the equivalent of "allowable claims." *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308.

Thus the owner of a note not yet due, indorsed by an alleged bankrupt, holds a provable claim against him, and may join in a petition to have him adjudged an involuntary bankrupt; the fact that the claim is not allowable until the maturity of the note is immaterial. *In re Rothenberg*, (S. D. N. Y. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485.

Time when petitioner must be creditor.—There is nothing in section 59, or in any other provision of the Bankruptcy Act, requiring that a petitioning creditor should have been one at the time of the commission of the act of bankruptcy; all that the Act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. *In re Hanyan*, (S. D. N. Y. 1910) 180 Fed. 498. See also *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 752, 22 Am. Bankr. Rep. 780.

But it has been held that a petitioning creditor must have had a provable claim at the time the act of bankruptcy was committed. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Callison*, (S. D. Fla. 1903) 130 Fed. 987, 12 Am. Bankr. Rep. 344, *affirming* (C. C. A. 5th Cir. 1904) 129 Fed. 201, 11 Am. Bankr. Rep. 797.

Effect of petitioner's subsequent indebtedness to bankrupt's assignee.—Where the claim of a petitioning creditor was provable, when the petition was filed, for an amount exceeding \$500, it was held to be immaterial that thereafter the creditor became liable to the bankrupt's assignee for the benefit of creditors because of a wrongful attachment. *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344.

Bankrupt creditor.—Where one of the petitioners, in a petition in involuntary bankruptcy, becomes a bankrupt before the hearing, his trustee may be substituted in his place as a petitioner. *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163.

The authority of an agent to act for his principal in petitioning for an adjudication in involuntary bankruptcy is material, and should be set forth in the affidavit, or otherwise established. *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

The president of a corporation may, under a by-law giving him general authority to transact its business, determine when bankruptcy proceedings should be instituted against its debtor, and his action in that behalf is conclusive until revoked by the board of directors. *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171.

Preferred creditors.—Since under section 57g a preferred creditor may surrender his preference and obtain the allowance of his claim, he may be a petitioner in involuntary bankruptcy proceedings under section 59b. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *In re Norcross*, (W. D. Mo. 1899) 1 Am. Bankr. Rep. 644; *In re Cain*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 378; *In re Wise*, 2 Nat. Bankr. N. 151.

Must surrender preference.—A preferred creditor who petitions in involuntary proceedings must surrender his preference. *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *In re Fishplate Clothing Co.*, (E. D. N. C. 1903) 125 Fed. 986, 11 Am. Bankr. Rep. 204.

And such creditor will not be counted as a petitioner, in ascertaining whether the required number have joined in the petition, until his preference has been surrendered. *In re Miner*, (D. C. Mass. 1900) 104 Fed. 520; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *Leighton v. Kennedy*, (1st Cir. 1904) 129 Fed. 737, 64 C. C. A. 265; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

Creditors holding unliquidated claims.—A creditor may join in or file a petition in involuntary bankruptcy even though his claim be an unliquidated one; providing it is capable of being liquidated under section 63b, and provable under section 63a. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484, *affirming*

(W. D. N. Y. 1903) 125 Fed. 576, 11 Am. Bankr. Rep. 48, and (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; *In re Manhattan Ice Co.*, (S. D. N. Y. 1901) 114 Fed. 400, 7 Am. Bankr. Rep. 408; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569.

Formerly, however, it was held that the ownership of an unliquidated claim was insufficient to support an involuntary petition. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761, 5 Am. Bankr. Rep. 425; *In re Big Meadows Gas Co.*, (W. D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697.

Disqualification of creditors as petitioners—*Generally.*—A creditor may, by his conduct, disqualify himself as a petitioner in involuntary bankruptcy proceedings; and such disqualification will be deemed to have taken place where it appears that a creditor, either by fraud, deceit, or unfair dealing, has brought about, or assisted in bringing about, the commission of an act of bankruptcy by the debtor. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *In re Curtis*, (S. D. Ill. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440, *affirmed* (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388; *Sinsheimer v. Simonson*, (D. C. Ky. 1899) 96 Fed. 579, *affirmed* (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171; *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed. 288, 11 Am. Bankr. Rep. 583; *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229; *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Weiss*, (E. D. Pa. 1905) 142 Fed. 279; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695.

Procuring issuance of execution.—There is no difference in principle between inducing or participating in an assignment and procuring a judgment creditor to issue execution for the sole purpose of enabling the procurer to file a petition in bankruptcy against a debtor, who, if permitted to utilize his resources, could continue in business and eventually meet all his obligations. *In re Weiss*, (E. D. Pa. 1905) 142 Fed. 279.

Proceeding in state court.—A creditor who has instituted a proceeding in a state court for the collection of his debt, on discovering that the debtor has given a preference or transferred his property, has the right, at his election, to abandon such proceedings and

file a petition in bankruptcy against his debtor within four months. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Creditors of an insolvent partnership are not estopped to maintain proceedings to have the firm adjudged an involuntary bankrupt, because of filing and proving their claims in a suit in a state court, under a state statute, for winding up the affairs of a bank owned by the partnership, instituted after the filing of the petition in bankruptcy, where the alleged act of bankruptcy was a conveyance of property not employed in the banking business nor involved in the state suit. *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122.

Having receivers appointed.—But where creditors of a corporation intervened in a suit against it in a state court, and assisted in having receivers appointed, and participated in such proceedings, while large sums were expended and sales of property negotiated by the receivers, they are thereby estopped to subsequently file a petition in bankruptcy based on the appointment of such receivers as an act of bankruptcy. *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601.

Splitting claims.—Creditors who have split up claims for the sole purpose of using them in order to make up the required number of creditors or amount of indebtedness, thereby disqualify themselves as petitioners in involuntary proceedings. *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695; *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673.

But where there are no objectionable features connected with the transaction, claims against a bankrupt may be purchased in order to make up the requisite number of petitioning creditors to sustain an involuntary petition. *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344.

Thus it has been held that a creditor is not disqualified as a petitioner because he acquired a claim by assignment after commission of an act of bankruptcy. *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772.

And, generally, where the conduct of a creditor is fair, and consistent with an honest effort to secure the payment of a just indebtedness, he will not be disqualified as a petitioner by the fact that he advised, or aided in fairly bringing about, the bankruptcy proceeding. *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, 4 Am. Bankr. Rep. 496; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266; *Lowenstein v. Henry*

McShane Mfg. Co., (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Mertens*, (6th Cir. 1906) 147 Fed. 177, 77 C. C. A. 473; *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Disqualification by participation in general assignment.—A creditor who has assented to a general assignment for the benefit of creditors is, as a general rule, disqualified thereby as a petitioner in subsequent involuntary proceedings in bankruptcy against the assignor, where an adjudication is sought on the ground that the assignment constitutes an act of bankruptcy. *In re Romanow*, (D. C. Mass. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; *In re Miner*, (D. C. Mass. 1900) 104 Fed. 520, 4 Am. Bankr. Rep. 710; *Durham Paper Co. v. Seaboard Knitting Mills*, (E. D. N. C. 1903) 121 Fed. 179, 10 Am. Bankr. Rep. 29, *distinguishing In re Curtis*, (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *Moulton v. Curn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695.

Effect of fraud, or nonassenting participation.—Creditors who are fraudulently induced to participate in a general assignment, or whose participation therein cannot be said to signify an assent thereto, are not precluded from filing a petition in involuntary bankruptcy against the assignor, or from joining in such a petition. *In re Curtis*, (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *Durham Paper Co. v. Seaboard Knitting Mills*, (E. D. N. C. 1903) 121 Fed. 179, 10 Am. Bankr. Rep. 29; *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163; *Canner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870. See also *In re Hirose*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 154.

Officer's assent as individual does not disqualify corporation creditor.—The fact that an officer of a corporation creditor of a bankrupt agreed to act as the bankrupt's assignee in his capacity as an individual only, does not estop the corporation, which was not a preferred creditor under the assignment, from joining in a petition to have the debtor declared an involuntary bankrupt. *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171.

Submission of claim to assignee for comparison.—Creditors are not estopped to maintain a petition on the ground of their having participated in proceedings under an assignment, where they submitted to the assignee, at his request, unverified statements

of their claims, merely for the purpose of enabling him to compare the same with the entries in the insolvent's books. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824.

Participation for purpose of attacking assignment.—A creditor who goes into the state court for the purpose of attacking as fraudulent certain alleged preferences in a general assignment, does not thereby waive his right to file a petition in involuntary bankruptcy against the assignor. *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385.

Delay in instituting bankruptcy proceedings.—Nor are creditors estopped from maintaining a petition because, having knowledge of an assignment and of the acts of the assignee thereunder, they delayed instituting proceedings in bankruptcy for about two months. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824.

II. FORM, AVERMENTS, AND AMENDMENT OF PETITION.

Form.—Petitions in bankruptcy should be made out in accordance with the forms and general orders in bankruptcy prescribed by the Supreme Court. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673. See also *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *Matter of Gorman*, (D. C. Hawaii 1906) 15 Am. Bankr. Rep. 587.

Prayer for intervention in earlier proceedings.—Where an involuntary bankruptcy petition was in fact an original petition, it will not be deprived of its status as such by the fact that it contained a prayer of the petitioner to intervene in earlier proceedings as a cautionary measure, in order that the petitioner might be represented in the proceedings on the earlier petition for the administration and preservation of the estate. *In re Hafl*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362.

Assignee under general assignment cannot be joined with bankrupt.—The statute contains no specific provision authorizing any third person to be joined as a party to a petition in involuntary bankruptcy; and, even conceding that a general assignee of the alleged bankrupt is a proper party, it can only be for the purpose of enabling him to contest the adjudication, the result of which might be to prejudice his rights as assignee. He cannot, by being so joined, be thus brought into the case for the purposes of all future inquiries and determinations made during the administration of the estate. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

Averment of facts.—All jurisdictional facts must affirmatively and distinctly appear in the petition; and all issuable facts should be set out clearly and with reasonable certainty. *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *In re Rome*

Planing Mill, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 124; *In re Nelson*, (W. D. Wis. 1899) 98 Fed. 76, 2 Am. Bankr. Rep. 556; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 121; *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed. 288, 11 Am. Bankr. Rep. 583; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *In re Vetterman*, (D. C. N. H. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245; *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 83; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

Time of objecting for insufficiency.—After verdict or judgment an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a cause of action; and the petition is impregnable to attack because it is otherwise defective, informal, indefinite, or incomplete, even though it was demurrable before answer or judgment. *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 18 Am. Bankr. Rep. 265.

Averment as to amenability of debtor.—A petitioner in involuntary bankruptcy must show that the defendant is not within one of the classes excepted from the operation of the Act, either by a negative averment to that effect or by a direct averment of his principal business. *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736, 9 Am. Bankr. Rep. 762; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *Callison v. Brake*, (C. C. A. 5th Cir. 1904) 129 Fed. 196, 11 Am. Bankr. Rep. 797; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 33; *In re Callison*, (S. D. Fla. 1903) 130 Fed. 987, 12 Am. Bankr. Rep. 344; *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357; *In re Lackow*, (E. D. Pa. 1905) 15 Am. Bankr. Rep. 826.

Thus it is necessary to aver, in a petition for involuntary bankruptcy, that the alleged bankrupt is not a wage earner, nor engaged

chiefly in farming or the tillage of the soil, unless the other averments sufficiently exclude the fact of such occupation. *In re Bel-lah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *Matter of Levingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

Petition subject to demurrer.—A petition in involuntary bankruptcy which does not show the business of the defendant, or that he does not come within the excepted classes, is subject to demurrer on such grounds. *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

Number of creditors and amount of claims.

—A petition in involuntary bankruptcy proceedings must aver the existence of the number of creditors, and the amount of claims, necessary to warrant the filing of such petition. *In re Tirre*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 493; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599; *In re Rogers Milling Co.*, (W. D. Ark. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Plotke*, (C. C. A. 7th Cir. 1900) 104 Fed. 964, 5 Am. Bankr. Rep. 175; *In re Mammouth Pine Lumber Co.*, (W. D. Ark. 1901) 109 Fed. 308, 6 Am. Bankr. Rep. 84; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *In re Independent Thread Co.*, (D. C. N. J. 1902) 113 Fed. 998, 7 Am. Bankr. Rep. 704; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 377, 12 Am. Bankr. Rep. 364; *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492; *In re Lackow*, (E. D. Pa. 1905) 140 Fed. 573, 14 Am. Bankr. Rep. 514; *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369, 15 Am. Bankr. Rep. 594; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Norcross*, (W. D. Mo. 1899) 1 Am. Bankr. Rep. 645; *In re Cain*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 378.

The actual amount due to petitioners is immaterial, providing they are creditors to an extent sufficient to satisfy the Act. *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872.

Where a petition shows on its face a sufficient petitioning creditor, and there is established upon the trial a sufficient petitioning creditor, the absence of a statement of amount in the petition may be disregarded. *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673.

To entitle less than three creditors to maintain a petition in involuntary bankruptcy, it must appear that there were less than twelve creditors at the date of the filing of the petition. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553.

The statutory right of a single creditor to have his debtor adjudged a bankrupt exists

only under special circumstances, namely, that his claim shall be sufficient in amount, and that all of the creditors shall be less than twelve. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553.

Time to ascertain number of creditors and amount of claims.—The time of the adjudication in bankruptcy, and not the time of the institution of the proceedings, is the time to test the sufficiency of the number of the petitioning creditors, and of the amount of their claims, to warrant the adjudication. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

Preferred creditors counted.—Since the claims of preferred creditors are provable debts on surrender or recovery of the preference, they must be taken into account in determining the amount of indebtedness. *In re Tirre*, (S. D. N. Y. 1899) 95 Fed. 425; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

Debtor cannot evade statute by transfer.—An insolvent having more than twelve creditors cannot defeat bankruptcy proceedings against him by transferring his property for the benefit of some of his creditors, leaving less than three unprovided for, but leaving them to be counted so that those remaining will be insufficient in number to maintain a petition in bankruptcy. *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97. See also *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

Averment of commission of act of bankruptcy.—The petition must allege the commission of an act of bankruptcy by the debtor; and such averment must be supported by such allegations of fact as are essential to bring the proceeding within the language of the statute. *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re Ewing*, (C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598. See also *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (E. D. Va. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594; *In re Vetterman*, (D. C. N. H. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245. And see generally the annotation under the several subdivisions of section 3a, *supra*, p. 481, as to what constitutes acts of bankruptcy, and the constituent elements thereof.

May allege several acts of bankruptcy.—A petition is not objectionable for the joinder of several acts of bankruptcy which are known to the creditors, and which were committed by the insolvent within four months prior to the filing of the petition. *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

Sufficiency of averment.—An allegation of the commission of an act of bankruptcy in a creditors' petition should state the specific fact relied on, with time, place, and circum-

stances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer. Therefore an allegation that the defendant committed various and sundry acts of bankruptcy by paying several of his creditors various sums of money while insolvent, with intent to give preferences, without stating the names of the creditors or the sums so paid, is wholly insufficient. *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed. 288, 11 Am. Bankr. Rep. 583.

Petitioning creditors are bound to as full a disclosure in their petition in respect to the acts of bankruptcy charged as their information enables them to make, supplemented by an explanation of its lack of completeness, so far as it may be thus lacking, and their case must rest on something more than rumor or vague hearsay or mere suspicion. *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343.

Language of Act insufficient.—Allegations of acts of bankruptcy, in an involuntary petition, in the language of the Act, without setting forth any other facts or circumstances, are usually insufficient. *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400.

Averment of intent.—A petition alleging payments to a creditor while insolvent as an act of bankruptcy is demurrable, unless it further avers that such payments were made with intent to prefer such creditor over the other creditors. *In re Ewing*, (C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269.

But, since the amendment of 1910, it seems that the averment should be as to a reasonable cause to believe that the transaction would effect a preference. See section 60b, *infra*, p. 739.

An averment that, "while insolvent, the debtors transferred portions of their property to one or more of their creditors, with intent to prefer such creditors over their other creditors," has been held to be insufficient because of the failure to specifically state the particulars of such transfer, by describing the property transferred, and when and to whom the same was made. *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577.

Fraudulent concealment may be shown as well by circumstantial as by direct evidence, and where the evidence is wholly circumstantial it is impossible, and therefore unnecessary, to aver in the petition the precise details of the act of concealment. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

Preferential payments.—A petition in involuntary bankruptcy, which alleges as an act of bankruptcy preferential payments made by the bankrupt to certain creditors within four months and while insolvent, should set out the names of the creditors to whom such payments were made, if known; but if the petitioners do not know their names the petition is good, although it may only aver in general terms that the payments were made, adding a sufficient reason why a more specific

allegation is not possible. *In re Lackow*, (E. D. Pa. 1905) 140 Fed. 573, 14 Am. Bankr. Rep. 514.

Unnecessary averments.—Only the constituent elements of the act charged need be alleged; thus, where insolvency is not essential to the commission of an act of bankruptcy, it need not be averred in the petition; and if averred, it need not be proved. See *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463.

Amendment of petition.—Under its general powers, the court of bankruptcy may permit the amendment of involuntary petitions in bankruptcy, to the same extent as amendments of pleadings are allowed in other proceedings; and such amendments, when allowed, relate back to the filing of the original petition. *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514, 19 Am. Bankr. Rep. 746; *In re Ogles*, (W. D. Tenn. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671; *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *In re Hartman*, (N. D. Ia. 1899) 96 Fed. 593; *In re Nelson*, (W. D. Wis. 1899) 98 Fed. 76, 2 Am. Bankr. Rep. 556; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662, 7 Am. Bankr. Rep. 434; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Mercur*, (C. C. A. 3d Cir. 1903) 122 Fed. 384, 10 Am. Bankr. Rep. 505, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 626; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 125 Fed. 736, 9 Am. Bankr. Rep. 762; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *In re Riggs Restaurant Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 691, 11 Am. Bankr. Rep. 508; *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343; *In re White*, (E. D. Pa. 1905) 135 Fed. 200, 14 Am. Bankr. Rep. 241; *In re Shoesmith*, (C. C. A. 7th Cir. 1905) 135 Fed. 684, 13 Am. Bankr. Rep. 645; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Haff*, (C. C. A. 2d Cir. 1905) 136 Fed. 78, 13 Am. Bankr. Rep. 362; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, (7th Cir. 1905) 141 Fed. 518, 72 C. C. A. 576, 15 Am. Bankr. Rep. 804; *In re Hark*, (E. D. Pa. 1905) 142 Fed. 279; *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 16 Am. Bankr. Rep. 502; *In re Hammond*, (E. D. N. Y. 1908) 163 Fed. 548, 20 Am. Bankr. Rep. 776; *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577; *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94, 21 Am. Bankr. Rep. 570; *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr.

Rep. 330; *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753.

While rule 11 of the general orders in bankruptcy deals with amendments to a petition and schedules, it was not intended to abrogate or restrict the court's general power of amendment in other respects. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310.

Amendment of statement of facts.—Thus a petition in involuntary bankruptcy may be amended to set forth more fully and clearly the facts which show that an adjudication should be made. *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94, 21 Am. Bankr. Rep. 570.

Amendment to show claims of petitioners.—And a petition may be amended to describe more fully and in detail the claims of the petitioners, if deemed insufficient in that respect. *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577.

Amendment to correct name.—So, also, the court may permit the amendment of an involuntary petition, correcting the name of the alleged bankrupt. *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602.

Amended petition cannot be converted into an original.—An amended petition in bankruptcy executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear to the court. *In re Hyde, etc., Mfg. Co.*, (E. D. N. Y. 1900) 103 Fed. 617, 4 Am. Bankr. Rep. 602.

Amendment of fatal defects.—Where the petition is fatally defective, an amendment thereof will not be allowed, unless the cause of the error in the original petition is shown, as required by general order in bankruptcy No. 11. *White v. Bradley Timber Co.*, (S. D. Ala. 1902) 116 Fed. 768, 8 Am. Bankr. Rep. 671; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *In re Portner*, (E. D. Pa. 1907) 149 Fed. 799, 18 Am. Bankr. Rep. 89; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735. See also *In re Sears*, (C. C. A. 2d Cir. 1902) 117 Fed. 294, 8 Am. Bankr. Rep. 713.

Jurisdictional defects.—Where a sufficient cause therefor is shown the federal courts have power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Hammond*, (E. D. N. Y. 1908) 163 Fed. 548, 20 Am. Bankr. Rep. 776.

And it has been held that jurisdictional

defects in bankruptcy proceedings should be considered by the court, even though called to its attention by creditors having no standing to contest the adjudication on its merits. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

But leave to amend should not be granted where the effect will be to withdraw the administration of the property from the Circuit Court, unless for cogent reasons. *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31.

Amendment of allegation as to act of bankruptcy.—The averments as to the acts of bankruptcy charged in the petition may be amended so as to cure any defect therein. *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re Hark*, (E. D. Pa. 1905) 142 Fed. 279; *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr. Rep. 330.

Additional acts of bankruptcy may also, in the discretion of the court, be inserted by amendment. *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (C. C. A. 3d Cir. 1907) 154 Fed. 662, 18 Am. Bankr. Rep. 756; *In re Cleary*, (E. D. Pa. 1910) 179 Fed. 990.

But where a proposed amendment to an involuntary bankruptcy petition seeks to plead alleged acts of bankruptcy occurring subsequently to those stated in the original petition, which must have been known to some of the original petitioners at the time such original petition was filed, and the alleged amendment is not served on the bankrupt, and no excuse is offered why the acts sought to be so pleaded were omitted from the original petition, leave to file such amendment will be denied. *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57.

It has also been held that the original bankruptcy petition cannot be amended by setting out acts of bankruptcy not therein referred to, and occurring more than four months before the application for an order allowing the amendment. *In re Haff*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

Amendment of allegation as to amenability of debtor.—Averments showing the amenability of the debtor to bankruptcy proceedings may also be permitted. *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514, 19 Am. Bankr. Rep. 746; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736, 9 Am. Bankr. Rep. 762; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1009,

13 Am. Bankr. Rep. 665; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577; *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

Time when amendment may be made.—For the purpose of curing ordinary defects and omissions an amendment will be allowed

at any time during the pendency of the proceedings, such allowance being within the legal discretion of the court. *In re Mercur*, (E. D. Pa. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; *In re Mercur*, (C. C. A. 3d Cir. 1903) 122 Fed. 384, 10 Am. Bankr. Rep. 505; *Hark v. C. M. Allen Co.*, (C. C. A. 3d Cir. 1906) 146 Fed. 665, 17 Am. Bankr. Rep. 3; *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753.

c [*Petitions in duplicate.*] Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt. [(1898) 30 Stat. L. 561.]

Cross-reference: As to
Time of filing petition, see section 3b,
supra, p. 492.

Filing of petition — *Filing in duplicate.* — The statute requires the filing within the specified period of four months of a petition in duplicate; one copy for the clerk and the other for service on the alleged bankrupt. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note; *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Wolf*, (D. C. N. J. 1899) 2 Am. Bankr. Rep. 322; *Matter of Levinston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

Waiver. — The objection that a petitioner in bankruptcy failed to file a duplicate of his petition is waived by an answer by the bankrupt within four months of the alleged acts of bankruptcy without presenting the objection. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

Two originals unnecessary. — In *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753, it was held that the statute is fully satisfied when an original and a copy are both filed in the clerk's office before the expiration of the four months period.

Promptness desired. — The various provisions of the Bankrupt Act clearly disclose a legislative intent that proceedings in bankruptcy shall be conducted and closed with all reasonable expedition; and, while it is true that a petition may be filed at such time on the last day of the period of limitation as to render impossible either the service or issuance of process within that period, it was nevertheless the manifest intention of Congress that the duplicate copy for service should be filed within that period, ready to be served with all convenient speed. *In re*

Stevenson, (D. C. Del. 1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66.

Vacancy in judge's office immaterial. — A District Court does not cease to exist because of a vacancy in the office of judge, in such sense that proceedings in bankruptcy may not be instituted therein; but in such cases it is the duty of the clerk to receive and file the petition when offered, and it seems that he may also issue a subpoena thereon, tested in his own name, as provided by R. S. sec. 911, 4 Fed. Stat. Annot. 560. *In re Urban*, etc., *Realty Title Co.*, (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687.

Docket should show filing. — Under general order No. 1 in bankruptcy, providing that "the clerk shall keep a docket" which "shall contain a memorandum of the filing of the petition," the docket should show that the petition was filed in duplicate, as required by the statute, if this requirement of the law is really complied with. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note.

Notice to creditors unnecessary. — The statute not having provided for notice to creditors of the filing of a petition in bankruptcy, such notice is not necessary. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

The failure of the Bankruptcy Act to provide for notice to creditors of the filing of a petition in voluntary proceedings, does not deprive such creditors of their property without due process of law, in view of the provisions of the Act for ten days' notice of the first meeting of creditors, and of each of the subsequent steps in the administration, and of the various provisions relative to the granting of a discharge, and for revocation of the same when procured by fraud or not warranted by the facts. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

d [*Notice to other creditors — hearing — dismissal.*] If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time,

to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. [(1898) 30 Stat. L. 561.]

Failure to allege number of creditors.—The failure of an involuntary petition filed by a single creditor to allege that the creditors were less than twelve in number does not deprive the court of jurisdiction where three creditors with provable claims have united in earlier proceedings, and the bankrupt does not deny the claims of such creditors, nor file a list of all of his creditors, with their addresses, under oath. *In re Haff*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362.

Determining number of creditors.—Whether the number of creditors of an involuntary bankrupt is less than twelve, so as to entitle a single creditor to file an involuntary petition, is to be determined as of the date of the petition. *In re Coburn*, (D. C. Mass. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212, affirmed (C. C. A. 1st Cir. 1904) 131 Fed. 201.

The list of creditors required of the defendant debtor, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve,

should contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each, the date of the debt, when it is due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another as partner or otherwise, and such full particulars as will enable the petitioning creditor to negotiate with others to join with him in the petition, and save the necessity and cost of a reference to ascertain the facts. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

Reference to settle dispute.—If the particulars of the debts shown in the list of creditors filed under section 59d, where it is alleged by the debtor that his debts are more than twelve in number, are not disclosed in the answer, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

e [Computing number of creditors—employees and relatives.] In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted. [(1898) 30 Stat. L. 562.]

Corporation officers may be counted against it.—Where a corporation is insolvent, and has been forced by reason of its insolvency to commit acts of bankruptcy in failing to vacate executions levied on its property, the fact that directors and stockholders, who are also creditors, join with other creditors in a petition to have it adjudged a bankrupt in

order to secure an equitable distribution of its assets, is not an evidence of bad faith or collusion which will avail the execution creditors to defeat the adjudication. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

f [Appearance of creditors.] Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. [(1898) 30 Stat. L. 562.]

Joining in petition.—It is well settled that creditors may join in a petition in involuntary bankruptcy proceedings at any time, even though it be more than four months after the alleged act of bankruptcy was committed; and creditors so joining may be counted to make up the number of creditors and amount of claims required for this purpose by section 59b. *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *In re Romanow*, (D. C. Mass. 1899) 92 Fed. 510, 512; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am.

Bankr. Rep. 266; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Bedingfield*, (N. D. Ga. 1899) 96 Fed. 190, 2 Am. Bankr. Rep. 355; *In re Stein*, (C. C. A. 2d Cir. 1901) 105 Fed. 749, 5 Am. Bankr. Rep. 288; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1901) 109 Fed. 308, 6 Am. Bankr. Rep. 84; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Columbia Real Estate Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 643, 7 Am. Bankr. Rep. 441; *In re Ryan*, (M. D. Pa. 1902) 114 Fed. 373, 7 Am. Bankr. Rep. 562; *In re C.*

Moench, etc., Co., (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Plymouth Cordage Co.*, (8th Cir. 1905) 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 778, 14 Am. Bankr. Rep. 739; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Lutfy*, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Charles Town Light, etc., Co.*, (N. D. W. Va. 1910) 183 Fed. 160.

Joinder by assignee.—But since an involuntary bankruptcy petition relates to the date of its commencement, it has been held that an intervening creditor, who became such by taking an assigned claim after the petition was filed, could not be counted in determining whether enough creditors had joined to sustain the petition. *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695.

The fact that an original involuntary bankruptcy petition is insufficient, by reason of the fact that one or more of the petitioners were disqualified, does not prevent the defect from being cured by the intervention of other creditors competent to sign the same. *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

Petitioners may request creditors to join.—A creditor who files a petition in bankruptcy has the right to ask other creditors to intervene, when such intervention becomes necessary to preserve the proceedings. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Intervention after dismissal.—Where an involuntary bankruptcy petition has been dismissed for insufficiency of petitioning creditors, it is then too late for a nonparticipating creditor to intervene as a matter of right. *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492.

A delay of one year before asking for the reinstatement of a dismissed petition is so unreasonable as to warrant a denial of the application. *In re Jemison Mercantile Co.*, (C. C. A. 5th Cir. 1902) 112 Fed. 966, 7 Am. Bankr. Rep. 588.

Intervention does not advance date of filing.—Amendments to a petition in involuntary bankruptcy filed by a single creditor, by which other creditors join therein, and setting out their claims, relate back to the filing of the petition, and, although such joinder was necessary to the sufficiency of the petition, do not advance the date of its filing. *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr. Rep. 330.

An objection to an application for inter-

vention should be made by motion to strike it from the files, and not by demurrer. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

Defective application for joinder curable.—The fact that the petition of a creditor, who intervenes and joins in a petition in involuntary bankruptcy, is defective in matter of form in setting out his claim, is immaterial, where the deficiency is supplied by the proof on the hearing. *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163.

Creditor cannot be compelled to join.—No power is vested in a court of bankruptcy to compel a creditor to become a petitioner in an involuntary proceeding. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123.

Opposing petition—Involuntary proceedings.—Creditors may also, under section 59f, intervene in opposition to the petition in involuntary proceedings. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Taylor*, 1 Nat. Bankr. N. 412. And see generally the annotation to this effect under section 18b, *supra*, p. 581.

Contest by assignee for creditors.—Where the act of bankruptcy charged in an involuntary petition against a partnership is the transfer of its property to an assignee for the benefit of its creditors, such assignee is entitled to appear and contest the petition. *In re Meyer*, (C. C. A. 2d Cir. 1899) 98 Fed. 976, 3 Am. Bankr. Rep. 559.

Intervening creditors may appeal.—Creditors who appear in opposition to a petition in involuntary bankruptcy, against their debtor, and contest the adjudication thereon, as authorized by the Bankruptcy Act, have a right to appeal from a decree of the District Court making the adjudication. *In re Meyer*, (C. C. A. 2d Cir. 1899) 98 Fed. 976, 3 Am. Bankr. Rep. 559.

Voluntary petition.—Section 59f does not authorize intervention in opposition to a petition in voluntary bankruptcy proceedings. *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *Matter of Carbone*, (D. C. Wash. 1904) 13 Am. Bankr. Rep. 55.

Withdrawal from petition.—A court of bankruptcy is authorized, in its discretion, to permit the withdrawal of a petition filed by a creditor asking leave to join in a petition in involuntary bankruptcy, which has been filed against the debtor, no action having been taken thereon. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *Cummins Grocery Co. v. Talley*, (C. C. A. 6th Cir. 1911) 187 Fed. 507.

But creditors who have joined in a petition in involuntary bankruptcy are not entitled to withdraw without the consent of all, when the effect of such withdrawal would be to require a dismissal of the proceedings. *In re Quincy Granite Quarries Co.*, (D. C. Mass. 1904) 147 Fed. 279, 16 Am. Bankr. Rep. 823.

g [Notice of dismissal.] A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. [(Amended 1910) 36 Stat. L. 841.]

Cross-reference: As to

Notice to creditors generally, see section 58a (8), *supra*, p. 716, and see also the other subdivisions of section 58.

Notice to creditors.—As provided by the amendment of 1910, before entering an application for dismissal, the court will require the bankrupt to file a verified list of all his creditors, with their addresses, and shall cause notices to be sent to all such creditors of the pendency of such application; and such creditors shall be given a reasonable time and opportunity to be heard. Even prior to this amendment it was the rule to give notice to all such creditors as were scheduled or known. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96; *In re Cronin*, (D. C. Mass. 1899) 98 Fed. 584, 3 Am. Bankr. Rep. 552; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Jemison Mercantile Co.*, (C. C. A. 5th Cir. 1902) 112 Fed. 966, 7 Am. Bankr. Rep. 588; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re Lederer*, (S. D. N. Y. 1903) 125 Fed. 96, 10 Am. Bankr. Rep. 492; *In re Lewis*, (D. C. Del. 1904) 129 Fed. 147, 11 Am. Bankr. Rep. 683; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492; *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962, 15 Am. Bankr. Rep. 294; *Bernard v. Abel*, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 19 Am. Bankr. Rep. 383. And see the annotation under section 18 d and g, *supra*, pp. 583, 586.

Trustee may oppose application for dismissal.—A trustee in bankruptcy, duly elected, may properly appear and answer a petition for dismissal of the proceedings for want of jurisdiction. *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872.

A petition in voluntary bankruptcy, which schedules no debt which would be barred by a discharge, may be dismissed in the discretion of the court. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292.

Thus it has been held that a petition in voluntary bankruptcy which schedules no property except such as is exempt under the laws of the state, and but a single debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject-matter upon which the court can act, and an adjudication of bankruptcy made thereon will be set aside on motion, and the proceedings dismissed for want of jurisdiction. *In re Maples*, (D. C. Mont. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426.

Withdrawal of voluntary petition.—Where there are no creditors of the estate of a voluntary bankrupt who have proved their claims, or who object thereto, he is entitled to withdraw his petition; and his right to do so cannot be affected by the objections of subsequent creditors, who have acquired liens on his wages, and desire to prevent the institution of new proceedings. *In re Hebbart*, (D. C. Vt. 1900) 104 Fed. 322, 5 Am. Bankr. Rep. 8.

SEC. 60. PREFERRED CREDITORS.—a [What constitutes preference.] A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. [(Amended 1903) 32 Stat. L. 799.]

Cross-reference: As to

Preference as an act of bankruptcy, see section 3a (2) and (3), *supra*, pp. 483, 486.

I. CREATION OF PREFERENCES, 730.
 II. CONSTITUENT ELEMENTS, 734.

I. CREATION OF PREFERENCES.

Section 60a furnishes the legal and controlling definition of the preference specified in section 57g, and other parts of the Bankrupt Act. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

The primary purpose of section 60a and b is to secure equality of distribution among creditors of the same class. *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748.

Subdivision a defines what shall constitute a preference, and subdivision b states a consequence of it, and gives a remedy against it. The former defines it to be a transfer of property which will enable the creditor to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered, provided, however, that the preference was given four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

Preference created by judgment.—A preference is given when, within four months prior to the bankruptcy of the debtor, a lien is secured on his property by a creditor by virtue of a judgment, entered against him by confession or otherwise, which enables the creditor to get out of the property, in any manner, more than he would have done had he remained a general creditor. *Benjamin v. Chandler*, (N. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439. See also *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re Metzger Toy, etc., Co.*, (W. D. Ark. 1902) 114 Fed. 957, 8 Am. Bankr. Rep. 307; *In re English*, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; *In re Collins*, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 1; *Wilson v. Nelson*, (1901) 7 Am. Bankr. Rep. 142, 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147.

A judgment which becomes a lien, or in consequence of which a lien has been created, within the four months period is annulled under section 67f. See the annotation thereunder, *infra*, p. 797.

"Enforcing" defined.—Where a lien stands as security for an undisputed debt, "enforcing" it would mean nothing more than leaving it to stand as such security and permitting the plaintiffs to take it unless the bankrupt paid the debt. *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

"Transfer" defined.—The word "transfer" in section 60a, both by the express terms of the bankruptcy law and by authoritative decision, includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513.

All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished. *In re Kellar*, (N. D. Ia. 1901) 110 Fed. 348.

The words "transfer any of his property" include the giving or conveying anything of value—anything which has debt paying or debt securing power. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

Thus a trust deed securing an antecedent debt, without a new consideration, executed by a corporation, while insolvent, for the purpose of preferring one creditor over another, and which was accepted for that purpose and operated as a preference, was held to be a preferential transfer. *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639.

Indorsement.—The indorsement, without consideration, by an insolvent firm, within four months of the filing of a petition in bankruptcy, of individual notes of the partners, apparently for the purpose of enabling the holders of the notes to participate with the partnership creditors in the distribution of the partnership property, has been held to be a preference. *In re Jones*, (E. D. Mo. 1900) 100 Fed. 781.

Purchase of partnership assets by member of firm.—In *In re Head*, (W. D. Ark. 1902) 114 Fed. 489, it is said that the dissolution of a firm while insolvent, and the purchase of its assets by a member thereof within four months of the institution of the bankruptcy proceedings, is in effect a gift by the insolvent firm to the creditors of the individual members, and therefore a preference to them over the partnership creditors, and that such dissolution should be set aside and the assets of the firm in the hands of both partners treated as partnership property.

Preference created by transfer.—Any transfer of the bankrupt's property, coming within the definitions set out in the preceding paragraphs, made or effected within four months before the filing of the petition in bankruptcy, and while the bankrupt was insolvent, will, under section 60a, be deemed to be a preference, if the effect of such transfer is such as to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814; *Carter v. Hobbs*, (D. C. Ind. 1899) 94 Fed.

108, 2 Am. Bankr. Rep. 224; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Heinsfurter* (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Burlington Malt-ing Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; *Stern v. Louisville Trust Co.*, (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 431; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Waterbury Furniture Co.*, (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; *Boyd v. Lemon, etc., Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 647, 8 Am. Bankr. Rep. 81; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *In re English*, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; *Johnston v. Huff, etc., Co.*, (C. C. A. 4th Cir. 1904) 133 Fed. 704, 13 Am. Bankr. Rep. 287; *In re Morrow*, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *In re Hines*, (W. D. Pa. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 500; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Gesas*, (C. C. A. 9th Cir. 1906) 146 Fed. 734, 16 Am. Bankr. Rep. 872; *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457; *Hanson v. Blake*, (D. C. Me. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; *In re Nechamkus*, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20 Am. Bankr. Rep. 237; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Brewster v. Goff*, (M. D. Pa. 1908) 164 Fed. 127, 21 Am. Bankr. Rep. 239; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *Rogers v. Fidelity Sav. Bank, etc., Co.*, (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *Atherton v. Green*, (C. C. A. 7th Cir. 1910) 179 Fed. 806; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Collins*, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 1; *In re Klingaman*, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 44; *In re Knost*, (S. D. Ohio) 2 Am. Bankr. Rep. 471; *Silberstein v. Stahl*, (1900) 4 Am. Bankr. Rep. 626, 32 Misc. 353, 66 N. Y. S. 646; *In re Wertheimer*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 187; *Landry v. Andrews*, (1901) 6 Am. Bankr. Rep. 281, 22 R. I. 597, 48 Atl. 1036; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316; *In re*

Belding, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 718; *Frank v. Musliner*, (1902) 9 Am. Bankr. Rep. 229, 76 App. Div. 617, 78 N. Y. S. 369; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *In re Riggs Restaurant Co.*, (C. C. A. 2d Cir. 1904) 11 Am. Bankr. Rep. 508; *Hackney v. Hargreaves*, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469.

Tested by result of transaction.—When a person is adjudged a bankrupt his property is sequestrated by law for equal distribution among his creditors; and all transactions, payments, or transfers of property within the four months prior to the filing of the petition in bankruptcy are reviewable; and if it should appear that, as the result of any such transactions, one creditor has obtained, or is likely to obtain, a greater percentage of the estate than other creditors of the same class, such transaction shall be deemed to be a preference which must be surrendered so that equality may be preserved. *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500.

The court must look at results, and not at the devious ways by which they are accomplished. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

Whether a transaction is a preference must be determined by its effect to prefer the creditor receiving the benefit thereof, and not by its form. *Rogers v. Fidelity Sav. Bank, etc., Co.*, (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1.

Schemes and artifices to evade the letter and spirit of the law will not be tolerated.—*In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; *Roberts v. Johnson*, (C. C. A. 4th Cir. 1907) 151 Fed. 567, 18 Am. Bankr. Rep. 132; *Benedict v. Deshel*, (1903) 11 Am. Bankr. Rep. 20, 177 N. Y. 1, 68 N. E. 999.

A creditor will not be permitted to obtain a preference indirectly by any colorable device or transaction intended to evade the provisions of the Bankruptcy Act. *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213.

Section 60a does not contemplate a usage of merchants, or a conventional arrangement between the parties, which would enable any one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other of such creditors of the same class. *In re Morrow*, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392.

Preference created by mortgage.—A preferential transfer may be, and very frequently is, created by a mortgage; and the fact that it was so made renders it none the less a preference, providing its effect is to enable one creditor to obtain, within the four months period, a greater percentage of his debt than is obtained by other creditors of the same class. *Pittsburgh Plate Glass Co. v. Edwards*, (C. C. A. 8th Cir. 1906) 148 Fed. 377, 17 Am. Bankr. Rep. 447; *Hussey v. Richardson-Roberts Dry Goods Co.*, (C. C. A. 8th Cir. 1906)

148 Fed. 598, 17 Am. Bankr. Rep. 511; *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *Coder v. McPherson*, (C. C. A. 8th Cir. 1907) 152 Fed. 951, 18 Am. Bankr. Rep. 523; *In re Reynolds*, (W. D. Ark. 1907) 153 Fed. 295, 18 Am. Bankr. Rep. 666; *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 456, 18 Am. Bankr. Rep. 773; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

Where a bankrupt, after having used funds belonging to a township to purchase merchandise, executed a mortgage on his stock of goods in favor of the township, it was held that such mortgage operated as a preference, and was unenforceable by the township. *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

A mortgage executed by an insolvent partnership on its property, within four months prior to its bankruptcy, to secure the individual debt of a partner, is voidable as against partnership creditors. *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438.

Time of giving mortgage.—A mere promise by a debtor, at the time the debt was contracted, to give a mortgage to secure it, without specifying the nature of the mortgage or the property on which it was to be given, does not create a mortgage; and the giving of one on a subsequent renewal of the debt, at a time when the debtor is insolvent, and within four months prior to his bankruptcy, constitutes a transfer of property to secure an antecedent debt, and creates a preference. *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616.

Preference created by payment.—The payment of an existing indebtedness within the four months period and during insolvency, when it results in the preference of one creditor over another of the same class, constitutes a preferential transfer within the meaning of section 60a. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717, 9 Am. Bankr. Rep. 773; *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, 15 Am. Bankr. Rep. 336; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 923; *In re Wolf*, (N.

D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 555; *In re Ft. Wayne Electric Corp.*, (7th Cir. 1900) 99 Fed. 400, 39 C. C. A. 582; *In re Sloan*, (S. D. Ia. 1900) 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re Fixen*, (C. C. A. 9th Cir. 1900) 102 Fed. 296, 4 Am. Bankr. Rep. 10; *In re Arndt*, (E. D. Wis. 1900) 104 Fed. 234, 4 Am. Bankr. Rep. 773; *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 857; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Waterbury Furniture Co.*, (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; *Boyd v. Lemon, etc., Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 647, 8 Am. Bankr. Rep. 83; *In re Belding*, (D. C. Mass. 1902) 116 Fed. 1016, 8 Am. Bankr. Rep. 718; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Jones*, (D. C. S. C. 1902) 118 Fed. 673, 9 Am. Bankr. Rep. 262; *In re Thompson*, (E. D. Pa. 1903) 121 Fed. 607, 10 Am. Bankr. Rep. 288; *In re Colton Export, etc., Co.*, (C. C. A. 2d Cir. 1903) 121 Fed. 663, 10 Am. Bankr. Rep. 14; *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25; *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153; *In re Jones*, (D. C. S. C. 1903) 123 Fed. 128, 10 Am. Bankr. Rep. 513; *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221; *In re Foley*, (E. D. Pa. 1905) 140 Fed. 300, 15 Am. Bankr. Rep. 832; *Ridge Ave. Bank v. Studheim*, (C. C. A. 3d Cir. 1906) 145 Fed. 798, 16 Am. Bankr. Rep. 863; *In re Plant*, (S. D. Ga. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272; *McNaboe v. Columbian Mfg. Co.*, (C. C. A. 2d Cir. 1907) 153 Fed. 967, 18 Am. Bankr. Rep. 684; *Pratt v. Columbia Bank*, (S. D. N. Y. 1907) 157 Fed. 137, 18 Am. Bankr. Rep. 406; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, 20 Am. Bankr. Rep. 40; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 514, 21 Am. Bankr. Rep. 202; *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721; *In re Knost*, (S. D. Ohio) 2 Am. Bankr. Rep. 471; *Landry v. Andrews*, (1901) 6 Am. Bankr. Rep. 281, 22 R. I. 597, 48 Atl. 1036; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469.

Preferential payments to several creditors.—A payment made by an insolvent corporation to a creditor, within four months prior to its bankruptcy, is no less a preference because some other creditors may also have obtained larger payments in proportion to their claims during such period. *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551.

Payment on notes.—Payments by the bankrupt, while insolvent and within four months prior to the filing of the petition in bankruptcy against him, upon his indorsed notes, which the indorsers would have paid if he had not, constitute a preference, whether the creditor preferred derived any benefit from these payments or not. *Swarts v. St.*

Louis Fourth Nat. Bank, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

Where notes, given by a debtor to close an account for goods, were still held by the creditor and unpaid at the time a further indebtedness on account was contracted, it was held that both the notes and account constituted the indebtedness then due, and that a payment of the notes thereafter, when the debtor was insolvent, and within four months prior to his bankruptcy, constituted the giving of a preference. *In re Jones*, (D. C. S. C. 1903) 123 Fed. 128, 10 Am. Bankr. Rep. 513.

The payment to a bank by an insolvent, within four months prior to his bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank. *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221.

The subsequent payment of a post-dated check, while insolvent and within the prohibited period, constitutes a preference. *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25.

Repayment of loan.—A payment made by a bankrupt two days before the bankruptcy and while insolvent, in repayment of a loan, constitutes a voidable preference. *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721.

Payment of rent by an insolvent is not necessarily a preference; but when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded. *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231.

Payment in goods.—Where, within a month prior to the filing of a bankruptcy petition, the bankrupts delivered certain goods to their father and another, in part payment of unsecured debts, it was held that such payment was a preference, and that the trustee was entitled to recover the goods or their value from the transferees. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

Directing another to pay creditors.—Where a partner of a bankrupt firm directed a mortgagee of firm property, who had foreclosed the mortgage and obtained a surplus after satisfaction of the mortgage debt, to pay such surplus to a firm creditor, it was held that the transaction was in effect a direct payment by the firm to the creditor, and constituted a preferential payment. *Johnson v. Hanley, etc., Co.*, (D. C. R. I. 1911) 188 Fed. 752.

But the repayment of money stolen does not constitute a preference. *McNaboe v. Columbian Mfg. Co.*, (C. C. A. 2d Cir. 1907) 153 Fed. 967, 18 Am. Bankr. Rep. 684.

Payments made on open accounts and in due course of business within the four months period, and which are received in good faith, without the creditor's knowledge of the debtor's insolvency, leaving a net amount due from the bankrupt's estate, do not constitute a preference. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906. 45 U. S. (L. ed.) 1171; *Jaquith v. Alden*, (1903) 189

U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717, 9 Am. Bankr. Rep. 773; *Yaple v. Dahl-Millikan Grocery Co.*, (1904) 193 U. S. 526, 24 S. Ct. 552, 48 U. S. (L. ed.) 776; *Wild v. Provident L., etc., Co.*, (1909) 214 U. S. 292, 29 S. Ct. 619, 53 U. S. (L. ed.) 1003, 22 Am. Bankr. Rep. 109; *In re Sagor*, (C. C. A. 2d Cir. 1903) 121 Fed. 658, 9 Am. Bankr. Rep. 361; *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506, *affirming* (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56; *In re Hall*, (W. D. N. Y. 1900) 4 Am. Bankr. Rep. 871.

Payment by indorser.—Where an indorser of a bankrupt's paper, well secured by the indorser's collateral, paid the paper to the bank, and charged the amount against its debt on open account to the bankrupt, it was held that equity did not require that the payment be held to constitute a preference to the bank by the bankrupt on the theory that the transaction was an evasion of the Act. *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733.

Necessity of increasing bankrupt's estate.—It has been held that it is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor, or on a running account, are not to be considered as preferential transfers. *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506.

Section 57g, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," will not be so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor, and correspondingly increasing the bankrupt's estate. *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726, 7 Am. Bankr. Rep. 186.

But even an increase of the bankrupt's estate, as a net result of the transactions between the bankrupt and a creditor within four months prior to filing the petition in bankruptcy, where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential before he is permitted to prove the balance of his claim against the bankrupt's estate, when the account runs far back beyond the four months before the petition was presented and the transactions between them end with a large payment on account of the whole indebtedness. *In re Watkinson*, (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56.

Payment of valid lien.—The payment by a partnership, within four months prior to its bankruptcy, of a sum of money to the mother of the partners, on account of accrued interest on her statutory dower in real estate, owned by the partners through descent from their father, but upon which the mother had a lien for her dower and interest, cannot

be assailed as a preference. *In re Riddle*, (E. D. Pa. 1903) 122 Fed. 559.

Banking transactions.—*The deposit of money in bank* by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, although the bank may be at the time a creditor, and, under section 68a, have the right to set off so much of its claim as equals the balance in such account. *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221; *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451; *Tomlinson v. Lexington Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 824, 16 Am. Bankr. Rep. 632; *McDonald v. Clearwater Shortline R. Co.*, (C. C. Idaho 1908) 164 Fed. 1007; *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733; *In re Elsasser*, (E. D. Pa. 1901) 7 Am. Bankr. Rep. 215; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469. See also the annotation under section 68 a and b, *infra*, p. 805 *et seq.*, as to the right of set-off.

Thus where an insolvent person borrows money from a bank, and executes his note therefor, and deposits the money in said bank subject to his check, such transaction does not constitute a preferential transfer under the Bankruptcy Act; and the bank may, before the depositor is declared a bankrupt, credit the amount of his deposit upon his debt due the bank, and such transaction will not entitle the trustee in bankruptcy to recover the amount of such deposit as a preference. *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469.

The application by a bank of the amount standing to the credit of a depositor in his general account, subject to check on a note of the depositor, although within four months prior to his bankruptcy, and while he was insolvent, does not constitute a preference. *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451.

Payment of overdraft.—So, also, where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft, it was held that the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference. *Tomlinson v. Lexington Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 824, 16 Am. Bankr. Rep. 632.

But see *In re Kellar*, (N. D. Ia. 1901) 110 Fed. 348, wherein it was held that deposits in a bank made by an insolvent within four months prior to his bankruptcy, and applied by the bank to the payment of an overdraft previously made, constitute a preference.

Deposit in pursuance of creditors' agreement.—A trustee in bankruptcy has no interest which he can enforce for the benefit of general creditors in an arrangement between the bankrupt and certain creditors by which money deposited with one, which was a bank, was to be held in trust and distributed *pro rata* between them, and which was not pro-

hibited by the bankruptcy statute. *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853.

Preferential payment to bank.—But a bank is not relieved from liability to refund, as a preference, a payment received on notes from a bankrupt while insolvent, under such circumstances that it had reasonable grounds to believe that a preference was intended, by the fact that the payment was made by a check on the debtor's deposit in the same bank, which, if it had remained until the debtor's bankruptcy, the bank might have retained as a set-off. *Ridge Ave. Bank v. Studheim*, (C. C. A. 3d Cir. 1906) 145 Fed. 798, 16 Am. Bankr. Rep. 863. And see to the same effect *Pratt v. Columbia Bank*, (S. D. N. Y. 1907) 157 Fed. 137, 18 Am. Bankr. Rep. 406; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501.

Payment of its officer by insolvent bank.—Where a day or two before the open insolvency of a bank its receiving and paying teller, with full knowledge of its insolvency, drew his check against the fund and paid himself \$3,100 which he claimed as a creditor of the bank, it was held that such transaction constituted a preference which was recoverable by the bank's trustee in bankruptcy. *In re Plant*, (S. D. Ga. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272.

II. CONSTITUENT ELEMENTS.

Insolvency.—It is elementary to the definition of a forbidden preference, considered under any section of the bankruptcy law, and for any purpose, that it must have been made by the debtor "while insolvent." A solvent debtor cannot make a preference. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 682; *In re Baumann*, (W. D. Tenn. 1899) 96 Fed. 946; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Alexander*, (N. D. Ga. 1900) 102 Fed. 464, 4 Am. Bankr. Rep. 376; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839, 5 Am. Bankr. Rep. 675; *In re Bloch*, (C. C. A. 2d Cir. 1901) 109 Fed. 790, 6 Am. Bankr. Rep. 300; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543, *affirming* (E. D. Wis. 1901) 6 Am. Bankr. Rep. 271; *In re Doscher*, (E. D. N. Y. 1902) 120 Fed. 408; *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584; *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774, *affirmed* (2d Cir. 1905) 135 Fed. 1021, 68 C. C. A. 546; *Lansing Boiler, etc., Works v. Ryerson*, (C. C. A. 6th Cir. 1904) 128 Fed. 701, 11 Am. Bankr. Rep. 558; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 374; *In re Shoesmith*, (C. C. A. 7th Cir. 1905) 135 Fed. 684, 13 Am. Bankr. Rep. 645; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281;

J. W. Butler Paper Co. v. Goembel, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 15 Am. Bankr. Rep. 26; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 296; *Ridge Ave. Bank v. Studheim*, (C. C. A. 3d Cir. 1906) 145 Fed. 798; *Calhoun County Bank v. Cain*, (C. C. A. 4th Cir. 1907) 152 Fed. 983, 18 Am. Bankr. Rep. 509; *In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *Worrell v. Whitney*, (E. D. Pa. 1910) 179 Fed. 1014; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Sebring v. Wellington*, (N. Y. 1901) 6 Am. Bankr. Rep. 671; *Matter of Linton*, (E. D. Pa. 1902) 7 Am. Bankr. Rep. 676; *Matter of Rung Furniture Co.*, (W. D. N. Y. 1903) 10 Am. Bankr. Rep. 51; *Halbert v. Pranke*, (1904) 11 Am. Bankr. Rep. 621, 91 Minn. 204, 97 N. W. 976; *John S. Brittain Dry Goods Co. v. Bertenshaw*, (1904) 11 Am. Bankr. Rep. 630, 68 Kan. 734, 75 Pac. 1027; *Cullinane v. State Bank*, (1904) 12 Am. Bankr. Rep. 776, 123 Ia. 340, 98 N. W. 887; *Hackney v. Hargreaves*, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 634, 94 N. W. 822, 99 N. W. 675, *reversing* (1903) 10 Am. Bankr. Rep. 213; *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, (1905) 15 Am. Bankr. Rep. 808; *Harder v. Clark*, (1910) 23 Am. Bankr. Rep. 756, 66 Misc. 584, 123 N. Y. S. 1102; *DeGraff v. Lang*, (1904) 92 App. Div. 564, 87 N. Y. S. 78.

What constitutes insolvency has been considered under section 1a (15), *supra*, p. 465.

The instances where any one has a moral or ethical standing to attack a security given by a perfectly solvent debtor are rare, although they may sometimes occur, and such exceptional instances do not justify straining the statute. *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962.

Preference must be given to creditor.—It is essential, in order to constitute a preference under section 60a, that a creditor obtain some portion of the bankrupt's property; otherwise there can be no preference. *Richardson v. Shaw*, (1908) 209 U. S. 365, 381, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *Swarts v. Siegel*, (E. D. Mo. 1902) 114 Fed. 1001, 8 Am. Bankr. Rep. 220; *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *Benjamin v. Chandler*, (M. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; *Wood v. U. S. Fidelity, etc., Co.*, (D. C. Mass. 1905) 143 Fed. 424, 16 Am. Bankr. Rep. 21; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538; *Ludvigh v. Umstadter*, (S. D. N. Y. 1906) 149 Fed. 319, 17 Am. Bankr. Rep. 774; *Kobusch v. Hand*, (C. C. A. 8th Cir. 1907) 156 Fed. 660, 19 Am. Bankr. Rep. 379; *Hut-*

tig Mfg. Co. v. Edwards, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *Mason v. National Herkimer County Bank*, (2d Cir. 1909) 172 Fed. 529, 97 C. C. A. 155; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Kayser*, (C. C. A. 3d Cir. 1910) 177 Fed. 383, 24 Am. Bankr. Rep. 174; *Catchings v. Chatham Nat. Bank*, (C. C. A. 2d Cir. 1910) 180 Fed. 103; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *Hackney v. Hargreaves*, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675.

Must have provable claim.—It seems to be an accepted doctrine that preferences are within the same subject-matter as claims provable; and that it is only with reference to claims provable that preferences can be declared. *Richardson v. Shaw*, (1908) 209 U. S. 365, 381, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

It is undoubtedly the general construction of the statute that nothing is within its purview so far as preferences are concerned, except with reference to debts which can be proved for a dividend. On the other hand, it must be accepted that anything which can be proved for a dividend is within the purview of those portions of the statute which relate to preferences, whether or not they are strictly shadowed out by the words "creditor" and "debt," as especially defined in the statute, or as otherwise reasonably understood. *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518.

Thus where a creditor of a bankrupt files a petition in the court of bankruptcy, setting up a claim to the ownership of a fund which has been paid into court subject to the rights of conflicting claimants, but does not seek to prove a claim as a general creditor of the estate, the amount of a preference received by such creditor cannot be deducted from such fund. *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648.

A surety or indorser for a bankrupt is a "creditor" within the meaning of the statute. *Kobusch v. Hand*, (C. C. A. 8th Cir. 1907) 156 Fed. 660, 19 Am. Bankr. Rep. 379; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349.

Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase; hence the customer is not a creditor of the broker with respect to the transaction, and the transfer of the stock to the customer on the settlement of his account cannot be considered the giving of a preference by the broker on his bankruptcy within four months thereafter. *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835.

Time of obtaining preference.—In order to constitute a preference within the meaning of the bankruptcy law, it is necessary that the transaction take place, or become effective as to creditors, within the four months preceding the filing of the petition in bankruptcy, or at some time thereafter and before the adjudication. Page v. Rogers, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Folb*, (E. D. N. C. 1898) 91 Fed. 107, 1 Am. Bankr. Rep. 22; *In re Stevenson*, (D. C. Del. 1899) 64 Fed. 110, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28; *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406; *Sabin v. Camp*, (C. C. Ore. 1900) 98 Fed. 974; *In re Terrill*, (D. C. Vt. 1900) 100 Fed. 778, 4 Am. Bankr. Rep. 145; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841, 12 Am. Bankr. Rep. 295; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *Long v. Farmer's State Bank*, (C. C. A. 8th Cir. 1906) 147 Fed. 360, 17 Am. Bankr. Rep. 103; *Merchant's Nat. Bank v. Cole*, (C. C. A. 6th Cir. 1907) 149 Fed. 708, 18 Am. Bankr. Rep. 44; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619; *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910; *In re Lewis*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 458; *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38; *Whitley Grocery Co. v. Roach*, (1902) 8 Am. Bankr. Rep. 505, 115 Ga. 918, 42 S. E. 282; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 10 Am. Bankr. Rep. 641; *Pratt v. Christie*, (1904) 12 Am. Bankr. Rep. 1, 95 App. Div. 282, 88 N. Y. S. 585; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329; *Matter of Wilson*, (D. C. Hawaii 1910) 23 Am. Bankr. Rep. 814.

The title of one who purchases property from an embarrassed debtor cannot be impeached by the latter's trustee in bankruptcy subsequently appointed, on the ground that the purchase was made for the purpose of enabling the debtor to pay some of his creditors in preference to others, in fraud of the bankruptcy law, the proceeds having been so used, when the sale and the payments to creditors occurred more than four months before the filing of the petition in bankruptcy. *In re Kindt*, (S. D. Ia. 1900) 101 Fed. 107, 3 Am. Bankr. Rep. 443.

The time is to be computed in accordance with section 31. The term "four months" means within four months from the commencement of the bankruptcy proceedings. *Whitley Grocery Co. v. Roach*, (1902) 8 Am. Bankr. Rep. 505, 115 Ga. 918, 42 S. E. 282. See also the cases cited under section 31, *supra*, p. 653.

Thus it has been held that although a petition in involuntary bankruptcy was insuffi-

cient on its face to authorize the court to make an adjudication, because it showed less than the required number of legally qualified petitioners, but other creditors afterwards joined therein, the four months period within which transfers of property may be avoided as preferential runs back from the time when such joinder made the petition sufficient, which for such purpose must be considered as the date of filing. *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217.

Renewal of old indebtedness.—A pledge of property to secure notes executed within four months prior to proceedings in bankruptcy against the pledgor is not voidable as an illegal preference, where the notes so secured were renewals of prior notes also secured by a pledge of the same property; the original indebtedness having been created and the original pledge made prior to the four months period. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441.

Effect of previous negotiation.—Where a transaction has resulted in a preference within the four months period, it will not be deprived of its preferential character by the fact that it was effected in the performance of a contract, or other negotiation, executed or agreed upon at a time antedating the bankruptcy proceedings by more than four months. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *Humphrey v. Tatman*, (1905) 198 U. S. 91, 25 S. Ct. 567, 49 U. S. (L. ed.) 956, 14 Am. Bankr. Rep. 74; *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406, 3 Am. Bankr. Rep. 554; *Sabin v. Camp*, (C. C. Ore. 1900) 98 Fed. 974; *In re Klingaman*, (S. D. Ia. 1900) 101 Fed. 691, 4 Am. Bankr. Rep. 254; *In re Ronk*, (D. C. Ind. 1901) 111 Fed. 154, 7 Am. Bankr. Rep. 31; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 166, 10 Am. Bankr. Rep. 616, *affirming* (D. C. S. C. 1902) 9 Am. Bankr. Rep. 262; *Annis-ton Iron, etc., Co. v. Annis-ton Rolling Mill Co.*, (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200; *In re Dismal Swamp Contracting Co.*, (E. D. Va. 1905) 135 Fed. 415, 14 Am. Bankr. Rep. 175; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 645; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 259; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864. See also *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *In re Barrett*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 48; *Matthews v. Hardt*, (1903) 9 Am. Bankr. Rep. 373, *affirming* (1902) 37 Misc. 653, 76 N. Y. S. 134; *Holdrege First Nat. Bank v. Johnson*, (1903) 10 Am. Bankr. Rep. 208, 68 Neb. 641, 94 N. W. 837; *Matter*

of Mandel, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 774; *Torrance v. Winfield Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 185; *Long v. Farmers' State Bank*, (C. C. A. 8th Cir. 1906) 17 Am. Bankr. Rep. 103.

Ratification of corporation agent's unauthorized act.—A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy, when it was insolvent and the creditor had reason to believe it to be so, is a preference, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period. *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501.

Delivery of pledge pursuant to prior agreement.—An agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor, nor set apart and treated as his property; and, where the creditor takes possession of the property a few days before the filing of a petition in bankruptcy against the debtor, the transaction is voidable as a preference, notwithstanding that the original agreement was made more than four months before that time. *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406.

But when an assignment of accounts is made more than four months prior to the bankruptcy, the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference. *Lowell v. International Trust Co.*, (1st Cir. 1907) 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853.

So, also, it has been held that a bankrupt cannot be held to have given a preference, recoverable by his trustee, because of sums collected by a creditor, after the bankruptcy, from third persons under a contract which had been in force between the bankrupt and the creditor for a number of years. *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652.

Where recording required.—The purpose and effect of the amendment of 1903 was to change the rule applied to the original and prior acts, under which not only the requirement of recording but the effect of a failure to record was controlled by the state law, by making instruments of transfer required by the state law to be recorded, in the sense in which such phrase is ordinarily used, speak from the date of recording, and not the date of execution, upon the question of voidable preferences. *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774; *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396, 14 Am. Bankr. Rep. 477; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Hunt*, (N. D. N. Y. 1905) 139 Fed. 283, 14 Am. Bankr. Rep. 416; *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; *Buchanan County First Nat. Bank v. Connett*, (C. C. A. 8th Cir. 1905) 142 Fed. 33, 15 Am. Bankr. Rep. 662; *In re Montague*,

(E. D. Va. 1905) 143 Fed. 428, 16 Am. Bankr. Rep. 18; *Loeuer v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1906) 148 Fed. 975, 17 Am. Bankr. Rep. 628; *Fisher v. Zollinger*, (C. C. A. 6th Cir. 1906) 149 Fed. 54, 17 Am. Bankr. Rep. 618, *affirming* (N. D. Ohio 1905) 15 Am. Bankr. Rep. 524; *In re McIntosh*, (C. C. A. 9th Cir. 1907) 150 Fed. 546, 18 Am. Bankr. Rep. 169; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 263; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *In re Mission Fixture, etc., Co.*, (W. D. Wash. 1910) 180 Fed. 263; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Torrance v. Winfield Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 185; *Matthews v. Hardt*, (1903) 9 Am. Bankr. Rep. 373, 37 Misc. 653, 76 N. Y. S. 134, *affirmed* 79 App. Div. 570, 80 N. Y. S. 462.

A transfer by an instrument required by the state law to be recorded speaks from the time of the recording, and not from the date of its execution, and may be void as a preference, regardless of the effect of the failure to record it under the state law. *Mattley v. Giesler*, (C. C. A. 8th Cir. 1911) 187 Fed. 970.

The word "required" has reference to the character of the instrument of transfer required to be recorded by the state law, rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument. *Buchanan County First Nat. Bank v. Connett*, (C. C. A. 8th Cir. 1905) 142 Fed. 33, 15 Am. Bankr. Rep. 662.

A state statute which requires a conveyance or transfer to be recorded, in order to be effectual against any class or classes of persons, is a law by which such recording is "required" within the meaning of section 60a. *Loeuer v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1906) 148 Fed. 975, 17 Am. Bankr. Rep. 628.

In *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, it appeared that a member of an insolvent partnership executed to a third person a mortgage on the firm's goods to secure money to purchase the share of another member. The mortgage was not filed until a few days before the assignment for the benefit of creditors, and within four months of the institution of bankruptcy proceedings, and it was held that the transaction was void as a preference.

What is or is not required to be recorded is to be determined by the law of the state. See the cases cited to this effect under section 67a, *infra*, p. 783.

Instrument valid under state law.—A chattel mortgage given by a bankrupt when solvent, in good faith and for a present consideration, does not become a preference be-

cause not recorded until within four months prior to the bankruptcy, where, under the state law as construed by its Supreme Court, the failure to record does not affect the validity of the mortgage as between the parties nor as against general creditors of the mortgagor, and it takes effect as of the date of its execution. *In re Sturtevant*, (C. C. A. 7th Cir. 1911) 188 Fed. 196.

Greater percentage.—Even though a transaction falls within the language of section 60a in all other respects, it must, in order to constitute a preference, be such as will enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; *In re Abraham Steers Lumber Co.*, (S. D. N. Y. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315, *affirmed* (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332; *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, 7 Am. Bankr. Rep. 181; *In re Union Feather, etc., Mfg. Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 774, 7 Am. Bankr. Rep. 472; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 135; *Swartz v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re Colton Export, etc., Co.*, (C. C. A. 2d Cir. 1903) 121 Fed. 663, 10 Am. Bankr. Rep. 14; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 205; *Gomila v. Wilcombe*, (C. C. A. 5th Cir. 1907) 151 Fed. 470; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20 Am. Bankr. Rep. 237; *Rogers v. Fidelity Sav. Bank, etc., Co.*, (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1; *In re Crafts-Riordan Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604; *In re Read*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 111; *In re Feuerlicht*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 550; *John S. Brittain Dry-Goods Co. v. Bertenshaw*, (1904) 11 Am. Bankr. Rep. 629, 68 Kan. 734, 75 Pac. 1027; *Hackney v. Hargreaves*, (Neb. 1904) 13 Am. Bankr. Rep. 164; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (C. C. A. 4th Cir. 1906) 17 Am. Bankr. Rep. 583; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Des Moines Sav. Bank v. Morgan Jewelry Co.* (1904) 123 Ia. 432, 99 N. W. 121.

The test of a preference is the payment, out of the bankrupt's estate, of a larger percentage of the claim of a creditor than other creditors of the same class receive from that

estate. *Swartz v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748.

The meaning of the term "class" should be derived, and the classification of creditors thereunder should be made, from the provisions of the Bankruptcy Act. *Swartz v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

The test of the classification of creditors is the percentage of their claims which they are entitled to draw out of the estate of the bankrupt, and not the relations of the creditors to parties other than the bankrupt. If they are entitled to receive the same percentage they are in the same class; if different percentages they are in different classes. *Swartz v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

There are two general classes: first, those who have priority and are to be paid in full; and, second, general or unsecured creditors, among whom the balance remaining after paying creditors of the first class is to be distributed equally in proportion to the amount of their respective claims. *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39.

Necessity of diminishing estate.—A transaction the result of which does not diminish the general fund does not constitute a preference. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 555; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543; *Swartz v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *New Kensington First Nat. Bank v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1903) 124 Fed. 968, 10 Am. Bankr. Rep. 782; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Ludvig v. Umstadter*, (S. D. N. Y. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774; *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853; *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20

Am. Bankr. Rep. 237; *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666; *Mills v. Virginia-Carolina Lumber Co.*, (C. C. A. 4th Cir. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750, *modifying* (E. D. N. C. 1907) 18 Am. Bankr. Rep. 218; *McDonald v. Clearwater Shortline R. Co.*, (D. C. Idaho 1908) 164 Fed. 1007, 21 Am. Bankr. Rep. 182; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733; *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Furth v. Stahl*, (1903) 10 Am. Bankr. Rep. 442, 205 Pa. St. 439, 55 Atl. 29.

Exchange.—There is nothing in the bankruptcy law which forbids an exchange of securities, and if a person, even while insolvent, makes such an exchange as will not diminish the value of his estate, it is unimpeachable; but the court is bound, when such a transaction is reviewed, to satisfy itself that the securities exchanged are of undoubtedly equal value. *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Ludvig v. Umstader*, (S. D. N. Y. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774; *In re Reese-Hammond Fire Brick Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 641.

Transfer for present consideration.—The purpose of section 60a is to prohibit the giving of a preference by a bankrupt to existing creditors, and it does not apply to transactions whereby the bankrupt receives a present consideration for the transfer. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962.

At the time a debt is created the creditor has the right to dictate the terms under which he will part with his money or property; he may therefore demand that he shall first be secured to such an extent as satisfies him; and with this the Bankruptcy Act does not interfere. *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650.

Delivery of property paid for.—Where a bankrupt, who operated a lumber mill, made a contract for the sale of the entire output of his mill and secured from the purchaser advance payments thereon, it was held that the purchaser, by insisting on and obtaining

the delivery of sufficient lumber, which was then on hand, to cover the advances, within four months prior to the bankruptcy, and when the seller was insolvent, did not thereby secure a preference. *Mills v. Virginia-Carolina Lumber Co.*, (C. C. A. 4th Cir. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750.

Return of fund under agreement.—Where a bank advanced money on a check drawn by a corporation, which afterwards became a bankrupt, with the express agreement that the money was to be used only for a particular purpose, and it was not so used, and was later returned to the bank in payment of the check, it was held that such transaction did not constitute a preferential payment. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

Claim disallowed as set-off.—The purchase of outstanding claims against an insolvent with a view to using such claims as a set-off, in the event of the insolvent being adjudged a bankrupt, is not a voidable preference where the claim of set-off, though pressed, is not allowed. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447.

Mere fictitious book entries, although made through collusion between the creditor and the bankrupt for the purpose of deceiving others, but which were unsuccessful, and did not affect the rights of other creditors, do not constitute a preference, nor estop the creditor from denying the *prima facie* effect of such entries. *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385.

A payment received by a creditor of a bankrupt from a third party, and which did not come out of the assets of the bankrupt, does not constitute a preference. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

A mortgage on both exempt and nonexempt property, constituting an unlawful preference, is only voidable by the mortgagee's trustee in bankruptcy as to the nonexempt property. *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201.

Policies of insurance against fire are mere personal contracts of indemnity, which do not attach to the property insured as an incident, and do not take its place when the property is destroyed, so as to entitle any one having a lien on the property to any interest therein; and, being so entirely separate from the property, the proceeds of a policy which has been pledged by the owner of the property to secure a debt exceeding the amount of such proceeds are no part of the debtor's estate, but belong to the pledgee; and other creditors can claim no interest therein, either by virtue of liens on the property or otherwise. *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543.

b [Preferences voidable.] If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a

transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(Amended 1903 and 1910) 32 Stat. L. 800, 36 Stat. L. 842.]

Cross-references: As to

Recovery of property transferred in fraud within the four months period, see section 67e.

Recovery of property transferred generally in fraud of creditors, see section 70c.

I. ELEMENTS OF VOIDABILITY, 740.

II. RECOVERY OF VOIDABLE PREFERENCES, 744.

I. ELEMENTS OF VOIDABILITY.

Reasonable cause to believe transaction would effect preference.—Section 60b, as amended by the Act of June 25, 1910, makes voidable all preferences wherein "the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe" that the transaction would effect a preference. Prior to that amendment it was necessary to show that there was reasonable cause to believe that a preference was intended. It is evident, therefore, that the amendment has substituted the effect of the transaction, for the intention of the parties. Under the former law there are numerous cases to the effect that, notwithstanding the fact that a transaction resulted in a preference within the meaning of section 60a, and would have to be surrendered under section 57g before the person benefited could prove his debt, nevertheless such preference was not voidable so as to be recoverable by the trustee, within the meaning of section 60b, unless the preference was intended. Essentially each case turns on its own circumstances. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685; *In re Davidson*, (S. D. Ia. 1901) 109 Fed. 882; *McNair v. McIntyre*, (4th Cir. 1902) 113 Fed. 113, 51 C. C. A. 89; *In re Wyly*, (N. D. Tex. 1902) 116 Fed. 38, 8 Am. Bankr. Rep. 604; *In re Bullock*, (E. D. N. C. 1902) 116 Fed. 667, 8 Am. Bankr. Rep. 646; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793;

Off v. Hakes, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *Hardy v. Gray*, (1st Cir. 1906) 144 Fed. 922, 75 C. C. A. 562; *Long v. Farmers' State Bank*, (C. C. A. 8th Cir. 1906) 147 Fed. 360, 17 Am. Bankr. Rep. 103; *Pittsburgh Plate Glass Co. v. Edwards*, (C. C. A. 8th Cir. 1906) 148 Fed. 377; *Hussey v. Richardson-Roberts Dry Goods Co.*, (8th Cir. 1906) 148 Fed. 598, 602, 78 C. C. A. 370; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 456; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Brewster v. Goff Lumber Co.*, (M. D. Pa. 1908) 164 Fed. 124, 21 Am. Bankr. Rep. 239; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *McAtee v. Shade*, (C. C. A. 8th Cir. 1910) 185 Fed. 442; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *In re Ebert*, (W. D. Wis. 1898) 1 Am. Bankr. Rep. 340; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604; *North v. Taylor*, (1901) 6 Am. Bankr. Rep. 233, 62 App. Div. 631, 71 N. Y. S. 1143; *Lever v. Seiter*, (1902) 8 Am. Bankr. Rep. 459, 69 App. Div. 33, 74 N. Y. S. 499; *Peck v. Connell*, (Pa. 1902) 8 Am. Bankr. Rep. 500, *affirming* (1901) 6 Am. Bankr. Rep. 93; *Babbitt v. Kelley*, (1902) 9 Am. Bankr. Rep. 335, 96 Mo. App. 529, 70 S. W. 384; *Matter of Bartheleme*, (W. D. N. Y. 1903) 11 Am. Bankr. Rep. 67; *Baden v. Bertenshaw*, (Kan. 1903) 11 Am. Bankr. Rep. 308; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Pratt v. Christie*, (1904) 12 Am. Bankr. Rep. 1, 95 App. Div. 282, 88 N. Y. S. 585; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Whitwell v. Wright*, (1910) 23 Am. Bankr. Rep. 747, 136 App. Div. 246, 120 N. Y. S. 1065; *Blyth, etc., Co. v. Kastor*, (1908) 17 Wyo. 180, 97 Pac. 921.

Preferential and fraudulent transfers distinguished.—Transfers with intent to prefer a creditor are often referred to as "fraudulent preferences." While fraud, in one sense, is no doubt involved in all such transfers, it is fraud of a different kind from that involved in transfers "with intent to hinder, delay, or defraud creditors" according to the ordinary meaning of those words. In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors and not to him. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

Question of fact.—It was held prior to the amendment of 1910 that the question whether a preference was intended was one of fact. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 682; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228. And see to the same effect *Turner v. Fisher*, (N. D. Cal. 1904) 133 Fed. 594, 13 Am. Bankr. Rep. 243; *Wetstein v. Franciscus*, (C. C. A. 2d Cir. 1904) 133 Fed. 900, 13 Am. Bankr. Rep. 326; *In re Andrews*, (D. C. Mass. 1905) 135 Fed. 599, 14 Am. Bankr. Rep. 247; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *Laundy v. Junction City First Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 223; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Upson v. Mt. Morris Bank*, (1905) 14 Am. Bankr. Rep. 6, 103 App. Div. 367, 92 N. Y. S. 1101.

A referee's conclusion on the question whether or not there was reasonable cause to believe that a preference was intended will not be disturbed where it is founded on sufficient evidence. *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 456, 18 Am. Bankr. Rep. 773.

If there is no reasonable ground to believe that a preference would result from the transaction, either on the part of the person benefited or his agent, then of course the transaction would not fall within the language of section 60b as a voidable one. To this effect it was held, prior to the amendment of 1910, that where there was no reasonable ground to believe that a preference was intended the transaction was not voidable. *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *J. W. Butler Paper Co. v. Goembel*, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 16 Am. Bankr. Rep. 26; *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387; *Gomila v. Wilcombe*, (C. C. A. 5th Cir. 1907) 151 Fed. 470, 18 Am. Bankr. Rep. 143; *Wright v. Sampter*, (S. D. N. Y. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, 18 Am. Bankr. Rep.

766; *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73; *Tumlin v. Bryan*, (C. C. A. 5th Cir. 1908) 165 Fed. 166, 21 Am. Bankr. Rep. 319; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Neill-Pinckney-Maxwell Co.*, (E. D. Pa. 1909) 170 Fed. 481, 22 Am. Bankr. Rep. 401; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *Sharpe v. Allender*, (C. C. A. 3d Cir. 1909) 170 Fed. 589, 22 Am. Bankr. Rep. 431; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *Smith v. Hewlett Robin Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 271; *Powell v. Gate City Bank*, (8th Cir. 1910) 178 Fed. 609, 102 C. C. A. 55; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Reber v. Shulman*, (C. C. A. 3d Cir. 1910) 183 Fed. 564; *In re Houghton Web Co.*, (D. C. Mass. 1910) 185 Fed. 213.

Thus where payments were made by bankrupts to one creditor within four months prior to the institution of bankruptcy proceedings, and the other creditors had no reasonable cause to believe that it was thereby intended to give a preference, it was held that the payments were not voidable by the trustee, nor was the creditor paid bound to surrender the same as a condition of his right to prove his debt in the bankruptcy proceedings. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

Mere grounds of suspicion that a debtor is insolvent, or that it is intended to create a preference by a transfer, are insufficient to establish the fact that the creditor who receives it has reasonable cause to believe that a preference was intended thereby. There must be substantial evidence of reasonable grounds for such a belief. *Tumlin v. Bryan*, (C. C. A. 5th Cir. 1908) 165 Fed. 166, 21 Am. Bankr. Rep. 319; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

But if a party has knowledge of facts which cause him to fear or suspect that a transaction into which he is entering will work a preference, that knowledge as a rule will at least be sufficient to put him upon an inquiry which if prosecuted would disclose the real character of the transaction. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

Financial embarrassment.—The fact alone that a creditor knows his debtor to be financially embarrassed, and is pressing for payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent. *Sharpe v. Allender*, (C. C. A. 3d Cir. 1909) 170 Fed. 589, 22 Am. Bankr. Rep. 431; *Page v. Moore*, (E. D. Pa. 1910) 179 Fed. 988.

The temporary failure of a debtor to discharge his obligations promptly when they fall due is not in itself sufficient to prove that a creditor who is aware of such a default has reasonable cause to believe that it was intended to give a preference by means of a transfer which he obtains. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436. See

also *J. W. Butler Paper Co. v. Gombel*, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 16 Am. Bankr. Rep. 26.

Debtor's knowledge insufficient.—The intention to give a preference cannot be presumed from the fact alone that the debtor knew himself to be insolvent. *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387.

Positive knowledge unnecessary.—In order that a preferential transaction should be deemed voidable under the provisions of section 60b, it is not necessary that the person to be benefited thereby should know positively that the result of the transaction would be the effecting of a preference, but it will be sufficient if the person preferred, or his agent therein, have knowledge or notice of such facts and circumstances as would incite a person of reasonable prudence under similar circumstances to make inquiry, where such inquiry would have developed the facts essential to a knowledge of the situation. It was so held, prior to the amendment of 1910, as to the necessity of having knowledge of facts from which it might be known that a preference was intended. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Fixen*, (9th Cir. 1900) 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; *In re Eggert*, (C. C. A. 7th Cir. 1900) 102 Fed. 735, 4 Am. Bankr. Rep. 449; *In re Henry C. King Co.*, (D. C. Mass. 1902) 113 Fed. 110, 7 Am. Bankr. Rep. 619; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *In re Virginia Hardwood Mfg. Co.*, (W. D. Ark. 1905) 139 Fed. 209; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *In re Knopf*, (D. C. S. C. 1906) 146 Fed. 109, 16 Am. Bankr. Rep. 432; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *In re Plant*, (S. D. Ga. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272; *Pittsburgh Plate Glass Co. v. Edwards*, (8th Cir. 1906) 148 Fed. 377, 78 C. C. A. 191; *Wright v. Sampter*, (S. D. N. Y. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; *Houck v. Christy*, (8th Cir. 1907) 152 Fed. 612, 81 C. C. A. 602; *Coder v. McPherson*, (8th Cir. 1907) 152 Fed. 951, 82 C. C. A. 99; *In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807; *Allen v. Mannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Wright v. William Skinner Mfg. Co.*, (C. C. A. 2d Cir. 1908) 162 Fed. 315, 20 Am. Bankr. Rep. 527; *Getts v. Janesville Wholesale Grocery Co.*, (W. D. Wis. 1908) 163 Fed. 417, 21 Am. Bankr. Rep. 5; *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Burgoyne v. McKillip*, (C. C. A. 8th Cir. 1910) 182 Fed. 452; *Stern v. Paper*, (D. C. N. D.

1910) 183 Fed. 228; *Gering v. Leyda*, (C. C. A. 8th Cir. 1911) 186 Fed. 110; *Coleman v. Decatur Egg Case Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 136; *In re Ebert*, (W. D. Wis. 1898) 1 Am. Bankr. Rep. 340; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Matter of Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900; *Harder v. Clark*, (1910) 23 Am. Bankr. Rep. 756, 66 Misc. 584, 123 N. Y. S. 1102; *Crawford v. Rumpf*, (1903) 205 Pa. St. 154, 54 Atl. 709.

Circumstances sufficient.—Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth; and the rule of evidence is well settled that circumstances, inconclusive if separately considered, may by their joint operation, especially when corroborated by moral coincidences, be sufficient. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

"Reasonable cause to believe," under section 60b of the Bankruptcy Act, covers substantially the same field as "notice" in determining whether a person is a *bona fide* purchaser of property. *Coder v. McPherson*, (8th Cir. 1907) 152 Fed. 951, 82 C. C. A. 99; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

A creditor is required to exercise ordinary prudence, and, if he fails to investigate, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. *Coder v. McPherson*, (C. C. A. 8th Cir. 1907) 152 Fed. 951, 18 Am. Bankr. Rep. 523.

Where the circumstances of a transaction are such as to indicate that a preference is intended, the representatives of a creditor seeking security cannot stop their ears and close their eyes to the obvious significance of things, and then say they did not hear or see, or did not understand. *Burgoyne v. McKillip*, (C. C. A. 8th Cir. 1910) 182 Fed. 452.

Creditor not chargeable with knowledge which inquiry would not have developed.—A creditor of a bankrupt, who at the time of receiving a preference is put on inquiry as to the solvency of the debtor, is not for that reason charged with notice of facts which could only be learned from intimate and inaccessible sources of information, such as the books of the bankrupt; but he is bound only by such information as could be obtained by open observation and reasonable inquiry. *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73.

So, also, it has been held that a creditor cannot be said to have had reasonable cause to believe that a preference was intended, unless the evidence shows that it knew, or

ought to have known, the substantial truth as to the bankrupt's financial condition. *In re Houghton Web Co.*, (D. C. Mass. 1910) 185 Fed. 213.

When an offer to compromise is made, creditors are not bound to investigate the debtor's ability to pay the amount offered, and whether it is his intent to pay it to all creditors alike, but are entitled to believe that the offer is made in good faith to all creditors, unless something occurs to put them on inquiry. *Smith v. Hewlett Robin Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 271.

Knowledge presumed.—Where a person benefited by a preferential transfer, or his agent therein, has, or is chargeable with, knowledge of such facts and circumstances as would indicate clearly to a man of ordinary intelligence that the transaction from which the preference resulted would naturally effect a preference, it will be deemed voidable under section 60b. Thus, prior to the amendment of 1910, it was held that where the facts and circumstances which were known or should have been known to the party benefited by a preference, or his agent therein, were sufficient to indicate to a man of ordinary intelligence that a preference must have been intended, the transaction would be presumed to be preferential. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *Stern v. Louisville Trust Co.*, (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305; *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793; *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Brewster v. Goff*, (M. D. Pa. 1908) 164 Fed. 127, 21 Am. Bankr. Rep. 239; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Alexander v. Redmond*, (C. C. A. 2d Cir. 1910) 180 Fed. 92; *In re Deutsche*, (M. D. Pa. 1910) 182 Fed. 435; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *Matter v. Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900; *Hess v. Theodore Hamm Brewing Co.*, (1909) 108 Minn. 22, 121 N. W. 232.

Where the inevitable effect of a transfer is to give a preference, it will be conclusively presumed that it was so intended. *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Brewster v. Goff Lumber Co.*, (M. D. Pa. 1908) 164 Fed. 124, 21 Am. Bankr. Rep. 106; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Alexander v. Redmond*, (C. C. A. 2d Cir. 1910) 180 Fed. 92.

The sale by a retail merchant of his entire stock of goods puts the purchaser on inquiry to learn whether the seller is not in financial

difficulty, and casts upon him the burden of proving that he used such means of knowledge as were at hand to ascertain the facts, in order to sustain his title as against creditors of the seller. *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Matter of Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900. See also *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370.

So, also, it has been held that a mortgage given by an insolvent firm within four months of bankruptcy proceedings, to secure a past indebtedness, and which conveys all the firm property, is void as giving to the creditor a preference. *In re Jones*, (D. C. S. C. 1902) 118 Fed. 673.

A creditor who indirectly repurchased goods from a debtor who was insolvent, and sold the same again at a loss, is presumed to have had reasonable cause to believe that a preference was intended. *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387.

Knowledge of insolvency.—It has been held that a creditor had reasonable cause to believe that a preference was intended so as to render it voidable, where he admitted that he knew the debtor was hard pressed and without credit, and that he had himself been persistently pressing his own claim for several months. *Wright v. William Skinner Mfg. Co.*, (C. C. A. 2d Cir. 1908) 162 Fed. 315, 20 Am. Bankr. Rep. 527.

Knowledge of bank president.—A bank is chargeable with notice of the insolvency of a debtor from whom it receives a payment, and that such payment constitutes an unlawful preference under the Bankruptcy Act, where its president had knowledge of such insolvency, gained while acting for the bank in the matter of such indebtedness. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123.

Knowledge of agent.—Where the agent of a creditor, when taking mortgages to secure the indebtedness to his principal within four months prior to the debtor's bankruptcy, had knowledge of facts which should have put him on inquiry as to the debtor's solvency, he and his principal are legally chargeable with knowledge of such facts as the inquiry would have disclosed. *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793.

Knowledge of fraudulent scheme.—Where, before bankruptcy proceedings, a bankrupt made a general assignment for the benefit of creditors, and afterwards conspired with certain creditors that his estate should be sold to their agent for less than half its value, who should resell, and out of the profits pay such creditors a part of their claims and return the surplus to the bankrupt, it was held that such application of the insolvent debtor's property to the payment of such creditors

constituted an unlawful preference. *Stern v. Louisville Trust Co.*, (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305.

II. RECOVERY OF VOIDABLE PREFERENCES.

Trustee vested with rights of creditor.— Since the enactment of the amendment of 1910, trustees, as to all property in the custody or coming into the custody of the bankruptcy court, are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, they are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2), *supra*, p. 682.

Necessity of recovering preferences.— A preferential transfer is not void, it is only voidable; the title of the recipient is good unless it is avoided; therefore, in order that a preference may become a part of the assets for distribution among the creditors, it is essential that the property be recovered by the trustee. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *Van Iderstine v. National Discount Co.*, (2d Cir. 1909) 174 Fed. 519, 98 C. C. A. 300; *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866.

Recovery of voidable preferences.— *The trustee may recover property which has been preferentially obtained, or the value thereof, from the person receiving it or benefited thereby, where it is shown that all the elements of a voidable preference, as defined by section 60b, exist.* *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Benjamin v. Chandler*, (M. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; *In re Nechamkus*, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; *Painter v. Napoleon Tp.*, (N. D. Ohio 1907) 156 Fed. 289, 19 Am. Bankr. Rep. 412; *Mason v. National Herkimer County Bank*, (N. D. N. Y. 1908) 163 Fed. 920, 21 Am. Bankr. Rep. 98; *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Blake*, (E. D. N. Y. 1909) 171 Fed. 298, 22 Am. Bankr. Rep. 612; *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572; *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; *Brown v. Streicher*, (D. C. R. I. 1910) 177 Fed. 473, 24 Am. Bankr. Rep. 267; *Campbell v. Balcomb*, (C. C. A. 7th Cir. 1910) 183 Fed. 766; *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602; *In re Adams*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 94; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *In re*

Rothschild, (S. D. Ga. 1901) 5 Am. Bankr. Rep. 587; *In re Meraman*, (W. D. N. Y. 1901) 7 Am. Bankr. Rep. 46.

Trustee's discretion.— The trustee as the representative, and in the interest, of all the creditors, and not of the petitioning creditors alone, is to determine in the first instance whether the transaction was undertaken with a view to give a preference, and whether the creditor had reasonable cause to believe that it was so, and if proof is forthcoming. He is to ascertain the facts, and to determine the probability of successful litigation, and whether the creditor sought to be pursued is responsible, so that the estate should not be mulcted in unnecessary litigation and costs. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13.

Only trustee can avoid preferential transaction.— A trustee in bankruptcy cannot assign to another his right to avoid a preferential transfer of property. *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

The statute does not sanction the bringing of a suit by a receiver to recover a voidable preference. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13.

Trustee may prosecute action begun by creditors.— A pending action brought by creditors of an insolvent partnership to avoid, as an unlawful preference, a sale by an individual partner of his individual property, may be prosecuted to final judgment by the trustee in bankruptcy of the partnership estate, even though the cause of action arose from the state law, and the application of that law is essential to secure the relief sought. *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

On recovery preference becomes part of estate.— Where an alleged preferential transfer is avoided, and the trustee recovers the fund sued for, it then becomes a part of the assets of the bankrupt estate in the possession of, and in the course of administration by, the bankruptcy court. *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602.

All persons entitled to participate in the assets, or claiming a lien thereon, may come into that court, and, under the jurisdiction acquired by the proceeding in bankruptcy, have their rights adjudicated. *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602. See also *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276.

But the validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference, since this would, in effect, transfer the administration of the bankrupt's estate from the federal District Court to the state court. *Eau Claire Nat. Bank v. Jackman*, (1907)

204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, 17 Am. Bankr. Rep. 675.

Jurisdiction.—The state and federal courts have concurrent jurisdiction of an action brought by a trustee in bankruptcy to avoid a preference. *Bowman v. Alpha Farms*, (N. D. N. Y. 1907) 153 Fed. 380, 18 Am. Bankr. Rep. 700; *Teague v. Anderson Hardware Co.*, (N. D. Ga. 1908) 161 Fed. 765; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *Bryan v. Madden*, (N. Y. 1905) 15 Am. Bankr. Rep. 388; *Drew v. Myers*, (1908) 22 Am. Bankr. Rep. 656, 81 Neb. 750, 116 N. W. 781. See also the annotation following section 23b, *supra*, p. 595.

Ancillary jurisdiction.—A federal District Court, of a district other than that in which a bankruptcy proceeding is pending, may entertain a suit by the bankrupt's trustee, to set aside an alleged fraudulent or preferential transfer by the bankrupt to parties residing in such district. *Teague v. Anderson Hardware Co.*, (N. D. Ga. 1908) 161 Fed. 765. And see section 2 (20), *supra*, p. 480, which was added by the amendment of 1910, and which especially provides for the exercise of ancillary jurisdiction.

Recovery by bill in equity.—A trustee in bankruptcy may maintain a suit in equity to recover property which has been preferentially transferred; such action being in the nature of a creditor's suit to set aside a fraudulent conveyance. *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992; *Wright v. Skinner*, (S. D. N. Y. 1905) 136 Fed. 694, 14 Am. Bankr. Rep. 500; *Parker v. Black*, (W. D. N. Y. 1900) 143 Fed. 560, 16 Am. Bankr. Rep. 202, *affirmed* (2d Cir. 1907) 151 Fed. 18, 80 C. C. A. 484; *Morris v. Small*, (D. C. Mass. 1908) 160 Fed. 142, 20 Am. Bankr. Rep. 138; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673. See also the annotation following section 23b, *supra*, p. 595.

Federal courts, both when exercising general jurisdiction and also when exercising the special one conferred by the Bankruptcy Act in this particular, require suits to set aside deeds and contracts as fraudulent to be instituted in equity. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

It is to be borne in mind that the equity practice of the federal courts is independent of, and unaffected by, state laws as to procedure in state courts. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

A bill by a trustee in bankruptcy to recover a payment of money made by a bankrupt within four months prior to bankruptcy, by alleging that the transaction amounted to a preference or a fraudulent payment, and that in either case he was entitled to its return, does not unite inconsistent causes of action. *Wright v. Skinner*, (S. D. N. Y. 1905) 136 Fed. 694, 14 Am. Bankr. Rep. 500.

The decree of a state court, granting registration of title to land under the law of the state, does not bar a suit in equity by a

trustee in bankruptcy to enforce a reconveyance of the land, alleged to have been conveyed by the bankrupt as a preference, against a defendant who was not a *bona fide* purchaser in good faith in reliance on the registered title. *Morris v. Small*, (C. C. Mass. 1908) 160 Fed. 142, 20 Am. Bankr. Rep. 138.

But where the trustee has an adequate remedy at law he cannot maintain a bill in equity in any court for the recovery of a preference. *Warmath v. O'Daniel*, (C. C. A. 6th Cir. 1908) 159 Fed. 87, 20 Am. Bankr. Rep. 101; *Sessler v. Nemcof*, (E. D. Pa. 1910) 183 Fed. 656.

Jurisdiction not determined on demurrer.—Though equity has cognizance of constructive and actual fraud, whether a bill in equity lies by a trustee in bankruptcy to set aside a preferential payment to a creditor of a bankrupt will not be determined on demurrer to the bill, but the demurrer will be overruled, reserving the right to raise the question of jurisdiction at final hearing. *Johnson v. Hanley, etc., Co.*, (D. C. R. I. 1911) 188 Fed. 752.

Recovery in assumpsit.—A trustee in bankruptcy may sue in assumpsit for the value of a preferential transfer of goods by the bankrupt to a creditor, for the reason that the creditor takes the goods impressed with the obligation created by the Bankruptcy Act to restore or pay on the trustee's electing to sue. *Reber v. Ellis*, (E. D. Pa. 1911) 185 Fed. 313.

Remedy by injunction pending recovery.—Under the rule that where equity will enforce a claim to specific property, an injunction may issue *pendente lite* to prevent a transfer that would interfere with or prejudice the ultimate relief to which a claimant may be entitled, it has been held that a court of bankruptcy will, on proper showing, grant an injunction to restrain the disposition of property preferentially transferred. *In re Kimball*, (W. D. Pa. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; *In re Mills*, (E. D. N. Y. 1910) 179 Fed. 409; *Pyle v. Texas Transport, etc., Co.*, (E. D. La. 1911) 185 Fed. 309.

Pleadings.—The pleadings must show all the essential elements of a voidable transfer in order to warrant a recovery. *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 508, 86 Pac. 59; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781.

Pleadings must comply with practice where suit is brought.—It is well settled that a proceeding instituted by a bankrupt's trustee to set aside illegal preferences is not a proceeding in bankruptcy, but, while ancillary to such proceeding and authorized by the Bankruptcy Act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice is concerned, by the laws and rules of the court wherein it is instituted. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

Evidence.—The burden of proving that the transaction which is attacked as having resulted in a preference is of such a character as to render it voidable under section 60b is on the trustee. *In re Pfaffinger*, (W. D. Ky. 1906) 154 Fed. 523; *Getts v. Janesville Wholesale Grocery Co.*, (W. D. Wis. 1908) 163 Fed. 417, 21 Am. Bankr. Rep. 5; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *Reber v. Shulman*, (E. D. Pa. 1910) 179 Fed. 574; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213.

But the defendant assumes the burden of proving an affirmative defense set up by him. *Ommen v. Talcott*, (C. C. A. 2d Cir. 1911) 188 Fed. 401.

Proof of insolvency in partnership cases.—A trustee in bankruptcy may not recover a conveyance of partnership property as a preference, unless it is shown that the partners, as individuals, were insolvent at the time of the conveyance. *Worrell v. Whitney*, (E. D. Pa. 1910) 179 Fed. 1014. See also the annotation under section 5a, *supra*, p. 501.

Establishing the existence of other individual creditors is not essential to the prosecution, by the trustee of a bankrupt partnership, of a pending suit to avoid, as constituting a preference under the state law, a sale by an individual partner of his individual property, where, under such law, partnership and individual creditors have a co-equal right to payment out of his individual estate. *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

Defenses—Expense in connection with preference.—It is no defense to an action for the recovery of a preference that the person receiving it has expended money thereon; a claim of that character must be pre-

sented for allowance against the estate. *In re Nechamkus*, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572.

Misconduct of creditor's agent.—The statute contains no exceptions to the effect that a preferred creditor may hold his advantage provided his agent and the insolvent have confidential relations, or provided his agent has self-interests antagonistic to a disclosure to his principal. To interpolate such exceptions is beyond the proper sphere of statutory construction and violative of the spirit of the Act wherein equality of distribution of the bankrupt's inadequate assets is a prime object. *Campbell v. Balcomb*, (C. C. A. 7th Cir. 1910) 183 Fed. 766.

Cross bill for recovery of dividend.—A court of equity, in a suit by a trustee in bankruptcy to recover a preference, will not entertain a cross bill for the recovery by defendant of the amount of the dividend to which he claims to be entitled from the bankrupt estate, but will require him to prove his claim in the bankruptcy court; but it may permit him, on the giving of security, to retain in his hands enough of the amount complainant is entitled to recover, to cover his dividend in case his claim shall be allowed. *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572.

Finding on creditors' petition not res judicata as to trustee.—A finding on a creditors' petition that a charge of preferential transfer of property by the alleged bankrupts was not sustained, is not an adjudication which can bind a trustee, subsequently appointed on an adjudication made by another court, in a suit brought by him against the alleged preferred creditor to recover the property. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

c [Set-off of new credit after preference.] If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. [(1898) 30 Stat. L. 562.]

Right of set-off.—Where a creditor who has been preferred, afterwards, in good faith, extends further credit without security, for property which becomes a part of the debtor's estate, the unpaid amount of such new credit may be set off against the amount which would otherwise be recoverable from the creditor by reason of his having obtained a voidable preference. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685; *In re Morrow*, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; *Price v. Derbyshire Coffee Co.*, (1908) 21 Am. Bankr. Rep. 280, 128 App. Div. 472, 112 N. Y. S. 830. See also the annotation following section 58a, *supra*, p. 715.

The requirement as to good faith in section 60c excludes any arrangement by which the creditor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with any other wrongful purpose. It means that the creditor should not act in such a way as to intentionally defeat the Bankruptcy Act, but should let the debtor have the money or property for some honest purpose. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685.

The requirement that the property should become a part of the debtor's estate excludes

cases in which the creditor delivers the property to a third person on the credit of the debtor, or delivers it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685.

Statute not applicable to innocent preferences.—Section 60c is not applicable to the mere preference defined in section 60a, and therefore does not entitle a creditor to the

right of set-off against such a preference when required to surrender it, under section 57g, prior to proving his claim. But the right of set-off, provided for in section 60c, is only applicable where, under section 60b, the trustee brings action to recover the property or the value thereof. *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; *In re Jones*, (D. C. S. C. 1903) 123 Fed. 128, 10 Am. Bankr. Rep. 513; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316. See also the annotation following section 58a, *supra*, p. 715.

d [Payments to attorneys—examination.] If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. [(1898) 30 Stat. L. 562.]

Cross-references: As to

Attorney fees as expenses, see section 62, *infra*, p. 749.

Attorney fees as entitled to priority, see section 64b (3), *infra*, p. 772.

A payment or transfer to counsel is valid to the extent that it is reasonable. It is neither a preference under section 60b, nor a fraudulent transfer under section 67e. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

Services rendered after institution of proceedings.—Section 60d is limited to the allowance of reasonable compensation to attorneys for services rendered to the bankrupt prior to and in contemplation of the commencement of the bankruptcy proceedings; it does not cover services rendered in resisting the creditor's petition for an adjudication of bankruptcy. *Pratt v. Bothe*, (C. C. A. 6th Cir. 1904) 130 Fed. 670, 12 Am. Bankr. Rep. 529.

Previous services.—A payment made by a bankrupt to his attorney immediately prior to the bankruptcy for services previously rendered, so far as the question of its being preferential is concerned, stands upon the same ground as a payment to any other creditor. *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

Re-examination of payment or transfer made to attorney.—Section 60d "recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the Act makes

provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness." *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1. And see to the same effect *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *Pratt v. Bothe*, (C. C. A. 6th Cir. 1904) 130 Fed. 670, 12 Am. Bankr. Rep. 529; *In re Habegger*, (8th Cir. 1905) 139 Fed. 623, 71 C. C. A. 607, 15 Am. Bankr. Rep. 198; *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777; *Furth v. Stahl*, (1903) 10 Am. Bankr. Rep. 442, 205 Pa. St. 439, 55 Atl. 29.

Determination of reasonableness.—The provisions of section 60d, although aimed at the recovery of undue payments for "services to be rendered," are analogous in so far as they give the court an opportunity to determine what allowance shall be made, with the provisions of section 64b (3); hence, proceedings to test the propriety of payments to an attorney for all services, namely, those rendered before the payment as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance, and for an order directing the return of the balance, unless an issue is raised. *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

Jurisdiction.—A state court has no jurisdiction to re-examine the reasonableness of an attorney's compensation under section 60d. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1; *Swartz v. Frank*, (1904) 183 Mo. 439, 82 S. W. 60.

Jurisdiction extends to nonresident attor-

neys.—The jurisdiction of the bankruptcy court extends to a case where the counsel concerned are nonresidents of the state and district, and where the transaction occurred, and the notice of the proceeding was served, outside the district. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

Ancillary jurisdiction.—It has been held that a trustee in bankruptcy cannot maintain a plenary suit in a court of bankruptcy to recover, in another jurisdiction, excessive payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, where that court has made no order in the proceeding authorized by section 60d to re-examine and reduce such payments or transfers. *In re Wood*, (1908) 210 U. S. 246, 28

S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

But see section 2 (20), *supra*, p. 480, which was added by the amendment of 1910, providing for the exercise of ancillary jurisdiction.

Notice.—Such notice, by mail or otherwise, as the court shall direct, of the proceeding taken, under section 60d, is sufficient, provided an opportunity is given to appear and contest the reasonableness of the charges. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

The right to trial by jury in suits at common law, secured by U. S. Const., 7th Amend., is not infringed by the proceeding authorized by section 60d. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

CHAPTER VII.

ESTATES.

SEC. 61. DEPOSITORIES FOR MONEY.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories. [(1898) 30 Stat. L. 562.]

Cross-reference: As to

Duties of trustee with reference to deposits and disbursements of funds, see section 47a (3) and (4), *supra*, p. 685.

Duty to designate depositories.—Section 61 of the Bankruptcy Act makes it the duty of courts of bankruptcy to designate, by order, banking institutions as depositories of funds of bankrupt estates, and to require of them bonds for the safekeeping and forthcoming thereof. *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349.

Deposit creates relation of debtor and creditor with depository.—Where a receiver or other officer of a court of bankruptcy deposits money in a designated depository, the same relation of debtor and creditor is created as in the case of an ordinary bank deposit; so that the bankruptcy court no longer has the same jurisdiction over it as it has over funds or property in the possession of a receiver or trustee. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

Deposits in other institutions renders officer liable.—To deposit the funds of a bankrupt estate in any bank other than a designated depository, renders the officers making such deposit liable. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574

Effect of failure of depository.—Where a state trust company, prior to failure, had been appointed a depository for bankruptcy funds, the question whether deposits made by trustees in bankruptcy were entitled to preference, under R. S. sec. 3466, 2 Fed. Stat. Annot. 45, giving preference to debts due the United States, is solely within the jurisdiction of the state supreme court, and cannot be determined on a motion in bankruptcy for an order requiring the superintendent of banks to pay out such deposits. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

Thus where a depository of bankruptcy funds executed a bond to the United States to pay out all moneys deposited with it in such depository only as provided by the Acts of Congress and the rules of court applicable thereto, and to abide by all lawful orders and decrees of the court, it was held that such provisions applied only to the depository while in possession of its own assets and conducting its ordinary business, and did not confer on the bankruptcy court power to make summary orders for the payment of deposits made with the trust company by receivers and trustees in bankruptcy, after the trust company had passed into the hands of the state superintendent of banks for liquidation. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

SEC. 62. EXPENSES OF ADMINISTERING ESTATES. — *a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred. [(1898) 30 Stat. L. 562.]

Cross-references: As to

Cost of preserving estate, see section 64b (1), *infra*, p. 770.

Cost of administration, etc., see section 64b (3), *infra*, p. 772.

Expense on application to take possession of assets, see section 3e, *supra*, p. 494.

Expense of creditors in preserving estate when transferred or concealed, see section 64b (2), *infra*, p. 771.

Re-examination of payment made to attorney, see section 60d, *infra*, p. 747.

Necessary expenses allowed. — The actual and necessary expenses incurred by officers in the administration of the estate are, subject to the approval of the court, allowable. *In re Stotta*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re J. W. Harrison Mercantile Co.*, (W. D. Mo. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 420; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 604, 3 Am. Bankr. Rep. 154; *In re Adams Sartorial Art Co.*, (D. C. Colo. 1900) 101 Fed. 215, 4 Am. Bankr. Rep. 107; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Wiessner*, (E. D. N. Y. 1902) 115 Fed. 421, 8 Am. Bankr. Rep. 415; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16; *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *Matter of National Mercantile Agency*, (S. D. N. Y. 1903) 11 Am. Bankr. Rep. 451; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *Matter of Marks*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 54.

Necessary traveling expenses, hotel bills, amounts paid stenographers and for other expenses may be allowed by special order of the judge, when a detailed account thereof, verified by the referee that they were necessarily and actually incurred, and showing the amount paid by him therefor, is returned to the bankruptcy court (with proper vouchers when they can be procured), as provided by the general orders 10, 16, and 35. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446.

The cost of the publication of notices is

properly chargeable to the bankrupt or his estate under the general order No. 35 (2). *In re Dixon*, (D. C. Cal. 1902) 114 Fed. 675.

A bankrupt who advances the money necessary to pay for the issuance and publication of notices of his application for discharge is entitled, under general order No. 10, to repayment of the same out of the estate as part of the costs of administration. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446; *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

Unavoidable loss. — The trustee may properly be allowed for unavoidable losses of small sums, to the estate, through his inability to collect from purchasers. *In re Dimm*, (M. D. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

Trustee's attendance at sales. — A trustee in bankruptcy is entitled to an allowance in his accounts for personal services rendered by him in attending and assisting in continuous auction sales, by means of which the bankrupt's stock of goods was disposed of to the substantial advantage of the estate; and for his necessary personal expenses while so doing. *In re Dimm*, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

Appraiser's fees. — In the ordinary case appraisers of a bankrupt's estate are entitled to but five dollars a day for three days; the trustee being required to justify any greater allowance. *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

Expense of carrying out bankrupt's contract. — Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable, are not costs of administration. *In re Bourlier Cornice, etc., Co.*, (W. D. Ky. 1905) 133 Fed. 958, 13 Am. Bankr. Rep. 585.

Expense of creditor attending on re-examination of claim. — Where an order is made on petition of a trustee for the re-examination of a claim previously allowed to a creditor who resides at a distance, and he is required to appear before the referee for examination, he may properly be allowed his expenses if his claim is finally allowed. *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370.

Money loaned to a receiver in excess of the sum authorized by the court will bind the estate only upon a showing that the proceeds were used in conducting its business, and then only ratably with the claims of other creditors of the receiver. *In re Burkhalter*, (N. D. Ala. 1910) 182 Fed. 353.

Unnecessary expense. — Items of expense incurred by accountants for entertainment and unusual hotel bills and Pullman fares

are not properly chargeable against the estate of a bankrupt, and will be disallowed. *Matter of Marks*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 54.

Expense for rent.—Necessary expense for rent, incurred by the trustee, receiver, or marshal, is included in the expense of administering the estate and properly payable therefrom. *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Hinckel Brewing Co.*, (N. D. N. Y. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484; *In re Luckenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455; *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 101; *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509.

Rent allowed on quantum meruit.—Where the receiver or trustee continues to occupy premises leased by the bankrupt without agreement as to rent, the landlord is entitled to rent on a *quantum meruit*. *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 101; *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509. See also *In re Lukenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455.

The expenses of an assignee for the benefit of creditors, in so far as they have been incurred for the preservation or for the benefit of the bankrupt estate, may be allowed. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165; *Summers v. Abbott*, (8th Cir. 1903) 122 Fed. 36, 58 C. C. A. 352; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186.

Expense incurred in state court.—The federal court will decline to recognize the authority of the state court to encumber the assets of a bankrupt estate for the fees and expenses of its officers after the proceedings therein were suspended by the bankruptcy proceedings; especially when accompanied by a ruling that such assets will not be delivered to the trustee until the allowances thus made are paid. *In re Rogers*, (S. D. Ga. 1902) 116 Fed. 435, 8 Am. Bankr. Rep. 723.

But it has been held that the state court may, prior to surrendering assets in its custody, charge such assets with the costs and expenses incurred in bringing the same into that court. *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5. See also *Matter of Cameron*, (E. D. Mich. 1908) 20 Am. Bankr. Rep. 790.

Attorney fees.—In the allowance of attorney fees as expenses of the administration of a bankrupt's estate, the general rule is that such fees will be allowed where counsel has been retained by a proper person, and the services performed were actually beneficial; where the services are not beneficial no counsel fee will be allowed. The amount allowed must be reasonable in consideration of the services performed, and is to be fixed by the court on the proof adduced, or, in the absence of such proof, from a knowledge of its value. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *Page v. Rogers*, (1909) 211 U. S.

575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re J. W. Harrison Mercantile Co.*, (W. D. Mo. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419; *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re O'Connell*, (S. D. N. Y. 1899) 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784, 4 Am. Bankr. Rep. 17; *In re Dreeben*, (N. D. Tex. 1900) 101 Fed. 110, 4 Am. Bankr. Rep. 146; *In re Rozinsky*, (S. D. N. Y. 1900) 101 Fed. 229, 3 Am. Bankr. Rep. 831; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 685; *In re Mayer*, (E. D. Wis. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 239; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 575; *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *In re Anderson*, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Brundin*, (D. C. Minn. 1901) 112 Fed. 306, 7 Am. Bankr. Rep. 298; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 572, 8 Am. Bankr. Rep. 635; *Smith v. Cooper*, (C. C. A. 5th Cir. 1903) 120 Fed. 230, 9 Am. Bankr. Rep. 755; *In re Connell*, (M. D. Pa. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Morris*, (E. D. N. C. 1903) 125 Fed. 841, 11 Am. Bankr. Rep. 145; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 188; *In re Covington*, (E. D. N. C. 1904) 132 Fed. 884, 13 Am. Bankr. Rep. 150; *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43, 14 Am. Bankr. Rep. 204; *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854; *In re Martin Borgeson Co.*, (E. D. N. Y. 1907) 151 Fed. 780, 18 Am. Bankr. Rep. 179; *In re Huddleston*, (S. D. Ga. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669; *In re Fischer*, (C. C. A. 2d Cir. 1910) 175 Fed. 531, 23 Am. Bankr. Rep. 427; *Caten v. Eagle Bldg., etc., Assoc.*, (W. D. Pa. 1909) 177 Fed. 998, 23 Am. Bankr. Rep. 130; *Matter of Smith*, (N.

D. N. Y.) 1 Am. Bankr. Rep. 37; *In re Mitchell*, (W. D. Pa. 1899) 1 Am. Bankr. Rep. 687; *In re Frick*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 719; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Silverman*, (S. D. N. Y. 1899) 3 Am. Bankr. Rep. 227; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 400; *Matter of Stratemeyer*, (D. C. Hawaii 1905) 14 Am. Bankr. Rep. 121; *Matter of Niman*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 515; *In re Oppenheimer*, (M. D. Pa. 1906) 17 Am. Bankr. Rep. 60.

The power to allow attorney's fees is a judicial, not an arbitrary, discretion vested in the court. When the fee asked for is exorbitant, even when recommended by the referee, no fee will be allowed. In re Carr, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

Referee may determine right to fees. — The question of allowing counsel fees as part of the cost of administering a bankrupt's estate may be determined by the referee *ex parte*. *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641.

Notice to creditors is not required before the referee can settle proper attorney's fees. In re Stotts, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641.

Services must be beneficial in fact. — Attorneys' compensation is allowable only on equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646. See also *In re Covington*, (E. D. N. C. 1904) 132 Fed. 884, 13 Am. Bankr. Rep. 150.

While the amount paid for services in administering the Bankruptcy Act should never be lavish or extravagant, and should always be rigidly scrutinized, it should be reasonable and adequate. In re Sully, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236.

Attorney retained by stakeholder. — Where the defendant, in an action by a trustee in bankruptcy, answered that it had in its hands a sum belonging to the bankrupt, but which was claimed as assignee by his wife, who thereupon intervened, and the only issue tried was between her and the plaintiff, it was held that the defendant, which occupied the position of a mere stakeholder, was not liable for costs, and was entitled to the allowance of a reasonable attorney's fee. *Caten v. Eagle Bldg., etc., Assoc.*, (W. D. Pa. 1909) 177 Fed. 996, 23 Am. Bankr. Rep. 130.

Fees of trustee's attorney. — A trustee in bankruptcy may employ counsel when the situation of the estate is such that he requires legal assistance; and the fees of such counsel, to a reasonable amount, for services properly and actually rendered to the trustee, may be allowed as part of the cost of administering the estate. *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re Rude*, (D. C. Ky.

1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Arnett*, (W. D. Tenn. 1901) 112 Fed. 770, 7 Am. Bankr. Rep. 522; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186; *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re Dimm*, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854; *In re Mitchell*, (W. D. Pa. 1899) 1 Am. Bankr. Rep. 687; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Knight*, (N. D. Ohio) 5 Am. Bankr. Rep. 560 note; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502; *Keyes v. McKirrow*, (Mass. 1902) 9 Am. Bankr. Rep. 322; *In re Niman*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 515. See also the cases cited under section 64b (3) to the same effect, *infra*, p. 772.

A trustee of a bankrupt, though an attorney, is not bound to perform legal services, but if he does so he cannot have compensation therefor from the estate. In re George Halbert Co., (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185. See also *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses; and, as such, a part of the costs and expenses of administration, which is entitled to preferential payment. Davidson v. Friedman, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854. See also the annotation following section 64b (2), *infra*, p. 771.

While the fact that an attorney had acted for the bankrupt may affect the propriety of his employment to act for the trustee, it does not deprive him of the right to compensation for services after he has been so employed. In re Dimm, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

Where attorneys for a bankrupt's trustee took a position antagonistic to the creditors, and in favor of the bankrupts, they will be allowed only a nominal sum for their services. In re Fidler, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

Claimant cannot be compelled to pay trustee's counsel a fee as part of the cost. — Where, on re-examination of the allowance of certain claims against a bankrupt's estate, it was found on sufficient evidence that the claims were unsustainable, it was held that while the referee properly required the claimant to pay the costs of the hearing, he was not authorized to require that the claimant also pay an attorney's fee to the trustee's attorney. *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820,

Fees of attorney for receiver.—Attorney's fees for services rendered to a receiver in bankruptcy should be allowed from the estate, only to the extent that the services were rendered for the direct benefit of the entire estate, and not of any particular creditor. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *In re Oppenheimer*, (M. D. Pa. 1906) 146 Fed. 140, 17 Am. Bankr. Rep. 59; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719; *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

Ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify the employment of an attorney; and hence, no claim for the services of an attorney so employed is chargeable *per se* against the estate where it is predicated alone on the fact of employment and service rendered. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

Fees of bankrupt's attorney.—*In involuntary proceedings.*—The compensation to be paid to the attorney for the bankrupt is confined to the services necessary to enable the bankrupt to comply with the duties required of him by the statute. *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Anderson*, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192; *Matter of Eschwege*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 282; *Matter of Stratemeyer*, (D. C. Hawaii 1905) 14 Am. Bankr. Rep. 120.

Where, after the discharge of certain bankrupts and their trustee, their attorney, as the result of considerable effort in examining records, etc., and the accounts relating to the estate of the bankrupts' father, and certain titles to mortgaged property, discovered additional assets amounting to \$2,000 to the credit of the estate of each of the bankrupts, it was held that an allowance to the attorney of \$37.50 for fees was inadequate, and should be increased to \$100 in each estate. *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165 (*modifying* C. C. A. 3d Cir. 1909) 174 Fed. 642, *affirmed in this respect* 23 Am. Bankr. Rep. 487.

Fees of a bankrupt's attorney for services in prosecuting a petition for the bankrupt's discharge cannot be charged against objecting creditors. *In re Gillardon*, (E. D. Pa. 1911) 187 Fed. 289.

In voluntary proceedings.—The attorney for a voluntary bankrupt may be allowed fees from the estate for such services as were actually rendered in assisting the bankrupt to comply with the statute in the preparation of his schedules, etc. *In re Terrill*, (D.

C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625.

Entitled to priority.—It has been held that the services of an attorney rendered to a voluntary bankrupt in the necessary performances of the bankrupt's statutory duties are entitled to priority of payment under section 64b (3). *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *Matter of Hitchcock*, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 664. See also the cases cited under section 64b (3), *infra*, p. 772.

But it has also been held that, except as to services tending to preserve the estate, an attorney for the bankrupt in voluntary proceedings can only submit his claim for compensation as a general debt of the estate. *In re Beck*, (S. D. Ia. 1899) 92 Fed. 889, 1 Am. Bankr. Rep. 535.

Claiming exemption.—Legal services rendered to a bankrupt in having his exemption allowed is a matter between the bankrupt and his attorneys. *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

Where an attorney has been paid, by the bankrupt or any one else, before the bankruptcy, a sufficient compensation for his services, no further sum will be allowed out of the estate. *In re O'Connell*, (S. D. N. Y. 1899) 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559.

Proof required.—No attorney's fee can be allowed in voluntary bankruptcy proceedings except upon proof of services actually rendered to the bankrupt in doing the things which the law requires of him. *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625.

Fees of creditors' attorneys.—The Bankruptcy Act does not allow, as a claim against the estate, compensation for the services of attorneys employed by creditors in their own interest. *In re Silverman*, (S. D. N. Y. 1899) 97 Fed. 325, 3 Am. Bankr. Rep. 227; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 398.

Attorneys elected by creditors to represent them in bankruptcy proceedings must look to them for compensation, not to the bankrupt estate or to the court. *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

Claimants having claims against the estates of bankrupts must establish them at their own expense, and will not be allowed their costs and expenses from the estate, where it does not appear that the defense

made by the trustee was captious or unwarranted. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

Thus it has been held that a court of bankruptcy will not allow costs or attorney's fees from an estate to a creditor whose claim was unsuccessfully contested. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623.

Where trustee refuses to act. — Where one of the creditors of a bankrupt, by his attorney, objects to the allowance of a claim filed by another creditor, the trustee declining to interfere, and upon a contest and trial secures its rejection, thereby saving a considerable sum for distribution among the creditors generally, the attorney for such contesting creditor may be allowed a fee for his professional services rendered, to be paid out of the estate. *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682. See also the cases cited under section 64b (2), *infra*, p. 771.

Claims for fees by attorneys for objecting

creditors should be filed with the referee in the first instance, so that any party aggrieved by the referee's ruling thereon may have the same reviewed by appropriate proceedings. *In re Stoddard Bros. Lumber Co.*, (D. C. Idaho 1909) 169 Fed. 190, 22 Am. Bankr. Rep. 435.

Expense incurred for benefit of creditors generally. — The only statutory allowance of attorney's fees is, under section 3e, upon a withdrawal or dismissal of a petition to take possession of the estate, or, as authorized by section 64b (3), to the attorneys for petitioning creditors. But it will be noticed that, under section 64b (2), creditors themselves may be allowed for the reasonable expense incurred in recovering any part of the estate which has been transferred or concealed; and such expense may, of course, include necessary attorney fees. See the cases cited under the sections specified, *supra*, p. 494, and *infra*, p. 771 *et seq.*

And see also *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

SEC. 63. DEBTS WHICH MAY BE PROVED. — a Debts of the bankrupt may be proved and allowed against his estate which are [(1898) 30 Stat. L. 562.]

Section 63a must be read in connection with section 17 limiting the operation of discharges. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833. See also *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367.

Creation and recognition of provability. — Creation of provability is one thing. Its mere recognition is another. The latter, however, whether express or implied, may have an important bearing upon the question of provability by indicating that the language used in section 63a to define provable claims was employed in a broader sense than would, without such recognition, have been attributable to it. It is proper that the section should be read in connection with section 17, section 64, or any other section calculated to throw light upon its scope and effect. The result may be that where the definition in section 63a of a class of provable debts is, in and by itself, susceptible to

two interpretations, the more liberal will be adopted. *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

The several subdivisions of section 63a are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others; thus the provision of subdivision (1), which limits the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims within other classes. *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112.

The general intent of Congress in the enactment of the statute was to make every debt and demand existing against the bankrupt at the time of his adjudication, which was recoverable either at law or in equity, provable in bankruptcy. *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428.

(1) [*Fixed liability.*] a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; [(1898) 30 Stat. L. 562.]

The status of a claim, as a fixed liability absolutely owing, is determined at the time of the filing of the petition in bankruptcy; and if a claim is then a provable debt, it comes within the language of the statute; otherwise it does not. *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *In re Reliance Storage, etc., Co.*, (E. D. Pa. 1900) 100 Fed. 619, 4 Am. Bankr.

Rep. 49; *In re Roche*, (5th Cir. 1900) 101 Fed. 956, 42 C. C. A. 115; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Cobb v. Overman*, (C. C. A. 4th Cir. 1901) 109 Fed. 65; *In re Swift*, (1st Cir. 1901) 112 Fed. 316, 50 C. C. A. 270, 7 Am. Bankr. Rep. 374; *Phillips v. Dreher Shoe Co.*, (M. D. Pa. 1902) 112 Fed. 404; *In re Garlington*, (N. D. Tex. 1902) 115 Fed. 989,

8 Am. Bankr. Rep. 602; *Swarts v. St. Louis Fourth Nat. Bank*, (8th Cir. 1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; *Swarts v. Siegel*, (8th Cir. 1902) 117 Fed. 13, 54 C. C. A. 399; *In re Pennnewell*, (C. C. A. 6th Cir. 1902) 119 Fed. 139, 9 Am. Bankr. Rep. 490; *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 308, 57 C. C. A. 374; *In re Coburn*, (D. C. Mass. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 426, 11 Am. Bankr. Rep. 367; *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129 Fed. 575, 12 Am. Bankr. Rep. 104; *In re Adams*, (D. C. Mass. 1904) 139 Fed. 381; *In re Miller*, (D. C. Vt. 1904) 132 Fed. 414, 13 Am. Bankr. Rep. 87; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *Slocum v. Soliday*, (C. C. A. 1st Cir. 1910) 183 Fed. 410; *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391; *Phenix Nat. Park Bank v. Waterbury*, (1910) 23 Am. Bankr. Rep. 250, 197 N. Y. 161, 90 N. E. 435. And see the cases cited to the same effect, under section 59a, *supra*, p. 717, as to the creditors who may file a petition in bankruptcy.

Claim accruing after bankruptcy.—An officer of a corporation is not entitled to prove a claim for salary, accruing after the bankruptcy of the corporation. *In re Dr. Voorhees Awning Hood Co.*, (M. D. Pa. 1911) 187 Fed. 611.

Claim payable after bankruptcy.—But where an obligation is absolutely due and owing, it is immaterial when it is payable. *In re Buzzini*, (S. D. N. Y. 1910) 183 Fed. 827. See also *Cobb v. Overman*, (C. C. A. 4th Cir. 1901) 109 Fed. 65.

Effect of composition agreement.—A voluntary composition between a debtor and his creditors, after proceedings in involuntary bankruptcy had been instituted, by which the creditors agreed to accept forty per cent. of their claims in full satisfaction, one-half to be paid in cash and the remainder to be evidenced by the notes of the bankrupt, does not operate as an accord and satisfaction until full payment has been made; and where the debtor is subsequently adjudged a bankrupt on his own petition, not having paid the notes, the creditors joining in the agreement are entitled to prove their original debts, giving credit for the cash payments received. *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343.

The statutory liability of a director of a savings bank corporation, whose funds have been embezzled or misappropriated by its officers, to depositors in such bank, is a fixed liability absolutely owing within the meaning of section 63a (1). *In re Brown*, (C. C. A. 9th Cir. 1908) 164 Fed. 673, 21 Am. Bankr. Rep. 123; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

Judgments.—Debts, evidenced by a judg-

ment, are expressly provided for in the Act; and, as a general rule, judgments existing and enforceable at the time of the filing of the petition may be proved in bankruptcy proceedings against the estate of the defendant. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *In re Alderson*, (D. C. W. Va. 1899) 98 Fed. 588, 3 Am. Bankr. Rep. 544; *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re Rebman*, (C. C. A. 9th Cir. 1906) 150 Fed. 759, 17 Am. Bankr. Rep. 767; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *In re Pease*, (N. D. N. Y.) 4 Am. Bankr. Rep. 547; *Doyle v. Heath*, (R. I. 1900) 4 Am. Bankr. Rep. 705; *Finnegan v. Hull*, (N. Y. 1901) 6 Am. Bankr. Rep. 648; *Claster v. Soble*, (1903) 10 Am. Bankr. Rep. 446, 22 Pa. Super. Ct. 631; *In re Lorde*, (E. D. N. Y. 1906) 16 Am. Bankr. Rep. 201.

Judgment for tort.—Judgments rendered before bankruptcy, whether based upon liability for tort or contract, are expressly provable under section 63a, and there is nothing in section 17 of the Act which affects this rule. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25. And see cases cited, *infra*, p. 760, under subdivision (4) of this section.

Decree of Orphans' Court.—In *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129 Fed. 575, 12 Am. Bankr. Rep. 104, *reversing* (E. D. Pa. 1903) 123 Fed. 185, 10 Am. Bankr. Rep. 545, it was held that a decree of the Orphans' Court is a fixed liability absolutely owing.

Where the renewal of a judgment is, because of a statutory requirement, necessary to make it a fixed obligation at the time of the filing of the petition, the absence of such renewal prevents proof of the judgment. *In re Farmer*, (E. D. N. C. 1902) 116 Fed. 763, 9 Am. Bankr. Rep. 19.

Judgments rendered on a debt which is not discharged in bankruptcy are not in any proper sense provable claims. See *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139.

Thus, a claim for alimony, even though evidenced by a judgment, decree, or order, has been held not to be a provable or dischargeable debt in bankruptcy. See *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009, 5 Am. Bankr. Rep. 829; *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 13 Am. Bankr. Rep. 1; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187; *In re Anderson*, (S. D. N. Y. 1899) 97 Fed. 321; *In re*

Nowell, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *Turner v. Turner*, (D. C. Ind. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67; *Maisner v. Maisner*, (N. Y. 1901) 6 Am. Bankr. Rep. 295; *Young v. Young*, (N. Y. 1901) 7 Am. Bankr. Rep. 171. See also the annotation following section 17a (2), *supra*, p. 573.

So, also, liabilities for the support and maintenance of children, even though reduced to judgment, are not provable in bankruptcy. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139. See also *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Hubbard*, (N. D. Ill. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528. And see the annotation under section 17a (2), *supra*, p. 573, as to the dischargeability of such liabilities.

Judgment for fines.—It has also been held that Congress did not intend to permit the discharge of any judgment rendered by a state or federal court imposing a fine in the enforcement of criminal laws, as such, of either jurisdiction. *In re Moore*, (W. D. Ky. 1901) 111 Fed. 145, 6 Am. Bankr. Rep. 590, *disapproving In re Alderson*, (D. C. W. Va. 1899) 98 Fed. 588, 3 Am. Bankr. Rep. 544. And see section 57j, *supra*, p. 710, as to debts owing for penalties or forfeitures.

A verdict allowing damages for personal injuries, when no judgment is entered thereon before intervention of bankruptcy proceedings, is not a "fixed liability" allowable in bankruptcy proceedings. *In re Ostrom*, (D. C. Minn. 1911) 185 Fed. 988.

A penal bond, executed by a person who is thereafter adjudged a bankrupt, to secure the payment to the obligee of an annuity during life, is an instrument creating a fixed liability absolutely owing at the time of the filing of the petition, payable in the future, and is provable as a debt against the bankrupt's estate. *Cobb v. Overman*, (C. C. A. 4th Cir. 1901) 109 Fed. 65, 6 Am. Bankr. Rep. 324.

Notes.—Claims due and owing on notes given by the bankrupt may be proven against his estate, as a claim evidenced by an instrument in writing. *Merchants' Bank v. Thomas*, (C. C. A. 5th Cir. 1903) 121 Fed. 306, 10 Am. Bankr. Rep. 299; *In re New York Car Wheel Works*, (W. D. N. Y. 1905) 141 Fed. 430, 15 Am. Bankr. Rep. 571, 139 Fed. 421, 14 Am. Bankr. Rep. 595; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524; *In re Kyte*, (M. D. Pa. 1908) 21 Am. Bankr. Rep. 110.

Trade certificates, issued by a corporation under a state statute, are provable debts against the estate of such corporation in bankruptcy. *In re Spot Cash Hooper Co.*, (W. D. Tex. 1911) 188 Fed. 861.

Indorsements.—A claim against the bankrupt as an indorser of commercial paper which, at the time of the filing of the petition, was a fixed liability, is provable against his estate in bankruptcy. *Moch v. Market St. Nat. Bank*, (C. C. A. 3d Cir. 1901) 107 Fed. 897, 6 Am. Bankr. Rep. 11; *In re Stout*,

(W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Philip Semmer Glass Co.*, (C. C. A. 2d Cir. 1905) 135 Fed. 77, 14 Am. Bankr. Rep. 25; *Gorman v. Wright*, (C. C. A. 4th Cir. 1905) 136 Fed. 164, 14 Am. Bankr. Rep. 135; *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112; *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443; *In re Buzzini*, (S. D. N. Y. 1910) 183 Fed. 827; *Whitwell v. Wright*, (1910) 23 Am. Bankr. Rep. 747, 136 App. Div. 246, 120 N. Y. S. 1065.

The holder of a note taken as collateral security, on which the bankrupt is an indorser, must, as against the bankrupt's estate, make due allowance for the value of any property taken by virtue of the principal security. *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443.

Surety debts.—A fixed liability due by the bankrupt, as a surety, at the time of the institution of the proceedings, is provable against his estate. *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129 Fed. 575, 12 Am. Bankr. Rep. 104, *reversing* (E. D. Pa. 1903) 123 Fed. 185, 10 Am. Bankr. Rep. 545; *Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75; *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55; *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186.

In *Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75, it appears that the bankrupt was surety on a bond given by a deputy collector of taxes, and that prior to his bankruptcy the deputy had become a defaulter by reason of the failure of a bank in which he deposited his collections; and it was held that the liability of the bankrupt on the bond was not contingent, but was a fixed liability provable against his estate, and that the right to prove the claim against the estate was not affected by the pendency of an action at law on the bond, nor by the fact that the public authorities had recovered a portion of the shortage from the receiver of the bank in which the fund was deposited, as these matters went only in reduction of the claim.

The remedies against a bankrupt principal, by filing a claim against his estate, and the action against such bankrupt's surety, on a surety bond, are separate and distinct, and may be simultaneously pursued. *U. S. v. Schofield Co.*, (E. D. Pa. 1910) 182 Fed. 240. See also *Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75.

The fact that a surety has made a part payment on the debt does not affect the right of the creditor to prove for the entire amount. *In re Heyman*, (S. D. N. Y. 1899) 95 Fed. 800.

Indemnity of another as surety.—Where trust deeds were executed by a bankrupt to secure the beneficiaries as sureties, it was held that such beneficiaries were not entitled to be paid personally the amounts of the debts for which they were sureties out of the bankrupt's estate, but were only entitled to have such debts paid to the creditors out of the proceeds of the property included in

the deeds, and to a release of their liability as sureties. *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186.

Stipulation for attorney fees.—In many instances the obligation by which a bankrupt's indebtedness is evidenced contains a stipulation for an attorney fee for the collection therefor; and in such cases, if the claim has been placed with an attorney for collection prior to bankruptcy, and collection proceedings were actually instituted, so that the attorney's fee was a fixed liability at the time of the filing of the petition in bankruptcy, such fee will constitute a provable debt against the estate of the debtor. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

Thus where notes given by a firm provided that if they were placed in the hands of an attorney for collection the makers and indorsers agreed to pay the holder an attorney fee of ten per cent. on the amount due, and the maker thereafter became bankrupt, and the notes were placed in the hands of an attorney for collection, it was held that the attorney's fee provided for was properly provable as a claim against the bankrupt's estate. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299.

So, also, where a mortgage executed by a bankrupt provided for the payment of the attorney's fees of the mortgagee in case he was required to employ counsel, it was held that the mortgagee was entitled to an allowance for a reasonable attorney's fee for services required in proving his claim and lien against the bankrupt's estate. *In re Ferreri*, (E. D. La. 1911) 188 Fed. 675.

A state rule to the effect that an attorney's commission, stipulated for in bond and mortgage in case of foreclosure, is subject to the control of the court, which may reduce the amount of such commission in its discretion, will be followed by a court of bankruptcy in that state. *In re Wendel*, (E. D. Pa. 1907) 152 Fed. 672, 18 Am. Bankr. Rep. 665.

Where, however, the obligation has not been given to an attorney to collect, or no effort has been made to realize thereon such as would authorize the collection of the fee as part of the claim, the stipulated fee, in such cases, has not become such a fixed liability as to make it available as a provable debt in bankruptcy. *In re Roche*, (5th Cir. 1900) 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369; *In re Garlington*, (N. D. Tex. 1902) 115 Fed. 999, 8 Am. Bankr. Rep. 602; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 426, 11 Am. Bankr. Rep. 367; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 429, 11 Am. Bankr. Rep. 370; *In re Gebhard*, (M. D. Pa. 1905) 140 Fed. 571, 15 Am. Bankr. Rep. 381; *In re T. H. Thompson Milling Co.*, (W. D. Tex. 1906) 144 Fed. 314, 16 Am. Bankr. Rep. 454; *McCabe v. Patton*, (C. C. A. 3d Cir. 1909) 174 Fed. 217, 23 Am. Bankr. Rep. 335;

In re V. & M. Lumber Co., (N. D. Ala. 1910) 182 Fed. 231.

Thus where judgments were entered against a bankrupt by confession, without suit, and included an allowance for attorney's fees, it was held that the bankrupt was entitled at the first opportunity, when such judgments were presented for allowance as claims against his estate, to object to the allowance of the attorney's fees because no testimony was offered as to the value of the services or the amount of the commissions which should be allowed, and his trustee in bankruptcy was entitled to raise the same objection. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

Equitable claims.—An equitable claim which, at the time of the filing of the petition in bankruptcy, was a fixed liability on the part of the bankrupt may be proved against his estate. *James v. Gray*, (C. C. A. 1st Cir. 1904) 131 Fed. 401, 12 Am. Bankr. Rep. 573; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Peasley*, (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496, reversed on other grounds (C. C. A. 1st Cir. 1906) 148 Fed. 374; *Carpenter v. Southworth*, (C. C. A. 2d Cir. 1908) 165 Fed. 428, 21 Am. Bankr. Rep. 390.

But see *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611, wherein it was said that only such claims are provable in bankruptcy as are made provable by section 63, and it does not include equitable claims unless they are included under the description of unliquidated claims which are made provable only after they are liquidated. All other claims enumerated in section 63 are legal claims, and a statutory mode of proof is prescribed for them in section 57.

Payments made to trustee by mistake.—The rule that payments made under mistake of law are not recoverable does not apply to a payment made to a trustee in bankruptcy, or other officer of a court holding the funds in his hands upon trust for equitable distribution. *Carpenter v. Southworth*, (C. C. A. 2d Cir. 1908) 165 Fed. 428, 21 Am. Bankr. Rep. 390.

Where a vendor has failed to make title as required by his contract for the sale of land, the purchaser is in equity entitled to recover interest on any advances made on the purchase money, whether with a stakeholder or paid to the vendor, and is also entitled to a lien on the land for the amount of such deposits and the interest; and these rules apply in bankruptcy proceedings. *Everett v. Mansfield*, (C. C. A. 1st Cir. 1906) 148 Fed. 374, 8 Ann. Cas. 956, reversed (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496.

The expenses and compensation of an assignee for the benefit of creditors may be proved in bankruptcy proceedings; and such claims will be allowed where the services rendered were beneficial to the estate, and not in furtherance of any fraud upon creditors. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105; *In re Klein*, (S. D. N. Y. 1902) 116 Fed. 523, 8 Am. Bankr. Rep. 559;

Summers v. Abbott, (C. C. A. 8th Cir. 1903) 122 Fed. 36, 10 Am. Bankr. Rep. 254; *In re Chase*, (C. C. A. 1st Cir. 1903) 124 Fed. 753, 10 Am. Bankr. Rep. 677; *In re Zier*, (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re Congdon*, (D. C. Minn. 1904) 129 Fed. 478, 11 Am. Bankr. Rep. 219; *In re J. H. Alison Lumber Co.*, (S. D. Ga. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78; *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450; *In re Pauly*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 333; *Matter of B. H. Gladding Co.*, (D. C. R. I. 1902) 9 Am. Bankr. Rep. 171; *Matter of Harson Co.*, (D. C. R. I.) 11 Am. Bankr. Rep. 514.

Thus where a bankrupt's assignee for the benefit of creditors redeemed a pawned diamond with his own funds, and later under compulsion delivered the diamond to the bankrupt's trustee, who sold it as a part of the bankrupt's estate for more than the amount advanced to redeem it, the assignee was entitled to receive the amount so advanced from the trustee. *In re Rudd*, (E. D. N. Y. 1910) 180 Fed. 312.

So, also, it has been held that a charge for the preparation of a general deed of assignment, which was avoided by an adjudication in bankruptcy against the assignor, on a petition filed within four months after the making of the assignment, may be proved as an unsecured claim against the bankrupt's estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

But where the assignee is a party to a fraudulent assignment, compensation will not be allowed. *In re Congdon*, (D. C. Minn. 1904) 129 Fed. 478, 11 Am. Bankr. Rep. 219. See also *Stearns v. Flick*, (S. D. Ohio 1900) 103 Fed. 919, 4 Am. Bankr. Rep. 723; *Wilbur v. Watson*, (D. C. R. I. 1901) 111 Fed. 493, 7 Am. Bankr. Rep. 54.

Provable as affected by person holding claim—*Claim by bankrupt's wife*.—If, under the state law, the claim of a wife against her husband is recognized as valid, such claim will constitute a provable debt in the bankruptcy court. *In re Novak*, (N. D. Ia. 1900) 101 Fed. 800, 4 Am. Bankr. Rep. 311; *In re Neiman*, (E. D. Wis. 1901) 109 Fed. 113, 6 Am. Bankr. Rep. 329; *In re Nickerson*, (D. C. Mass. 1902) 116 Fed. 1003, 8 Am. Bankr. Rep. 707; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Domenig*, (E. D. Pa. 1904) 128 Fed. 146, 11 Am. Bankr. Rep. 552; *James v. Gray*, (C. C. A. 1st Cir. 1904) 131 Fed. 401, 12 Am. Bankr. Rep. 573; *Neumann v. Blake*, (C. C. A. 8th Cir. 1910) 178 Fed. 916; *In re Carpenter*, (D. C. S. C. 1910) 179 Fed. 743; *In re Kyte*, (M. D. Pa. 1908) 21 Am. Bankr. Rep. 110.

But where the claim is one that could not be recovered under the state laws, it cannot be proved in bankruptcy. *In re Winkels*, (W. D. Wis. 1904) 132 Fed. 590, 12 Am. Bankr. Rep. 696; *In re Tucker*, (D. C. Mass. 1905) 148 Fed. 928, 17 Am. Bankr. Rep. 247; *In re Suckle*, (E. D. Ark. 1910) 176 Fed. 828, 23 Am. Bankr. Rep. 821; *Teter v. Viquesney*, (C. C. A. 4th Cir. 1910) 179 Fed. 655; *In re*

Kaufmann, (E. D. N. Y. 1900) 5 Am. Bankr. Rep. 104.

Thus where a wife furnishes money to her husband, who subsequently becomes a bankrupt, under such circumstances that it would be deemed a gift under the state law, the wife cannot sustain a claim for the money, so given, as against her husband's estate in bankruptcy. *Teter v. Viquesney*, (C. C. A. 4th Cir. 1910) 179 Fed. 655.

A daughter of the bankrupt may prove a claim against his estate. *Matter of Brewster*, (N. D. N. Y. 1902) 7 Am. Bankr. Rep. 486.

The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in the other, and that they have mutual dealings, will not in general merge them into one corporation, or prevent the enforcement by one of an otherwise valid claim against the other. *In re Watertown Paper Co.*, (C. C. A. 2d Cir. 1909) 169 Fed. 252, 22 Am. Bankr. Rep. 190.

A director of a corporation may maintain a claim against its estate in bankruptcy. *In re Salvator Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522.

Partners.—As to the claims of partners against the partnership estate, and as against each other, see section 59.

A county may prove its claim against the bankrupt. *In re Wright*, (D. C. Mass. 1899) 95 Fed. 807.

The interest due on a fixed liability is provable in bankruptcy under the express terms of the statute. See *Everett v. Mansfield*, (C. C. A. 1st Cir. 1906) 148 Fed. 374, 8 Ann. Cas. 956, reversing (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

A creditor of a bankrupt who has taken a mortgage is entitled to interest on the mortgage debt, where the estate is ample for that purpose. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 15.

Interest ceases to run on a secured claim when the money is realized from the security. The estate ought not to be burdened with the payment of interest subsequent to that time. *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

In *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, it was said: "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. *Ex p. Bennet*, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts, *Ex p. Wardell* (1787); *Ex p. Hercy* (1702); 1 Cooke Bankrupt Laws (4th ed.) 181 (1st ed. appendix); and notwithstanding occasional doubts, it has been so applied with the prevailing assent of the English judges ever since, *Ex p. Badger*, 4 Ves. Jr. 165; *Ex p. Ramsbottom*, 2 Mont. & A. 79; *Ex p. Penfold*, 4 De G. & S. 282; *Ex p. Lubbock*, 9 Jur. N. S. 854; *In re Savin*, L. R. 7 Ch. 760, 764; *Ex p. Bath*, 22 Ch. D. 450, 454; *In re London, etc., Hotel Co.*, [1892] 1 Ch. 639; *In re Bonacino*, 1 Manson 59. As

appears from *Cooke, supra*, the rule was laid down, not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops. See section 63 (1). *Shawnee County v. Hurley*, (8th Cir. 1909) 94 C. C. A. 362, 169 Fed. 92, 94."

Contingent claims.—Claims which are of so contingent a character as to make proof of them substantially impossible are not provable in bankruptcy proceedings, because they are not such a fixed liability as is contemplated by section 63a (1). *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Jefferson*, (D. C. Ky. 1899) 93 Fed. 948; *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706; *Hawk v. Hawk*, (W. D. Ark. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463; *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428; *Atkins v. Wilcox*, (5th Cir. 1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Hays, etc., Co.*, (W. D. Ky. 1902) 117 Fed. 879; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131; *In re Hartman*, (M. D. Pa. 1909) 166 Fed. 776, 21 Am. Bankr. Rep. 610; *In re Inman*, (N. D. Ga. 1909) 171 Fed. 185; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *In re Merrill*, (C. C. A. 2d Cir. 1911) 186 Fed. 312; *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714.

Under a statute providing that a wife who is granted a divorce from her husband "shall be entitled to one-third of the husband's personal property absolutely," it has been held that the interest of a wife in the personal property of her husband after the commencement of an action for divorce, but before decree, is not such a claim as is provable against the husband's estate in bankruptcy. *Hawk v. Hawk*, (W. D. Ark. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463.

The liability of a bankrupt on a guaranty, executed by him, of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt. *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728.

A defendant's liability on a replevin bond, given to reclaim property, has been held to be of such a contingent nature as not to be provable in bankruptcy. *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714.

Claims barred by limitation.—A claim which, at the time of the filing of a petition in bankruptcy against the debtor, was barred by the statute of limitations of the state

where the debtor resides, and where the proceedings in bankruptcy are instituted, is not a provable debt against his estate in bankruptcy. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225; *In re Lafferty*, (E. D. Pa. 1903) 122 Fed. 558, 10 Am. Bankr. Rep. 290; *In re Watkinson*, (E. D. Pa. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 245.

In *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, the court said that it is the duty of a trustee in bankruptcy to plead the statute of limitations, especially when required by creditors whom he represents.

Where a bankrupt claims property as a homestead, and proceedings are taken before the referee to subject it to the payment of a prior debt, the bankrupt should be allowed an opportunity to set up the statute of limitations against such debt. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

But the bar of the statute does not affect the bankrupt's right to be discharged. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225. And see the annotation under sections 14 and 17 generally, *supra*, pp. 547, 570.

A new promise to pay may, however, be proved in the bankruptcy proceedings, notwithstanding the fact that the original debt was barred by limitation. *Dacovich v. Schley*, (C. C. A. 5th Cir. 1905) 134 Fed. 72, 13 Am. Bankr. Rep. 752.

But a claim barred by the statute of limitations is not revived or made provable by the fact that the bankrupt includes it in his schedule of debts filed in the bankruptcy proceedings. *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670.

Usurious claim.—A claim tainted as usurious cannot be proved in bankruptcy. *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

The defense of usury is available to the trustee in bankruptcy against a mortgage given by the bankrupt. *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7.

But this objection is not available if the claim is proved apart from the usurious obligation. *In re Wilde*, (S. D. N. Y. 1904) 133 Fed. 562, 13 Am. Bankr. Rep. 217; *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

Thus where certain claimants against a bankrupt were shown by the schedules to have been creditors for goods sold, for which notes had been given and later an alleged usurious mortgage delivered, it was held that they were entitled, if they had not estopped themselves, or limitations had not run against them, to prove such amount as a general claim against the estate, though their liens were defeated. *In re Vogt*, (E. D. N. Y. 1911) 188 Fed. 764.

Where, under the state laws, the defense of usury can be pleaded only by the borrower, it has been held that creditors of a bankrupt cannot set it up as a defense to the claim of another creditor. *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566.

Fraud—Of claimant.—A claim will be disallowed in bankruptcy where it appears to have been based on a transaction in fraud of the rights of the general creditors. *In re Lansaw*, (D. C. Mo. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 123. See also *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

But a preferential transfers may, on the setting aside of the conveyance as fraudulent, participate in the proceeds of a sale of the property as to a debt not involved in the fraudulent conveyance, and incurred before its execution. *In re Hurst*, (N. D. W. Va.) 188 Fed. 707.

Bankrupt's fraud.—Creditors in bankruptcy proceedings may invoke the principle that money procured by fraud may be recovered back, by proving a demand for money had and received by the bankrupt to their use. *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320.

A claim for commissions and expenses incurred by a trustee named in a deed of trust, executed by the bankrupt, in the sale of certain chattels thereunder prior to bankruptcy, is not such a claim as is provable under section 63 of the Bankruptcy Act. *In re Standard Dairy, etc., Co.*, (D. C. 1908) 20 Am. Bankr. Rep. 321.

Claim of unregistered foreign corporation.—Where duebills issued by a bankrupt corporation for money lent to it by a foreign corporation were adjudged invalid in the hands of an assignee, and refused allowance against the bankrupt estate, on the ground that in lending the money the foreign corporation was doing business in the state without having registered as required by the state law, it was held that such corporation could not prove the same indebtedness as a claim against the estate on the theory that, the duebills being void, the lender was entitled to recover on an implied contract as for money had and received; such contracts being equally within the statute. *In re Montello Brick Works*, (E. D. Pa. 1909) 174 Fed. 498, 23 Am. Bankr. Rep. 375.

Effect of ultra vires and illegality.—*Bonds issued by a corporation which are ultra vires* and void under the law of the state are not allowable against the corporation's estate in bankruptcy. *In re Waterloo Organ Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 341, 13 Am. Bankr. Rep. 466.

Corporation's agreement to pay debts of third persons.—Where a corporation gave its promissory note to a bank for the indebtedness of third parties for which it was in no way responsible, and also for its own debt, it was held that, to the extent of the amount of the debts of the third parties, the note was invalid in the hands of the bank, which knew these facts, and that the claim of the bank

against the estate of the bankrupt corporation must be reduced to the amount which the corporation owed the bank when the note was given, and the interest thereon. *Mapes v. German Bank*, (C. C. A. 8th Cir. 1910) 176 Fed. 89, 23 Am. Bankr. Rep. 713.

So, also, it has been held that renewal notes, executed by a corporation to a bank, covering notes given for an indebtedness of another corporation, without any new consideration, are not enforceable in bankruptcy, under the rule that a corporation has no authority to pay the debts of a third person, in the absence of a binding obligation arising from an agreement to assume such third party's debts, based on a valuable consideration. *In re Stanford Clothing Co.*, (N. D. Ala. 1911) 187 Fed. 172.

A corporation has no power to purchase shares of its own stock, where the transaction renders it insolvent, and in consequence operates as a fraud on its creditors; and notes given by it in such case for a part of the purchase price are invalid, and cannot be proved against its estate in bankruptcy by the selling stockholder. *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 118.

But where stock had been issued for merchandise, the value of such consideration being fairly debatable, and the corporation enjoyed, used, and did its entire corporate business for several years on the property so conveyed to it, and where such property cannot be restored or the contract rescinded, and where no person was in any way induced to act or was misled or wronged by the maintenance of that status, it was held that the corporation had no such right against the stockholder as would prevent him from participating in the distribution of the estate to the amount of such sums as were rightfully due to him. *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810.

But if the claimant does not require the aid of the tainted transaction in order to establish his claim, it may be proved. *In re T. H. Bunch Co.*, (E. D. Ark. 1910) 180 Fed. 519.

Gambling transactions.—Where a claim against a bankrupt's estate was based on a note given by her in a marginal gambling transaction, it was held that the defense that it was based on an illegal consideration was available to her, and was, therefore, available to her trustee in bankruptcy. *In re Hill*, (E. D. Pa. 1911) 187 Fed. 214.

Claim against bucket shop owner.—Where a customer of a bankrupt who was a stockbroker filed a claim for a balance due on account of purchases and sales of stock, for the claimant's account, on the theory that the transactions were real purchases and sales, but the evidence showed that the creditor knew that the bankrupt was operating a bucket shop, and intended no real purchase or sale, it was held that the creditor was nevertheless entitled to the allowance of his claim for the amount of cash deposited with the bankrupt, and interest thereon, under a state statute which permitted such recovery as against the broker. *Streeter v. Lowe*, (C. C. A. 1st Cir. 1911) 184 Fed. 263.

(2) [*Costs of suit.*] due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; [(1898) 30 Stat. L. 563.]

Costs due when the petition was filed, and which were then a fixed liability, are provable. See *Aiken v. Haskins*, (1901) 6 Am. Bankr. Rep. 46, 34 Misc. 505, 70 N. Y. S. 293.

Costs adjudged against a complainant after his adjudication as a bankrupt, in a suit brought prior to such adjudication, do not constitute a provable debt against his

estate, under section 63, and he is not entitled to be protected by the bankruptcy court from arrest on an execution therefor. *In re Marcus*, (D. C. Mass. 1900) 104 Fed. 331, 5 Am. Bankr. Rep. 19; *Aiken v. Haskins*, (1901) 6 Am. Bankr. Rep. 46, 34 Misc. 505, 70 N. Y. S. 293.

(3) [*Claim for taxable costs.*] founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; [(1898) 30 Stat. L. 563.]

Costs incurred by creditors in good faith and for the benefit of the estate are usually entitled to priority of payment, and have been considered under section 64b (2), *infra*, p. 771.

Costs in attachment proceedings depend usually, as provable or priority claims, on the law of the state, and have been considered under section 64b (5), *infra*, p. 777.

(4) [*Open account or contract.*] founded upon an open account, or upon a contract express or implied; and [(1898) 30 Stat. L. 563.]

Contracts and open accounts. — Claims founded on an express or implied contract, or on an open account, and which were a fixed liability at the commencement of the bankruptcy proceedings, are provable against the debtor's estate therein under section 63a (4). *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, reversing (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, *affirming* (N. Y. 1905) 15 Am. Bankr. Rep. 179; *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *Moch v. Market St. Nat. Bank*, (C. C. A. 3d Cir. 1901) 107 Fed. 897, 6 Am. Bankr. Rep. 12; *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *McDonald v. Fefft-Weller Co.*, (C. C. A. 5th Cir. 1904) 128 Fed. 381, 11 Am. Bankr. Rep. 800; *In re Adams*, (D. C. R. I. 1904) 130 Fed. 788, 12 Am. Bankr. Rep. 367; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Ladue Tate Mfg. Co.*, (W. D. N. Y. 1905) 135 Fed. 910, 14 Am. Bankr. Rep. 235; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re New York Car Wheel Works*, (W. D. N. Y. 1905) 141 Fed. 430; *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112; *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643; *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882; *Matter of Buffalo Mirror, etc., Co.*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 122; *In re The Copper King*, (N. D. Cal. 1906) 16 Am. Bankr. Rep. 150; *Robinson v. Pesant*, (1873) 8 Nat. Bankr. Reg. 426, 53 N. Y. 419.

The statute recognizes all valid contracts executed prior to the institution of bankruptcy proceedings; and, unless impeached upon the ground of fraud or some other valid legal ground, courts of bankruptcy will uphold and enforce them. *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643.

The contract of a mercantile agency whereby it agrees, in consideration of an annual fee, to furnish a subscriber with certain books and reports, is provable in bankruptcy for the subscription fee. *Matter of Buffalo Mirror, etc., Co.*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 122.

A good faith "representation and warranty" made by one joint purchaser of timber to his co-purchasers as an inducement to the purchase, as to the quantity of lumber which could be cut from such timber, is not within the rules as to "warranties" in sales of property or insurance contracts to the extent of implying a promise to reimburse his co-purchasers for loss on account of the failure of the tract to cut as much as represented, so as to create a liability therefor on an implied contract provable against his estate in bankruptcy under section 63a (4). *Switzer v. Henking*, (C. C. A. 6th Cir. 1908) 158 Fed. 784, 19 Am. Bankr. Rep. 300.

An executory contract will give rise to a provable claim. *In re Stern*, (2d Cir. 1902) 116 Fed. 604, 54 C. C. A. 60; *In re Glick*, (S. D. N. Y. 1911) 184 Fed. 967.

On the proof of a claim arising from an executory contract, the measure of damages must be sought in the contract itself. *In re Glick*, (S. D. N. Y. 1911) 184 Fed. 967.

The contract must be valid and binding; as in bankruptcy, as well as elsewhere, contracts which are void or voidable for illegality, ultra vires, or other causes, cannot suc-

cessfully form the basis of a claim. *In re Talbot*, (D. C. Mass. 1901) 110 Fed. 924, 7 Am. Bankr. Rep. 29; *In re Ervin*, (E. D. Pa. 1902) 114 Fed. 596, 7 Am. Bankr. Rep. 480; *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 118; *In re Waterloo Organ Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 341, 13 Am. Bankr. Rep. 466.

Thus a contract made by a cotton mill company for the purchase of cotton for deferred delivery at different times, but which also contained a put and call clause, under which the parties had actually settled one loss by the company without any delivery, taken in connection with extrinsic testimony tending to show that no deliveries were intended by the parties, was held to be a gambling contract which the corporation had no power to make and which created no liability provable against its estate in bankruptcy. *In re Aetna Cotton Mills*, (D. C. S. C. 1909) 171 Fed. 994, 22 Am. Bankr. Rep. 629.

So, also, it has been held that a contractual obligation which, under the state law, ceases to be binding, is not provable in bankruptcy. *Kenyon v. Mulert*, (C. C. A. 3d Cir. 1911) 184 Fed. 825.

Effect of bankrupt's fraud.—A debtor will not be allowed to secure deposits of money by false and fraudulent representations of material facts, and afterwards be heard to say that the depositors shall not recover it on the ground that the ultimate use to be made of the money was to bet on horse races; any other conclusion would permit bankrupts, after successfully swindling the community, to bid defiance to their creditors and enjoy the fruits of their iniquity unrestrained. *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320.

Rescinded contract.—A claim by the vendor of land against a bankrupt purchaser for the balance of the price due, less the value of the land, will not be allowed, where the trustee has delivered and the vendor has accepted a quitclaim deed to the land, the contract of sale to the bankrupt being thereby virtually rescinded. *In re Davis*, (W. D. Pa. 1910) 179 Fed. 871.

Renting contracts.—Rent due at the time of the filing of the petition in bankruptcy constitutes a provable claim against the estate of a bankrupt tenant; but rent to become due cannot, as a general rule, be so proved, for the reason that it was not, when bankruptcy occurred, a fixed liability. *In re Jefferson*, (D. C. Ky. 1899) 93 Fed. 948; *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706; *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428; *Atkins v. Wilcox*, (5th Cir. 1900) 105 Fed. 595, 44 C. C. A. 628, 53 L. R. A. 118; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Mitchell*, (D. C. Del. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 327; *In re Hays, etc., Co.*, (W. D. Ky. 1902) 117 Fed. 879, 9 Am. Bankr. Rep. 144; *Watson v. Merrill*, (8th Cir. 1905) 136 Fed. 362, 60 C. C. A. 185, 69

L. R. A. 719; *In re Winfield Mfg. Co.*, (E. D. Pa. 1905) 137 Fed. 984, 15 Am. Bankr. Rep. 24; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131; *In re Inman*, (N. D. Ga. 1909) 171 Fed. 185; *In re Roth*, (S. D. N. Y. 1909) 174 Fed. 64, 22 Am. Bankr. Rep. 504; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 687; *In re Collingnon*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 250; *In re Curtis*, (1902) 9 Am. Bankr. Rep. 286, 109 La. 171, 33 So. 125. See also the cases cited under sections 64b (5) and 67d, as to the right of a landlord to a lien or preferential payment under the law of the state.

A landlord having a lien or charge for the rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which was adjudicated, in order to preserve his right to priority must establish his claim by proof under the Bankruptcy Act, the same as other creditors. *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 264.

Taxes and insurance premiums which a bankrupt covenanted to pay as a part of his rent, but which at the time of the bankruptcy were not due, nor the amount then capable of ascertainment, are not provable. *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

Damages for the breach of a contract of the bankrupt to pay rents at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim, for the same reason that the claim for the rents is not provable. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454. See also *In re Shaffer*, (D. C. Mass. 1903) 124 Fed. 111, 10 Am. Bankr. Rep. 633.

But see *In re Caloris Mfg. Co.*, (E. D. Pa. 1910) 179 Fed. 722 (*disapproving In re Roth*, (S. D. N. Y. 1909) 174 Fed. 64), wherein it was held that rent accruing subsequently to the filing of the petition in bankruptcy was provable when liquidated as provided in section 63b.

Lease providing for rent to become due.—Where a lease provides that on default in the payment of any rent, the rent for the entire term should at once become due and payable, it has been held that, on the bankruptcy of the lessee while so in default, the rent for the term, so far as definitely fixed by the lease, is a "fixed liability absolutely owing." *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227. See also *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454.

Breach of contract.—A claim for damages resulting from the breach of a contractual obligation by the bankrupt is, under section 63a (4), provable against his estate. *In re Manhattan Ice Co.*, (S. D. N. Y. 1901) 114 Fed. 400, 7 Am. Bankr. Rep. 408, *affirmed* (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *In re Stoevers*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345; *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349; *In re Pettingill*, (D. C. Mass.

1905) 137 Fed. 143; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 142 Fed. 293, 15 Am. Bankr. Rep. 445; *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425; *In re National Wire Corp.*, (D. C. Conn. 1909) 166 Fed. 631, 22 Am. Bankr. Rep. 186.

Inability to perform.—Where a company which was furnishing its customers ice at so much per ton, payable weekly, under contracts covering a period of several years, broke such contracts, and became unable to continue them in the future, it was held that the claims of the customers for damages sustained by reason of the company's inability to fulfil the executory portions of the contracts were "provable claims" in involuntary bankruptcy proceedings against the company. *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569.

Repudiation of contract of sale.—Where a bankrupt became insolvent and repudiated a contract which it had entered into for the purchase of machinery, it was held that the seller was entitled to prove its claim against the bankrupt estate for the profit which it would have made on the sale, where such profit can be shown with reasonable certainty. *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 142 Fed. 293, 15 Am. Bankr. Rep. 445.

Damage accruing in future.—Where certain claims for breaches of contract were undisputed, it was held that the mere fact that the damages therefrom were to accrue in the future did not prevent them from being provable. *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349, following *In re Stern*, (2d Cir. 1902) 116 Fed. 604, 54 C. C. A. 60.

In re Manhattan Ice Co., (S. D. N. Y. 1901) 114 Fed. 399, 7 Am. Bankr. Rep. 408, affirmed (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569, it appears that an ice company agreed to deliver ice to the petitioning creditors in bankruptcy for specified terms, and at a specified price, and afterwards broke the agreement, and it was held that the loss for the entire term was provable, and not merely the current damages.

Time of performance in future.—Where a bankrupt shortly prior to his bankruptcy gave notice to the other party to an executory contract that he would be unable to perform on his part because of his financial condition, such other party may treat the contract as broken, although the time for performance has not arrived, and prove his claim for damages for the breach against the estate in bankruptcy under section 63a (4). *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425. See also *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391.

Breach occasioned by bankruptcy.—It has been quite generally held that the bankruptcy of one of the contracting parties is, in itself, a sufficient breach of the contract to support a claim against the estate of the party who has been declared bankrupt. *In re Silver-*

man, (W. D. Mo. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83; *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *In re Manhattan Ice Co.*, (S. D. N. Y. 1901) 114 Fed. 399, 7 Am. Bankr. Rep. 408, affirmed (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349, affirming (W. D. N. Y. 1903) 125 Fed. 576, 11 Am. Bankr. Rep. 48; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Neff*, (C. C. A. 6th Cir. 1907) 157 Fed. 57, 19 Am. Bankr. Rep. 23.

Equivalent of refusal to perform.—It is not essential to the right to prove a claim against the estate of a bankrupt that it should have existed prior to the bankruptcy; but where the filing of the petition in bankruptcy itself operates as a breach of an executory contract, because equivalent to a refusal to perform, the other party may prove his claim for damages as one existing at the time of the filing of the petition. *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374.

Equivalent of disenablement and repudiation.—If a bankrupt, at the time of bankruptcy, by disenablement himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy, on the ground that bankruptcy is the equivalent of disenablement and repudiation. *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728.

Thus where a bankrupt, prior to the appointment of receivers, had put the claimant to considerable trouble concerning a contract for the sale of wire, and the receivers and the bankruptcy adjudication accomplished a complete breach of the contract, it was held that the claimant was entitled to the allowance of an award of damages therefor in the bankruptcy proceedings. *In re National Wire Corp.*, (D. C. Conn. 1909) 166 Fed. 631, 22 Am. Bankr. Rep. 186.

So, also, it has been held that bankruptcy is such a breach of contract to purchase stock at a stated price and time, which time is subsequent to bankruptcy, that a claim for damages for the breach is a provable debt. *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Neff*, (C. C. A. 6th Cir. 1907) 157 Fed. 57, 19 Am. Bankr. Rep. 23. See also *In re Swift*, (1st Cir. 1901) 112 Fed. 315, 50 C. C. A. 264.

Where a corporation which, as part consideration for an exclusive license to manufacture under a patent, had contracted to pay the patentee a bonus or royalty on the patented articles sold, with a guaranty of a minimum number during the year, became bankrupt before the end of the year, it was held that the patentee was entitled to prove a claim for the amount of royalty which had accrued up to the time of the bankruptcy at the minimum rate, irrespective of the number of articles actually sold. *In re Dr.*

Voorhees Awning Hood Co., (M. D. Pa. 1911) 187 Fed. 611.

But where the contracting parties cannot be placed *in statu quo*, one who has defaulted in the performance thereof cannot rescind the contract and recover against the other's estate in bankruptcy. *In re Morgantown Tin Plate Co.*, (N. D. W. Va. 1911) 184 Fed. 109.

Performance rendered impossible.—In *In re Swift*, (1st Cir. 1901) 112 Fed. 315, 50 C. C. A. 264, it was held that bankruptcy made it impossible to fulfil an agreement to deliver stock, for the reason that it took the stock from the bankrupt and vested it, with all his property, in his trustee.

Injured party may prove or not at his election.—In the case of a contract of sale to be consummated at a future date when the vendee files a petition in bankruptcy prior to that date, the vendor at his election may treat the contract as broken by anticipation and assert and prove his claim in bankruptcy for the damages for the breach, or may ignore the repudiation and wait for the date fixed for the consummation of the sale, tender the goods, and sue for the purchase price. In the latter case the claim is not discharged by a prior adjudication in bankruptcy. *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391. See also *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425.

Necessity of present claim for damages.—But an adjudication of bankruptcy in an involuntary proceeding against a corporation is not of itself a repudiation by the bankrupt of an executory contract by which it agreed to take and pay for a certain quantity of a product to be grown and delivered by the seller in each of a number of future years; nor is it the equivalent of a permanent disenablement to perform the contract, so as to give the seller a present claim for damages for breach, which may be liquidated and proved as a debt of the estate, where the time for performance has not arrived and there has not in fact been any tender of performance on the one part nor refusal nor repudiation on the other. *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; and see to the same effect *Watson v. Merrill*, (8th Cir. 1905) 136 Fed. 363, 69 C. C. A. 185.

Nor can damages be recovered by the seller for the buyer's alleged breach of an executory contract of sale, resulting solely from the buyer's involuntary bankruptcy. *In re Inman*, (N. D. Ga. 1910) 175 Fed. 312, 23 Am. Bankr. Rep. 566.

Claims for tort.—Causes of action arising *ex delicto* may be proved in bankruptcy proceedings in all instances where a contractual relationship existed between the parties, and the tort results from a breach of such contract; and, in like manner, a tortious cause of action is provable where the wrong is of such a nature as to permit the waiver thereof, and a recovery in an action sounding in assumpsit on an implied contract, and this rule permits proof of those claims where, on

waiver of the tort involved, the law raises an implied contract upon which a recovery is based. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484; *In re Lewensohn*, (S. D. N. Y. 1900) 99 Fed. 73; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Filer*, (S. D. N. Y. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835, *affirming* 5 Am. Bankr. Rep. 582; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 431; *Barrett v. Prince*, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64; *Standard Varnish Works v. Haydock*, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 287; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 17 Am. Bankr. Rep. 565; *Clingman v. Miller*, (C. C. A. 8th Cir. 1908) 160 Fed. 326, 20 Am. Bankr. Rep. 360; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *In re Coe*, (C. C. A. 2d Cir. 1910) 183 Fed. 745; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 185 Fed. 518; *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007, *affirming* (1900) 5 Am. Bankr. Rep. 42.

Form of action immaterial.—If a debt originates or is "founded upon an open account, or upon a contract express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833.

A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tortfeasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518.

Bankruptcy courts allow proof of debts founded upon "a contract express or implied," a construction sufficiently broad to include a quasi contract arising upon a conversion where the tort has been waived. *Reynolds v. New York Trust Co.*, (C. C. A. 1st Cir. 1911) 188 Fed. 611.

Right of independent action for tort immaterial.—A claim on a warranty, as such, is necessarily a claim arising out of a contract, and is provable in bankruptcy even if, in case of actual fraud, there might be an independent claim purely in tort. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484. See also *In re*

Coe, (S. D. N. Y. 1909) 169 Fed. 1002, 22 Am. Bankr. Rep. 384.

A claim arising out of a conversion by stockbrokers of shares purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is provable under section 63a, as a debt "founded upon an open account, or upon a contract express or implied." *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659.

Conversion by partnership.—The rule which permits the owner of property converted to waive the tort and recover the value of the property as on an implied contract is based on the ground that defendant's estate has been unjustly enriched by the conversion; and where it was by a partnership, and inured to the benefit of the firm estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property, after having proved his claim against the partnership estate as one of contract, is not entitled to prove it against the individual estate of a partner, which would have the effect of giving them an advantage over creditors having express contracts with the firm. *Reynolds v. New York Trust Co.*, (C. C. A. 1st Cir. 1911) 188 Fed. 611.

Claimant cannot split demand.—Where a creditor filed a claim with the trustee for goods sold and delivered under a contract, but not for the value of goods obtained by fraud, it was held that he thereby elected to affirm the contract, and that he could not subsequently split his demand so as, at the same time, to file a claim for a return of a part of the goods sold which remained in the bankrupt's possession at the time of the filing of his petition. *In re Hildebrandt*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 184. See also *Silvey v. Tift*, (1905) 17 Am. Bankr. Rep. 9, 123 Ga. 804, 51 S. E. 748.

Mere torts not provable.—Where, however, a claim arising *ex delicto* does not involve a breach of contract, but is a mere tort which may be waived so as to recover on an assumpsit, it is not provable in bankruptcy proceedings. *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re New York Tunnel Co.*, (C. C. A. 2d

Cir. 1906) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518; *In re Friedman*, (E. D. Wis. 1908) 21 Am. Bankr. Rep. 213. And see the cases cited under subdivision b of this section, *infra*, p. 765.

A statutory penalty for cutting trees cannot be said to be the measure of the implied contract, and, for that reason, is not within the class of claims arising out of torts that are provable, but the actual value of the trees converted would constitute a provable claim. *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498.

Contingent claims.—The claim urged under a contract, express or implied, must have resulted in a fixed liability at the time of the filing of the petition in bankruptcy; a claim depending on a contingency is not provable. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 145; *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706, 4 Am. Bankr. Rep. 246; *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428, 5 Am. Bankr. Rep. 457; *In re Shaffer*, (D. C. Mass. 1903) 124 Fed. 111, 10 Am. Bankr. Rep. 633; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 453; *In re Ellis*, (C. C. A. 6th Cir. 1906) 143 Fed. 103, 16 Am. Bankr. Rep. 221; *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Collignon*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 250; *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714; *Evans v. Lincoln Co.*, (1903) 10 Am. Bankr. Rep. 401, 204 Pa. St. 448, 54 Atl. 321.

But a contractual liability of a bankrupt, which was contingent at the time the petition was filed, but became definite and capable of liquidation within the year allowed for making proof, is provable against the estate. *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882, following *Moch v. Market St. Nat. Bank*, (3d Cir. 1901) 107 Fed. 897, 47 C. C. A. 49. And see also the cases cited under subdivision b of this section, *infra*, p. 765.

(5) [*Judgment after filing of petition.*] founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. [(1898) 30 Stat. L. 563.]

Judgments recovered after adjudication.—Where a creditor holding a valid and provable debt against a bankrupt at the date of the adjudication, thereafter, and before the bankrupt's discharge, recovers judgment thereon against the bankrupt's estate, such judgment, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry thereof, may be proved in the bankruptcy proceedings under

section 63a (5). *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882, following *Moch v. Market St. Nat. Bank*, (3d Cir. 1901) 107 Fed. 897, 47 C. C. A. 49; *In re Kranich*, (E. D. Pa. 1910) 182 Fed. 849; *In re Pinkel*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 333.

Effect of judgment after bankruptcy.—The reduction of a claim to judgment after bankruptcy establishes the claim and stops the running of the statute of limitations, but it will not give the creditor a lien or priority nor entitle him to levy on the bankrupt's property. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

In an action for breach of promise of marriage a judgment, recovered after the filing of the petition in bankruptcy and before the bankrupt applied for discharge, is provable under section 63b. *In re Fife*, (W. D. Pa.

1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258.

An action under an employer's liability Act to recover damages for a personal injury alleged to have been caused by the master's negligence is one sounding in tort, and not one based upon the contract of employment; and a judgment recovered in such an action, brought after the defendant had been adjudged a bankrupt, is not provable against the estate. *In re Crescent Lumber Co.*, (S. D. Ala. 1907) 154 Fed. 724, 19 Am. Bankr. Rep. 112.

b [Unliquidated claims.] Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate. [(1898') 30 Stat. L. 563.]

Claims capable of liquidation and proof.—Under section 63b any unliquidated claim which at the time of the filing of the petition in bankruptcy was provable as within the enumeration of provable claims set out in section 63a in its several subdivisions may be liquidated and proved against the bankrupt estate. But unliquidated claims which are not provable debts under section 63a cannot be liquidated or proved under section 63b. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Marcus*, (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Pittsburgh Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *In re Filer*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 582; *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 664.

Section 63b adds nothing to the class of debts which may be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court may direct. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139.

As contradistinguished from the paragraph which precedes it, section 63b is concerned with the mere matter of procedure, directing how a provable claim which is open and unsettled may be liquidated and made certain; and whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it. *Brown v. United Button Co.*,

(C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25.

Taxes and insurance premiums which a bankrupt agrees to pay as part of the rent are not such unliquidated claims against the bankrupt as can be proved under section 63b. *In re Pittsburgh Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

Liquidation does not necessitate allowance.—But, although a claim has been liquidated, its allowance in bankruptcy does not follow as a necessary consequence. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10.

Liquidation of claims for tort.—A claim arising *ex delicto*, if founded on contract express or implied, may be proved in bankruptcy proceedings, and the cases to this effect have been collected under subdivision a (4) of this section, *supra*, p. 760. But a claim for tort, which does not result from the breach of a contract, or which may not be waived so as to warrant a recovery on an implied contract, cannot be liquidated or proved against a bankrupt's estate under section 63b, for the reason that such a claim is not a provable one under section 63a. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365; *In re Filer*, (S. D. N. Y. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390, *affirmed* (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565; *In re Crescent Lumber Co.*, (S. D. Ala. 1907) 154 Fed. 724, 19 Am. Bankr. Rep. 112; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Brinckmann*, (D. C. Ind. 1900) 4 Am. Bankr. Rep. 551; *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 664; *Zimmer v. Schleeauf*, (1874) 115 Mass. 52; *Gilman v. Cate*, (1884) 63 N. H. 278; *Winfrey v. Jones*, (1905) 104 Va. 39, 51 S. E. 153.

Injury to property.—A claim for unliqui-

dated damages resulting from injury to the property of another, not connected or growing out of any contractual relation, is not provable in bankruptcy, under the existing law. *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565, *affirming* (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

Injury to person.—A right of action for damages for an assault and battery, not reduced to judgment nor otherwise liquidated under direction of the court, is not a debt or demand provable in bankruptcy. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 4 Am. Bankr. Rep. 551.

A cause of action for unliquidated damages for a wilful and malicious injury to the person of the claimant is not a claim provable in bankruptcy. *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365.

An unliquidated claim for damages against the defendant for having negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, is a claim *ex delicto*, and is not provable in bankruptcy. *Winfrey v. Jones*, (1905) 104 Va. 39, 51 S. E. 153.

A claim for damages alleged to have been caused by the negligence of a master in failing to furnish safe appliances has been held to be incapable of liquidation under section 63b. *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 661.

Fraud.—It has been held that where an employee, by forgery and other devices, has fraudulently secured possession of various sums of money belonging to his employer, the employer may waive the tort and treat the claim as moneys had and received for the use of the employer, which claim, although unliquidated, is provable in bankruptcy. *In re Filer*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 582.

Necessity of liquidation.—An unliquidated claim of such a nature as to be provable under section 63a must, before it may be so proved, first be liquidated as provided for in section 63b. *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 113; *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Silverman*, (W. D. Mo. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761; *In re Big Meadows Gas Co.*, (W. D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697; *In re E. T. Kenney Co.*,

(D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611; *In re Pittsburgh Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *Talcott v. Friend*, (C. C. A. 7th Cir. 1909) 179 Fed. 676.

A cause of action for deceit which has not been reduced to judgment is not a provable debt. *Talcott v. Friend*, (C. C. A. 7th Cir. 1909) 179 Fed. 676.

Claim for damages.—A bankrupt's landlord is not entitled to file a claim for damages, sustained by an alleged unlawful taking of the premises by the bankrupt's receiver and trustee, until the damages have been liquidated by such means as the court may direct on a petition therefor. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

Claim partly unliquidated.—Where the claim of a petitioning creditor, although made up of different elements, is based upon a single written instrument and the non-performance of its covenants by the alleged bankrupt, it must be treated under the Bankruptcy Act as a single claim; and where some of the elements are confessedly unliquidated, the claim as a whole is an unliquidated one, and subject to the limitations incident to a claim of that character. *In re Big Meadows Gas Co.*, (W. D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697.

Manner of liquidation.—Under the power conferred on the court to direct the manner in which unliquidated claims against a bankrupt may be liquidated, ample authority exists for the adoption of any procedure appropriate to the particular case, whether it be submission to a jury on an issue of fraud, or production of evidence before the referee, or some other method. *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

Claims may be liquidated by hearing before the referee, by a plenary suit in a court of competent jurisdiction, or by permitting an action pending in any court to proceed to judgment. *In re Buehan's Soap Corp.*, (S. D. N. Y. 1909) 169 Fed. 1017, 22 Am. Bankr. Rep. 382. See also *In re Rouse*, (N. D. Ohio 1898) 1 Am. Bankr. Rep. 393.

So, also, it has been held that a claim may be liquidated by agreement or arbitration if the trustee consents, or by suit, as the court, or the referee, if the case has been referred, shall direct. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

SEC. 64. DEBTS WHICH HAVE PRIORITY. — *a* [*Taxes.*] The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. [(1898) 30 Stat. L. 563.]

What constitutes claim for taxes—Question for federal courts.—Whether or not a particular claim is one for taxes within the

contemplation of section 64a of the Bankruptcy Act, and, as such, entitled to priority of payment, is a question for the ultimate

determination of the federal courts. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 491, 27 S. Ct. 137, 140, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63; *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478.

If the legislature of a state gives the name "tax" to an exaction which is not a tax, and if the courts of the state join in the misnomer, the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of the other claimants. The state courts may authoritatively expound the substance, and the federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And, moreover, the latter part of section 64a seems to direct the bankruptcy courts to determine independently of the "legality of any such tax." *In re Cosmopolitan Power Co.*, (C. C. A. 7th Cir. 1905) 137 Fed. 858, 14 Am. Bankr. Rep. 604. See also *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

But the construction placed upon a state statute by the state courts is entitled to careful and weighty consideration. *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

The word "tax," as used in the Bankruptcy Act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the state and general government under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term "tax" as used in the Bankruptcy Act. *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478.

Taxes are not debts. They are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63.

Taxes become "legally due and owing" on the day they are assessed within the meaning of the statute. *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

Taxes assessed on returns made prior to the adjudication are legally due and owing and entitled to the preference given by section 64a although not collectible until after the adjudication. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63.

Taxes entitled to priority.—Taxes legally

due and owing by the bankrupt to the United States, or to any state, county, district, or municipality, are entitled to priority of payment under the express provisions of section 64a. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63; *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re Hollenfeltz*, (N. D. Ia. 1899) 94 Fed. 629, 2 Am. Bankr. Rep. 499; *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268, 4 Am. Bankr. Rep. 59; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 334; *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 558; *In re Sims*, (W. D. Ga. 1902) 118 Fed. 356, 9 Am. Bankr. Rep. 162; *Swarts v. Hammer*, (C. C. A. 8th Cir. 1903) 120 Fed. 256, 9 Am. Bankr. Rep. 691; *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567; *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709; *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79, 11 Am. Bankr. Rep. 481; *Cooper Grocery Co. v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 815, 11 Am. Bankr. Rep. 734; *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720; *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195; *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 414; *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404; *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247; *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478; *In re Wyoming Valley Ice Co.*, (M. D. Pa. 1908) 165 Fed. 789, 21 Am. Bankr. Rep. 1; *In re Scheidt*, (S. D. Ohio 1908) 177 Fed. 599, 23 Am. Bankr. Rep. 778; *In re Weissman*, (D. C. Conn. 1910) 178 Fed. 115; *In re Baker*, (E. D. Tex. 1899) 1 Am. Bankr. Rep. 526. And see to the same effect *In re Tilden*, (S. D. Ia. 1899) 1 Am. Bankr. Rep. 300; *Matter of Hilberg*, (W. D. Pa. 1901) 6 Am. Bankr. Rep. 714; *In re Barr Plumbing Engine Co.*, (E. D. Pa. 1904) 11 Am. Bankr. Rep. 312; *In re Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352.

The significance of section 64a, as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes. Some seemingly unjust features may be presented by the application of the stringent provisions relating to priorities, but as the law is plain and singularly free from ambiguity, it is obvious that Congress intended that the statute should be strictly construed and applied, unless the facts disclose unjust or prejudicial results. *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122.

Tax accruing during bankruptcy.—The Bankruptcy Act does not withdraw the estates of bankrupts from the reach of the tax-

ing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of the trustees, the same as if they were not. Even though accruing after bankruptcy, taxes must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145.

The statute does not make funds in the hands of trustees in bankruptcy exempt from taxation, and the courts will order the trustees to pay all taxes which might have been assessed and collected had not bankruptcy supervened, and to which similar property in the same locality is subject. *In re Sims*, (W. D. Ga. 1902) 118 Fed. 356; *Swarts v. Hammer*, (C. C. A. 8th Cir. 1903) 120 Fed. 256, affirmed (1904) 194 U. S. 441, 24 S. Ct. 695, 48 U. S. (L. ed.) 1060.

In *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268, the court said: "The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself."

Necessity of property coming into trustee's possession.—A city's claim against a bankrupt for taxes assessed against him is entitled to priority of payment by the trustee, though the property on which the taxes were levied never came into the hands of the trustee. But in such case the city is not entitled to a lien on the bankrupt's assets for the payment of such taxes. *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79, 11 Am. Bankr. Rep. 481; *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195. And see the next following paragraph.

Tax on exempt property.—A claim for a tax upon the bankrupt's property, even though the whole or part of the tax is upon property that is exempt by the laws of the state in which the bankrupt resides, and although, as a consequence, the property does not come into the custody of a court of bankruptcy, may be paid out of the proceeds of other property in the hands of the trustee; and the state or city to which the taxes are due is not required to collect its claim from the exempt property. *In re Baker*, (E. D. Tex. 1899) 1 Am. Bankr. Rep. 528. And see to same effect *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680.

Accumulated taxes.—All taxes which were collectible from the bankrupt prior to his bankruptcy must be paid, and it is immaterial that, through the negligence of the officers charged with their collection, taxes have accumulated until the aggregate amount with interest will absorb all or a large part of the estate. *In re Weissman*, (D. C. Conn. 1910) 178 Fed. 115.

Assessments for local improvements.—A city is entitled to preference in the payment

of assessments levied for local improvements, as "taxes" within the meaning of section 64a. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

The franchise tax or license fee imposed by a state upon corporations organized under its laws is a "tax" within the meaning of section 64a of the Bankruptcy Act. *In re Halsey Electric Generator Co.*, (D. C. N. J. 1909) 23 Am. Bankr. Rep. 401. And see to the same effect *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 64; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 22 Am. Bankr. Rep. 843; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 435.

Water rents due to a municipality, which are levied on property annually as a tax and made a lien in like manner, are "taxes" which a trustee in bankruptcy is required to pay when levied against property of the estate in his possession. *In re Industrial Cold Storage, etc., Co.*, (E. D. Pa. 1908) 163 Fed. 390, 20 Am. Bankr. Rep. 904.

But the contractual obligation of the bankrupt to pay water rent, primarily due by another person, cannot be regarded as within the statute as entitled to priority of payment. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

Personal tax.—A personal tax due and owing to a municipality is a "debt" within the meaning of the Bankruptcy Act. *Matter of Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352.

Partnership tax.—Under a state statute which provides that "any individual of a partnership is liable for the taxes due from the firm," it has been held that taxes levied against a firm become an individual debt of a partner, and, by virtue of section 64a, must be paid from his estate in bankruptcy as a preferred claim. *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553.

Tax on cigarette dealers.—In *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478, it was held that a tax imposed on cigarette dealers was within the meaning of the statute, and entitled to priority of payment.

But a liquor license, although designated a tax, does not come within the provisions of section 64a, and is not entitled to the priority therein given to taxes. *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

Interest on tax claims.—It has been held that interest due on tax claims is recoverable therewith. *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 414.

But see *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404, wherein it was held that section 64a does not provide for the payment of interest on taxes.

A penalty for the nonpayment of taxes, recoverable under the state law in lieu of interest, is collectible as part of the tax. *In re Scheidt*, (S. D. Ohio 1908) 177 Fed. 599, 23 Am. Bankr. Rep. 778.

Taxes due under lease.—A claim for taxes assessed by a municipality against property of which a bankrupt was lessee, and

which by his lease he contracted to pay, is not entitled to preference of payment as taxes legally owing by the bankrupt. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

Tax not due by bankrupt.—An account settled by state officers against a bankrupt corporation on account of taxes imposed on its bonds, and due by the bondholders, is not a tax due from the bankrupt entitled to priority of payment. *In re Wyoming Valley Ice Co.*, (M. D. Pa. 1906) 145 Fed. 267, 16 Am. Bankr. Rep. 594.

Taxes erroneously claimed.—The court of bankruptcy may disallow such part of a tax as may have been assessed on nontaxable or nonexistent property, even if regularly assessed and beyond dispute under the state law. *In re Otto Freund Arnold Yeast Co.*, (E. D. N. Y. 1910) 178 Fed. 305.

Bonus required for increase of stock.—A bonus exacted by a state from a corporation for the privilege of increasing its capital stock is not a tax entitled to priority, but is a debt based on a contractual relationship, provable and entitled to a *pro rata* distribution with general creditors. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

Obligation to collect taxes.—The statutory duty of a corporation, through its treasurer, to collect from the holders of its obligations a tax of four mills, by deducting it from the interest due them, is not a tax on the corporation, and an account settled therefor by the state officers is not entitled to a priority in the distribution under the bankrupt law. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

Penalties imposed on a corporation for failure to return an increase of capital stock, file reports, etc., are not taxes within the meaning of any law, and are not entitled to priority under the Bankruptcy Act, and cannot be allowed except for the amount of the pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes, the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

Claim against tax collector.—An indebtedness of a bankrupt for taxes collected by him as county tax collector, and not accounted for, or which should have been collected, and for which he is liable under the law of the state, is not one for "taxes." *In re Waller*, (D. C. Md. 1905) 142 Fed. 883, 15 Am. Bankr. Rep. 753. See also *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 480, 16 Am. Bankr. Rep. 648.

Order of priority.—In *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, it was said that taxes, as a class, are at the head of everything, even above the expense of preserving the estate and the cost of administration. And see to the same effect *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600,

15 Am. Bankr. Rep. 195; *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247.

And in *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 122, it was said that the significance of section 64a, as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes.

But it has also been held that state taxes are not entitled to priority of payment over the actual and necessary cost of preserving the estate subsequent to the filing of the petition. *New Jersey v. Lovell*, (C. C. A. 3d Cir. 1910) 179 Fed. 321; *In re Halsay Electric Generator Co.*, (D. C. N. J. 1909) 23 Am. Bankr. Rep. 401.

Payment of taxes from proceeds of sale.—Where real property belonging to a bankrupt's estate is sold by authority of the court, and produces a fund larger than the liens for municipal taxes on such property, these taxes must be paid before any dividends are allowed in favor of the general creditors. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567. See also *In re Veitch*, (D. C. Conn. 1900) 101 Fed. 251, 4 Am. Bankr. Rep. 112; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680.

In *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, it was held that the sale of a stock of goods in bankruptcy proceedings does not affect a statutory lien for state taxes previously assessed against the same, but the court suggests that it is the duty of the trustee, in order to protect the purchaser, to provide for the payment of such taxes out of the remainder of the estate.

Where, however, the property has been sold subject to taxes, the tax claims are not entitled to priority of payment from the bankrupt's estate. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709. See also *In re Hollenfeltz*, (N. D. Ia. 1899) 94 Fed. 629, 2 Am. Bankr. Rep. 499.

But the foreclosure of an equity of redemption in certain lands by a city, under its charter provisions, to recover unpaid city taxes, in which the land was struck off to the city for less than the amount due, does not deprive the city of its right to priority of payment of the balance due on such taxes from the owner's estate in bankruptcy. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

Subrogation as to tax claims.—*Purchasers* of lands on which taxes are due are not, on the payment of such taxes by them, entitled to be subrogated to the right of the municipality to priority of payment. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567; *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427; *Cooper Grocery Co. v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 815, 11 Am. Bankr. Rep. 734; *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122.

Section 64a must be strictly construed when

it would inure to the benefit of a particular creditor and not to a municipality. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

Payment of taxes by remainderman.—It has been held that a remainderman, who was charged with and paid a tax due by the life tenant, has an equitable claim upon the funds in the trustee's hands according to the doctrine of subrogation. *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114.

Proof of tax claims.—Taxes due from a bankrupt do not constitute a claim against his estate to be proved like those of creditors; but it is the duty of the court to direct the payment of such taxes together with such penalties or interest as have accrued thereon under the laws of the state to the time of actual payment. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 679; *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 415; *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404; *In re Cleanfast Hosiery Co.*, (S. D. N. Y. 1900) 4 Am. Bankr. Rep. 702.

Duty of trustee to pay taxes.—It has been held that it is the duty of the trustee to pay, in advance of dividends, all taxes due and owing by the bankrupt, including taxes assessed upon mortgaged property which the trustee has relinquished to the mortgage creditors. *Chattanooga v. Hill*, (C. C. A.

6th Cir. 1905) 139 Fed. 600, 3 Ann. Cas. 237 (and see note at p. 238). See also *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79.

It has been held that where taxes on property sold by the trustee in bankruptcy are assessed against the purchaser, but are properly chargeable to the trustee, the court will not, on petition of the purchaser, order the trustee to pay them, but will direct the trustee to have the property assessed in his name, as trustee, and to pay the amount to the proper official. *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268.

Property in hands of trustee.—It is the duty of the trustee to pay the taxes assessed or becoming due on the property of the bankrupt while in his hands for administration, and he is not relieved from such duty by the fact that the taxes were allowed to remain unpaid until the property was sold, by consent of the court of bankruptcy, under a decree of foreclosure in a state court. *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404.

Tax on exempt property.—The trustee must pay out of the estate in his hands taxes legally assessed and due on the homestead of the bankrupt, and constituting a lien thereon at the time of the adjudication, although such homestead has been set apart to the bankrupt as exempt under the Act. *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300.

b [Order of payment.] The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be [(1898) 30 Stat. L. 563.]

(1) [Cost of preserving estate.] the actual and necessary cost of preserving the estate subsequent to filing the petition; [(1898) 30 Stat. L. 563.]

Cost of preserving estate.—The actual and necessary cost of preserving the estate subsequent to the filing of the petition is, under section 64b (1), entitled to priority of payment. What items shall be allowed as such cost is purely a question for the determination of the court in the exercise of a sound judicial discretion. *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509; *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 167 Fed. 875, 21 Am. Bankr. Rep. 685; *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860. And see to the same effect the following earlier cases: *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 543; *In re Allen*, (N. D. Cal. 1899) 96 Fed. 512, 3 Am. Bankr. Rep. 38; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 557; *In re J. H. Allison Lumber Co.*, (S. D. Ga. 1905)

137 Fed. 643, 14 Am. Bankr. Rep. 78; *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450; *In re Gerson*, (E. D. Pa. 1899) 1 Am. Bankr. Rep. 251; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502; *Matter of National Mercantile Agency*, (S. D. N. Y. 1903) 11 Am. Bankr. Rep. 451; *Matter of Harson Co.*, (D. C. R. I.) 11 Am. Bankr. Rep. 514; *Knittel v. McGowan*, (E. D. Pa. 1905) 14 Am. Bankr. Rep. 209; *Matter of Hutchinson Co.*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 518.

Order of priority.—It has been quite generally held that taxes have a right to prior payment over the cost of preserving the estate. *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546; *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195; *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247.

But it has also been held that the actual and necessary cost of preserving the estate subsequent to filing the petition, being an expense necessary to enable the court to exercise its jurisdiction, is entitled to priority of payment over the taxes due the state. *New*

Jersey v. Lovell, (C. C. A. 3d Cir. 1910) 179 Fed. 321; *In re Halsey Electric Generator Co.*, (D. C. N. J. 1909) 23 Am. Bankr. Rep. 401.

Priority over liens.—Where property in custody of the bankruptcy court is, by its consent, turned over to the marshal in admiralty, and sold in suit to enforce maritime liens, the proceeds are subject to the payment of the necessary cost incurred by the bankruptcy court in preserving the property before it was turned over and the costs of administration; and such costs are entitled to priority over the admiralty liens. *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303.

Secured creditors of a bankrupt, who make use of the bankruptcy court and its officers to realize on their security, may be required to contribute their proportion to the costs of the proceedings and for the preservation of the property during their pendency, where there is not sufficient unencumbered estate. *In re J. H. Alison Lumber Co.*, (S. D. Ga. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78.

Trustee's commissions are necessary costs of preserving the estate, and fall under section 64b (1). *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247.

Expense incurred by a trustee in bankruptcy in caring for real estate which is subject to valid mortgages is presumed to be for the protection of the supposed interest of general creditors, and unless the mortgagees expressly or by necessary implication assent to such expenditures they cannot, in general, be charged with them. *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671.

Care of property by bankrupt.—Where a bankrupt who has an interest in growing crops omits to list the same in his schedule of assets, not from any fraudulent design, but because he was advised that they would not pass to his trustee, and completes their cultivation and harvesting after his adjudication in bankruptcy, and is then ordered to surrender the proceeds of their sale to the trustee, he will be allowed a reasonable compensation for work and care bestowed from the date of the adjudication. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

But a bankrupt is not entitled to reimbursement for his expenses in taking care of exempt property pending its being set off to

him. *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728.

The amount of receiver's certificates, authorized by a court of bankruptcy to raise money required for the purpose of preserving property of the estate, represents an expenditure for the benefit of all parties in interest, and is entitled to priority of payment from the proceeds of such property. *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 107 Fed. 875, 21 Am. Bankr. Rep. 685.

Wages earned in preservation of estate.—*In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689, it was said: "Under the bankruptcy law of the United States every laborer who actually labors under the authority of the court for the preservation or enhancement of the fund or property in *custodia legis* is entitled as to that estate to an equitable lien equivalent in effect to that of a *bona fide* purchaser without notice. To express it otherwise, a laborer who by order of the court is employed on property in the hands of the court, as to the existent values in hand, will be paid by the court for the value of his services rendered to that property to which the liens of the creditors attach, and for the benefit of which his services were rendered."

Claim of assignee for creditors for preserving estate.—An assignment for the benefit of creditors, fairly made and intended to facilitate the equal distribution of the insolvent's property among his creditors, without any attempt to defraud or embarrass persons to whom he was indebted, is not so contrary to the policy of the Bankruptcy Act as to preclude the assignee from recovering for disbursements and services made for the benefit and preservation of the estate prior to the filing of the bankrupt's petition. *In re Chase*, (1st Cir. 1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677. See also *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

But in *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105, it was held that no allowance can be made by a court of bankruptcy to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of a petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors.

(2) [*Filing fees — expense of recovering concealed assets.*] the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; [(*Amended 1903*) 32 Stat. L. 800.]

The expense of recovering concealed or transferred property by creditors for the benefit of the estate was provided for by the amendment of 1903. *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep.

188; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 182 Fed. 509. See also *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep.

815, affirmed (C. C. A. 2d Cir. 1900) 5 Am. Bankr. Rep. 320 (decided prior to the enactment of the amendment).

Recognition of creditor's right to recover property for estate.—Section 64b (2) of the Bankruptcy Act, as amended, clearly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property transferred by him either before or after the filing of the

petition, and the Act makes no distinction as to the character of the transfer, whether it be one involving actual fraud, an intent to hinder, delay, or defraud the creditors of the bankrupt, which the law declares to be null and void, or a constructive fraud, which the law declares to be fraudulent without inquiring into its motive. *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866.

(3) [*Cost of administration—attorneys' fees.*] the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; [(1898) 30 Stat. L. 563.]

Cross-reference: As to

Expenses of administration generally, see section 62, *supra*, p. 749.

The proper expenses of the trustee and referee are entitled to priority as costs of administration. *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502. And see the annotation under section 62, *supra*, p. 749.

The cost of notifying creditors of an application for discharge is included in the cost of administration. *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

Cost of continuing business.—Where a general assignee for creditors, after an adjudication of bankruptcy against his assignor, with the approval of the referee, continued in the management of the bankrupt's business until the appointment of a trustee, and conducted the same successfully, it was held that he was entitled to payment for his services rendered during such time, and the trustee should also be required to pay bills properly and legitimately contracted by him in the conduct of the business after the adjudication, but not those previously made. *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450.

Expense of carrying out contracts.—Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable, are not costs of administration within the meaning of section 64b (3). *In re Bourlier Cornice, etc., Co.*, (W. D. Ky. 1905) 133 Fed. 958, 13 Am. Bankr. Rep. 585.

Attorney fees allowed.—An attorney fee is provable and entitled to priority (1) when the services were rendered to the petitioning creditors in involuntary cases; (2) where the services are rendered to the bankrupt in involuntary cases while performing the duties prescribed by the Act; and (3) when the services of an attorney are really necessary and

required by a receiver or trustee in the performance of their duties in the care and administration of the bankrupt estate. Such fees to be allowed as part of the expense of the care and preservation of the estate, and are confined to services rendered during the bankruptcy proceedings. *In re Standard Fuller's Earth Co.*, (S. D. Ala. 1911) 186 Fed. 578. And see to the same effect *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324; *Smith v. Cooper*, (C. C. A. 5th Cir. 1903) 120 Fed. 230, 9 Am. Bankr. Rep. 755; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re McCracken*, (W. D. Tenn. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646, affirming (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 627; *In re Young*, (E. D. N. C. 1906) 142 Fed. 891, 16 Am. Bankr. Rep. 106; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192, reversed on other grounds (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332; *In re Clausen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476; *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 182 Fed. 509; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236.

Services rendered to voluntary bankrupt.—It has been held that the services of an attorney rendered to a voluntary bankrupt in the necessary performance of the bankrupt's statutory duties are entitled to priority of payment. *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *Matter*

of Hitchcock, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 664.

But no attorneys' fee can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt, in doing the things which the law requires of him. *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781.

It has also been held that the attorney for a voluntary bankrupt is not entitled to priority of payment out of the estate. *In re Beck*, (S. D. Ia. 1899) 92 Fed. 889, 1 Am. Bankr. Rep. 535; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641.

Order of priority.—Fees of attorneys for the petitioning creditors in a proceeding in involuntary bankruptcy are allowable and given priority as a part of the cost of administration, and such claims rank next after the wages of laborers, taking precedence, subject to tax claims, of all liens on the funds in the hands of the court for distribution. *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

Services must be beneficial.—Compensation for an attorney's services are allowable only on equitable considerations, for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646, affirming (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re Clauseen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34.

The statute does not authorize the allowance of fees for all legal work the attorney may do for the bankrupt in the proceeding, but only for that which the referee or the court may consider was required by the provisions of the law and the necessities of the proceeding. *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192.

The services for which the attorneys of the bankrupt may be paid out of the bankrupt's estate, as part of the costs of administration, are the preparation and filing of the petition and schedules and the attendance upon the first meeting of the creditors; and the question is, what would be a reasonable fee for their services. *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104.

Services rendered in good faith.—The court may allow an attorney for the bankrupt in an involuntary proceeding, for services actually rendered in good faith for the real purpose of impartially administering the estate. *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626.

Allowance confined to one fee.—The statute authorizes the allowance of one reasonable fee only to the petitioning creditors or the bankrupt as reimbursement; and fees will not be allowed on account during the administration of an estate on petition of attorneys and without notice to parties interested. *In re Young*, (E. D. N. C. 1906) 142 Fed. 891, 16 Am. Bankr. Rep. 106.

Division of fee.—The one attorney's fee allowed the petitioning creditors by section 64b (3) should be equitably divided between

the attorneys representing two petitions filed and consolidated by order of the court under general order No. 7. *In re McCracken*, (W. D. Tenn. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95.

Where two petitions in involuntary bankruptcy were filed by different creditors against a corporation, one of which did not present grounds upon which it could legally be adjudged a bankrupt, and the adjudication was made on grounds alleged in the latter, the attorneys in the subsequent petition are entitled to the fee allowed for filing the petition and procuring the adjudication. *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

Time of presenting claim.—The claim of the bankrupt's attorney for a fee, payable as part of the costs of administration, does not lose its right to priority of payment out of the funds on hand at the time it is presented, merely because it was not presented until after the declaration and payment of a first dividend. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

Amount of attorney fees—Must be reasonable.—The fees allowable to the attorney for a voluntary bankrupt include the payment for services reasonably necessary to aid the bankrupt in performing the duties required of him by the Act, and in securing the benefit of its provisions, and obtaining his discharge, if entitled to one; the amount of such allowance to be in all cases reasonable in view of the services required and the amount of the estate. *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710.

Allowances to attorneys for services in bankruptcy cases must be made in view of the clearly disclosed policy of the law to reduce the expense of administering bankrupt estates to the minimum. *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794.

A referee in bankruptcy is entitled, and it is his duty, to reduce the amount named for fees of the bankrupt's attorney, if in the referee's opinion it is too high. *In re Ferreri*, (E. D. La. 1911) 188 Fed. 675. See also section 60d, *supra*, p. 747, as to transfer or payment made to an attorney in contemplation of bankruptcy.

Matters taken into consideration.—The amount of the estate, the complexity of the bankrupt's affairs, the time reasonably devoted to the service, the standing and experience of counsel—these are all proper elements to be taken into consideration in estimating the reasonableness of the attorney's fees. It would be unwise, for both creditors and bankrupts, to make the compensation so parsimonious that attorneys of standing and experience would be reluctant to act on behalf of the bankrupts. *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710.

Where the services have been important and beneficial to the estate, a liberal compensation should be allowed. *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236.

Discretion of court.—The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion. *In re Standard Fuller's Earth Co.*, (S. D. Ala. 1911) 186 Fed. 578.

The fees allowed are always subject to revision by the court. *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710.

Attorney fee denied.—A claim for an attorney fee will not be allowed, at least as one entitled to priority, where the services rendered were not of the character specified in the statute, or were not beneficial to the estate. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 574, 9 Am. Bankr. Rep. 58; *In re Connell*, (M. D. Pa. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155; *In re Zier*, (7th Cir. 1905) 142 Fed. 102, 73 C. C. A. 326, *affirming* (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re O'Hara*, (M. D. Pa. 1909) 166 Fed. 384, 21 Am. Bankr. Rep. 508; *In re Crave, etc., Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 769.

Services tending to defeat and delay proceedings.—There will be no allowance of an attorney fee in a case where it is not shown that the bankrupt has performed the duties laid upon him by the law, but where it appears, on the contrary, that he has been actively engaged in trying to defeat or delay the proceedings. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Zier*, (7th Cir. 1905) 142 Fed. 102, 73 C. C. A. 326.

Services not beneficial.—An attorney is not entitled to an allowance from the estate in bankruptcy on account of services rendered to a state receiver where, as a whole, his services cost the estate and general creditors several times its amount, in increased expenses of administration. *In re Zier*, (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527. See also *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155.

Filing defective petition.—Attorneys who

filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, which was made on a second petition by other creditors, are not entitled to an allowance of fees from the estate. *In re Fischer*, (C. C. A. 2d Cir. 1910) 175 Fed. 531, 23 Am. Bankr. Rep. 427.

Resisting adjudication.—A claim for legal services rendered to the assignee in a general deed of assignment, in unsuccessfully resisting an adjudication of bankruptcy against his assignor on a petition filed within four months after the making of the assignment, is not provable against the bankrupt's estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

Contesting application for composition.—An involuntary bankrupt is not entitled to an allowance for counsel fees and disbursements expended on a contested application to confirm a composition, such expenditures not being a part of the costs of administration, nor for services rendered to the bankrupt while performing duties prescribed by section 64b (3). *In re Fogarty*, (C. C. A. 7th Cir. 1911) 187 Fed. 773.

Service rendered on application for discharge.—No allowance can be made from the estate to attorneys for services rendered in the matter of the bankrupt's application for a discharge, which has no relation to the administration of the estate, whether such services were rendered in behalf of the bankrupt or opposing creditors. *In re Brundin*, (D. C. Minn. 1901) 112 Fed. 306, 7 Am. Bankr. Rep. 296.

Unnecessary services.—The unnecessary filing of a second petition on behalf of creditors who did not join in the first one, does not entitle the attorney for such creditors to a fee for his services; and this is true even though the first petition is demurrable, where it is subsequently amended and an adjudication made thereon. *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155.

Services in connection with claim for exemptions.—The statute does not authorize the allowance of a fee for services in endeavoring to sustain the bankrupt's exemption claim. *In re O'Hara*, (M. D. Pa. 1909) 166 Fed. 384, 21 Am. Bankr. Rep. 508.

Fourth. [Employees' wages.] Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant. [;] [(Amended 1906) 34 Stat. L. 267.]

Wages entitled to priority.—Claims for wages due to workmen, clerks, traveling or city salesmen, or servants, earned within the three months prior to the institution of the bankruptcy proceedings, and not exceeding \$300, are, under section 64b (4), entitled to priority of payment from the funds of the estate of the bankrupt. *Shropshire v. Bush*, (1907) 204 U. S. 186, 27 S. Ct. 178, 51 U. S. (L. ed.) 436, 17 Am. Bankr. Rep. 77; *In re North Carolina Car Co.*, (E. D. N. C. 1903)

127 Fed. 178, 11 Am. Bankr. Rep. 488; *In re Harmon*, (S. D. W. Va. 1903) 128 Fed. 170, 11 Am. Bankr. Rep. 64; *In re Burton Bros. Mfg. Co.*, (N. D. Ia. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Fuller*, (S. D. W. Va. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443; *In re Huntenberg*, (E. D. N. Y. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697; *In re New England Thread Co.*, (D. C. R. I. 1907)

154 Fed. 742, 18 Am. Bankr. Rep. 840, *affirmed* (C. C. A. 1st Cir. 1907) 158 Fed. 788, 20 Am. Bankr. Rep. 47; *In re Fink*, (E. D. Pa. 1908) 163 Fed. 135, 20 Am. Bankr. Rep. 897; *In re Caldwell*, (E. D. Ark. 1908) 164 Fed. 515, 21 Am. Bankr. Rep. 236; *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55; *In re Yoke Vitriified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Roebuck Weather Strip, etc., Co.*, (S. D. N. Y. 1910) 180 Fed. 497; *In re Van Wert Mach. Co.*, (D. C. Mass. 1910) 186 Fed. 607; *Matter of Winton Lumber, etc., Co.*, (E. D. Ky. 1906) 17 Am. Bankr. Rep. 117; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 17 Am. Bankr. Rep. 699; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *In re Andrews*, (W. D. N. C. 1907) 19 Am. Bankr. Rep. 441; *Matter of Strickland*, (S. D. Ga.) 20 Am. Bankr. Rep. 923; *Matter of McIntyre*, (S. D. Miss. 1908) 21 Am. Bankr. Rep. 588; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69.

The word "wages" must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice. *In re Dexter*, (C. C. A. 1st Cir. 1907) 158 Fed. 788, 20 Am. Bankr. Rep. 47.

Wages accruing during vacation are within the statute. *In re B. H. Gladding Co.*, (D. C. R. I. 1903) 120 Fed. 709, 9 Am. Bankr. Rep. 700.

The perfection of a wage claim under the state law is not essential to its right of priority in bankruptcy. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22. See also *Matter of Strickland*, (S. D. Ga.) 20 Am. Bankr. Rep. 923.

Reducing a wage claim to judgment does not disentitle it to the priority accorded by the bankruptcy law. *In re Anson*, (N. D. Cal. 1899) 101 Fed. 698, 4 Am. Bankr. Rep. 231.

Commissions included.—The term "wages," as used in this section, has received a very liberal construction; and it has been held to include commissions or other methods of payment. *In re Dexter*, (1st Cir. 1907) 158 Fed. 788, 89 C. C. A. 285, 20 Am. Bankr. Rep. 47; *In re Fink*, (E. D. Pa. 1908) 163 Fed. 135, 20 Am. Bankr. Rep. 897; *In re Roebuck Weather Strip, etc., Co.*, (S. D. N. Y. 1910) 180 Fed. 497.

But commissions earned by an "incidental" agent, on whom there was no obligation to serve, are not "wages" within the meaning of the bankruptcy law. *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *Matter of Smith*, (D. C. R. I. 1903) 11 Am. Bankr. Rep. 647.

Damages occasioned by a breach of contract of employment for a fixed period are not wages within the meaning of the statute. *In re Sweetser*, (C. C. A. 2d Cir. 1905) 142 Fed. 131, 15 Am. Bankr. Rep. 650.

A judgment recovered for the wrongful discharge of a salesman is not entitled to priority as a claim for wages. *Matter of Lewis*, (D. C. R. I. 1904) 12 Am. Bankr. Rep. 279.

Money loaned to pay wages.—The prior-

ity accorded by the statute is for the benefit of the wage earner alone, and does not entitle a lender to priority for money advanced to the insolvent for the payment of the wages of his laborers. *In re North Carolina Car Co.*, (E. D. N. C. 1903) 127 Fed. 178, 11 Am. Bankr. Rep. 488. See also *In re St. Louis Ice Mfg., etc., Co.*, (E. D. Mo. 1906) 147 Fed. 752, 17 Am. Bankr. Rep. 194; *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55.

Who may claim wages.—A "piece worker" is entitled to priority as a wage earner. *In re Gurewitz*, (C. C. A. 2d Cir. 1903) 121 Fed. 982, 10 Am. Bankr. Rep. 350.

Salesmen.—"Traveling or city salesmen" are, since the amendment of 1906, entitled to priority of payment. *In re Gay*, (D. C. Mass. 1910) 188 Fed. 392. See also *In re New England Thread Co.*, (D. C. R. I. 1907) 154 Fed. 742, 18 Am. Bankr. Rep. 840, *affirmed* (C. C. A. 1st Cir. 1907) 158 Fed. 788, 20 Am. Bankr. Rep. 47; *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 743; *In re Fink*, (E. D. Pa. 1908) 163 Fed. 135, 20 Am. Bankr. Rep. 897; *In re Roebuck Weather Strip, etc., Co.*, (S. D. N. Y. 1910) 180 Fed. 497.

Clerks.—The claim of a clerk for his wages, earned within three months of the bankruptcy of his employer, is a priority fixed by the Bankruptcy Act. *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Henry C. King Co.*, (D. C. Mass. 1902) 113 Fed. 110, 7 Am. Bankr. Rep. 619; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 17 Am. Bankr. Rep. 699; *Matter of Strickland*, (S. D. Ga.) 20 Am. Bankr. Rep. 923.

Bookkeepers.—The word "clerk," as it is used in section 64b (4), includes a person who regularly keeps a bankrupt's books. *In re Baumblatt*, (E. D. Pa. 1907) 153 Fed. 485, 19 Am. Bankr. Rep. 500.

Musicians employed at regular wages to play in a theatre or other place are "servants," and entitled to priority of payment from the estate of the employer in bankruptcy, for their wages earned within three months. *In re Caldwell*, (E. D. Ark. 1908) 164 Fed. 515, 21 Am. Bankr. Rep. 236.

A *teamster*, while not entitled to priority for charges for the use of his wagon and team, has a prior right of payment with respect to the services which he personally rendered. *Matter of Winton Lumber, etc., Co.*, (E. D. Ky. 1906) 17 Am. Bankr. Rep. 117.

The manager of a store has been held to be entitled to priority for sums due to him as wages. *In re Andrews*, (W. D. N. C. 1907) 19 Am. Bankr. Rep. 441.

But the manager of a branch office of a broker in another city is not a "workman, clerk, or servant," and his claim for services is not entitled to priority on the bankruptcy of his employer. *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 281, 22 Am. Bankr. Rep. 496.

The president of a commercial corporation is not such a workman as will be entitled to priority under the statute. *In re Grubbs-Wiley Grocery Co.*, (W. D. Mo. 1899) 96 Fed.

183; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154.

The proprietor of a blacksmith shop is not entitled to priority of a workman, with respect to a claim due to him for services rendered to the bankrupt. *Weaver v. Hugill Stone, etc., Co.*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 516.

An independent contractor is not a workman, nor is his compensation wages, within the meaning of the statute. *In re Deutschle*, (M. D. Pa. 1910) 182 Fed. 430.

A buyer, commissioned to buy goods for the bankrupt, as well as for other persons, is not entitled to priority. *Matter of Smith*, (D. C. R. I. 1903) 11 Am. Bankr. Rep. 647.

Assignee of wage claim.—It has been quite generally held that an assignee of a wage claim is entitled to the priority given to such claim by the bankruptcy law; the priority being attached to the claim and not to the person. *Shropshire v. Bush*, (1907) 204 U. S. 186, 27 S. Ct. 178, 51 U. S. (L. ed.) 436, 17 Am. Bankr. Rep. 77; *In re Campbell*, (E. D. Wis. 1900) 102 Fed. 686, 4 Am. Bankr. Rep. 535; *In re North Carolina Car Co.*, (E. D. N. C. 1903) 127 Fed. 178, 11 Am. Bankr. Rep. 480; *In re Harmon*, (S. D. W. Va. 1903) 128 Fed. 170, 11 Am. Bankr. Rep. 64; *In re Fuller*, (S. D. W. Va. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443; *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69.

It was, however, formerly held in some cases that the assignee of a wage claim was not entitled to priority. *In re Westlund*, (D. C. Minn. 1900) 99 Fed. 399, 3 Am. Bankr. Rep. 646; *In re St. Louis Ice Mfg., etc., Co.*, (E. D. Mo. 1906) 147 Fed. 752, 17 Am. Bankr. Rep. 194.

The priority to which an assignee of a wage claim is entitled may be lost by novation. *In re Fuller*, (S. D. W. Va. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443.

Subrogation is not a matter of strict right but purely equitable in its nature, dependent upon the facts and circumstances of each particular case. *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55.

Order of priority.—Section 64b (4), giving priority to wages due to workmen, is not intended to give such priority over debts secured by valid liens. *In re Proudfoot*, (N. D. W. Va. 1909) 173 Fed. 733, 23 Am. Bankr. Rep. 106. See also *In re Muhlhauer*, (C. C. A. 6th Cir. 1903) 121 Fed. 629, 10 Am. Bankr. Rep. 231; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104.

But a priority of wage claims over liens, which is recognized by the law of the state, will also be recognized in bankruptcy proceedings. *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96. See also *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689, wherein it appears that priority was accorded a wage claim as one for the preservation of the estate. And

see the annotation under section 64b (5), *infra*, p. 777.

Wage claims are entitled to priority over those claims falling within the subsequent classification in section 64b. *In re Yoke Vitrified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Pittsburg Industrial Iron Works*, (W. D. Pa. 1909) 22 Am. Bankr. Rep. 851.

Application of payments.—A wage claimant, to whom wages were owing on a running account, is not required to credit payments made to him within the last three months to reduce wages earned within that period, but is entitled to credit all the payments to the earlier items of the account. *In re Van Wert Mach. Co.*, (D. C. Mass. 1910) 186 Fed. 607. See also *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Andrews*, (W. D. N. C. 1907) 19 Am. Bankr. Rep. 441; *Matter of McIntyre*, (S. D. Miss. 1908) 21 Am. Bankr. Rep. 588.

Time of earning wages—Before filing petition.—A claim for wages, in order to be entitled to the priority accorded by the statute, must have been earned within the three months preceding the commencement of the proceedings in bankruptcy. *In re Rouse*, (C. C. A. 7th Cir. 1899) 91 Fed. 96, 1 Am. Bankr. Rep. 234, reversing (N. D. Ill. 1899) 91 Fed. 514, 1 Am. Bankr. Rep. 231; *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re B. H. Gladding Co.*, (D. C. R. I. 1903) 120 Fed. 709, 9 Am. Bankr. Rep. 700; *In re Slomka*, (C. C. A. 2d Cir. 1903) 122 Fed. 630, 9 Am. Bankr. Rep. 635; *In re Burton Bros. Mfg. Co.*, (N. D. Ia. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218; *In re Huntenberg*, (E. D. N. Y. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697.

But it has been held that the three months is to be computed from the time the bankrupt suspended business, and not from the time the petition was filed. *In re Rouse*, (N. D. Ill. 1899) 1 Am. Bankr. Rep. 231.

Where only a part of a claim against a bankrupt for labor was for services performed within three months prior to the commencement of the bankruptcy proceedings, it was held that the claimant was entitled to priority only for such part as was earned within the three months period. *In re Burton Bros. Mfg. Co.*, (N. D. Ia. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218.

Wages earned after filing petition.—In *In re Gerson*, (E. D. Pa. 1899) 1 Am. Bankr. Rep. 251, it was said: "While it is probable that all of these sums were not earned before the commencement of proceedings, and may not therefore be within the letter of the clause (4) of section 64, it would be a great hardship to exclude such claimants, who were without notice of the filing of the petition. From this right of priority, and such literal interpretation would not be within the spirit of the usual legislation on the subject, in which the purpose to fully protect such creditors is always apparent."

The amount of a wage claim allowable in bankruptcy is governed by clause (4), and not by clause (5), of section 64b. *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 782, 6 Am. Bankr. Rep. 501; *In re Slomka*, (C. C. A. 2d Cir. 1903) 122 Fed. 630, 9 Am. Bankr. Rep. 635.

(5) [*Debts owing to person entitled to priority.*] debts owing to any person who by the laws of the States or the United States is entitled to priority. [(1898) 30 Stat. L. 563.]

Cross-references: As to

Liens recognized under state laws, see section 67d.

Trustee's title as subject to valid liens, etc., see the several subdivisions of section 70a, *infra*, p. 811.

The amendment of 1910 does not attempt to repeal nor alter section 64 of the Bankruptcy Act, which regulates the order of distribution of assets, nor does it change clause 5 of that section, which provides that "debts owing to any person who by the laws of the states or the United States is entitled to priority" shall be given priority in the distribution of the bankrupt's estate next after those claims which are given priority by previous clauses of the section. *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647.

Recognition of local law constitutional.—The recognition of the local law by the Bankruptcy Act does not render the Act void as an attempt by Congress unlawfully to delegate its legislative power. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

The controlling principle of construction applicable to section 64b (5) is that the creditor shall be allowed the same priority under the Bankruptcy Act which he would have had if such Act had not superseded the state laws governing the distribution of the estates of insolvent debtors. *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Yoke Vitriified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235.

Priorities accorded by state or federal laws.—Section 64b (5), in providing for the payment of debts in accordance with the priorities recognized by the laws of the state or the United States, is clearly an adoption of those laws, at least in so far as they do not conflict with the bankruptcy law. Therefore, whatever claims are entitled to priority of payment under the state or federal statutes and decisions will also be entitled to such priority of payment in bankruptcy proceedings. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re Lewis*, (D. C. Mass. 1900) 99 Fed. 935, 4 Am. Bankr. Rep. 51; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, 4 Am. Bankr. Rep. 497; *In re Beaver Coal Co.*, (D. C. Ore. 1901)

107 Fed. 98, 6 Am. Bankr. Rep. 404; *In re Laird*, (C. C. A. 6th Cir. 1901) 109 Fed. 550, 6 Am. Bankr. Rep. 1; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 767, 7 Am. Bankr. Rep. 648; *In re Crow*, (W. D. Ky. 1902) 116 Fed. 110, 7 Am. Bankr. Rep. 545; *Summers v. Abbott*, (C. C. A. 8th Cir. 1903) 122 Fed. 36, 10 Am. Bankr. Rep. 254; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43, 14 Am. Bankr. Rep. 204; *Mott v. Wissler Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Smart*, (N. D. Ohio 1905) 136 Fed. 974, 14 Am. Bankr. Rep. 672; *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 480, 16 Am. Bankr. Rep. 648; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Doran*, (W. D. Ky. 1906) 148 Fed. 327, 17 Am. Bankr. Rep. 799; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Bennett*, (C. C. A. 6th Cir. 1907) 153 Fed. 673, 18 Am. Bankr. Rep. 320; *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167; *In re Iroquois Mach. Co.*, (D. C. R. I. 1909) 166 Fed. 629, 22 Am. Bankr. Rep. 183; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Standard Oak Veneer Co.*, (E. D. Tenn. 1909) 173 Fed. 103, 22 Am. Bankr. Rep. 883; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *In re Amoratis*, (C. C. A. 9th Cir. 1910) 178 Fed. 919; *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170; *In re Yoke Vitriified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186; *In re Rose*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 68; *In re Frick*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 719; *In re Duncan*, (N. D. Tex. 1898) 2 Am. Bankr. Rep. 321; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *In re Pittsburg Industrial Iron Works*, (W. D. Pa. 1909) 22 Am. Bankr. Rep. 851; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69.

Priority under federal laws.—Section 64b (5) does not lessen nor affect the rights of the United States under R. S. sec. 3466, 2 Fed. Stat. Annot. 45, nor the right of a surety, in a bond given by the bankrupt to the United States, who pays the money due on such bond, to be subrogated to a "like

priority" under the provisions of R. S. sec. 3468, 2 Fed. Stat. Annot. 50. Title Guaranty, etc., Co. v. Guarantee Title, etc., Co., (C. C. A. 3d Cir. 1909) 174 Fed. 385, 23 Am. Bankr. Rep. 340. See also *In re Stoeber*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345.

Priority dependent on state law.—Any priority of payment allowed under section 64b (5), so far as it is therein made to depend upon the "law of the state," must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment; and it is clearly incumbent upon the person who claims priority to show the existence of such law. *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226.

Assignee entitled to priority.—A claim which is given priority because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee. *In re Bennett*, (C. C. A. 6th Cir. 1907) 153 Fed. 673, 18 Am. Bankr. Rep. 320; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69. And see also the cases to this effect, with respect to the assignment of wage claims, cited under the preceding subdivision of this section, *supra*, p. 774.

Right of subrogation to priority claim.—One who, at the request of a debtor, furnishes the money to discharge a lien, under an agreement that he shall have the same lien, is entitled in equity to be subrogated to the lien of the creditor whose debt is paid. *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704.

Priority of judgment lien.—Where a creditor of a bankrupt claims priority of payment out of his estate by virtue of an alleged judgment lien on the property of the estate, the burden is on such claimant to show that he has done everything required by statute to make his judgment attach as a lien. *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695. But see the following paragraph.

Claimant not bound to follow procedure prescribed by state statute.—An adjudication of bankruptcy brings the bankrupt's assets into the custody of the court of bankruptcy for administration; and a creditor of the bankrupt, having a lien on such property at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the Bankruptcy Law directs. *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437. But see the preceding paragraph.

The right to priority may be lost. Thus where an infant obtained a bill of sale from a bankrupt to secure advances, and after his claim of preference by virtue of such bill of sale had been disallowed he elected to disaffirm the same because of his infancy, it was held that he was then only entitled to prove

his claim for advances as a general creditor. *In re Huntenberg*, (E. D. N. Y. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697.

So, also, it has been held that where payment of an alleged specific lien was made by a bankrupt's trustee, after notice to all creditors and without objection, a general judgment creditor claiming a prior lien cannot thereafter object, under the rule that lien creditors who are not prompt and persistent in asserting rights may lose them. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576. And see to the same effect *Keyser v. Wessel*, (3d Cir. 1904) 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126.

Pleading.—On an issue in bankruptcy as to the priority of a mortgage lien, the bill should allege the names of all the creditors of the bankrupt other than the mortgagee, the amounts of their debts, the character of the same, and when created. *Teague v. Anderson Hardware Co.*, (N. D. Ga. 1908) 161 Fed. 765.

Proof.—While a verified petition for the allowance of a claim in bankruptcy is *prima facie* evidence of the claim itself, on which it may be allowed as a general claim, allegations therein of facts to establish the right of such claim to priority are not to be taken as *prima facie* true, but must be proved by evidence. *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206. See also *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695; *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226.

Order of priority.—Debts which come within section 64b (5), as entitled to priority under the laws of the state or the United States, are subordinate, in the order of priority, to the debts enumerated in the preceding clauses of section 64b; that is, they follow (1) the cost of preserving the estate, (2) the filing fees, (3) the cost of administration, and (4) claims due for wages. *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 660; *In re Yoke Vitrefied Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *In re Pittsburgh Industrial Iron Works*, (W. D. Pa. 1909) 22 Am. Bankr. Rep. 851.

Priority as fixed by state statutes.—Section 64b (5) does not operate to place all preferred debts of the class therein provided for upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands of his trustee in the same relative rank and order in which they are fixed by the state statutes. *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437.

An unliquidated claim for damages for breach of a contract by receivers of a bankrupt is not entitled to priority as against antecedent liens against the estate. *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

Landlord's right to priority.—Whether or

not a landlord is entitled to priority for rent, as against his tenant's estate in bankruptcy, depends solely on the law of the state; the bankruptcy law does not expressly provide for such preference. But under section 64b (5), if the state law allows the landlord a priority over the creditors, such priority will be recognized and enforced in the bankruptcy court. *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Ruppel*, (W. D. Pa. 1899) 97 Fed. 778, 3 Am. Bankr. Rep. 233; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 558; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *McFarland Carriage Co. v. Solanes*, (E. D. La. 1901) 108 Fed. 532, 6 Am. Bankr. Rep. 221; *In re Hoover*, (W. D. Pa. 1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 3 Am. Bankr. Rep. 169; *In re Mitchell*, (D. C. Del. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 335; *In re Duble*, (M. D. Pa. 1902) 117 Fed. 795, 9 Am. Bankr. Rep. 121; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 328; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 264; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593, 16 Am. Bankr. Rep. 80; *In re Wheaton Restaurant Co.*, (E. D. Pa. 1906) 143 Fed. 921, 16 Am. Bankr. Rep. 294; *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289; *In re Morris*, (M. D. Pa. 1908) 159 Fed. 591; *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860; *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454; *In re Burns*, (S. D. Ga. 1909) 175 Fed. 633, 23 Am. Bankr. Rep. 640, explaining *In re D. H. Dougherty Co.*, (N. D. Ga. 1901) 109 Fed. 480; *In re Southern Co.*, (D. C. Md. 1904) 180 Fed. 838.

But if the landlord is not entitled to priority under the state law, he is not entitled to priority under the bankruptcy law. *In re Southern Co.*, (D. C. Md. 1904) 180 Fed. 838; *In re Chaudron*, (D. C. Md. 1910) 180 Fed. 841.

Order of priority. — The claim of the landlord is not entitled to payment prior to the debts specified in clauses (1), (2), (3), and (4) of section 64b. *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289.

Distress unnecessary. — Where a lease to a bankrupt contained a waiver of exemptions, and the landlord proved his claim for rent before the referee, it was held that he was entitled to receive such rent as a prior claim out of the proceeds of property from which the bankrupt claimed his exemption, and which was subject to distress for rent, though

the landlord made no levy either before or after the filing of the bankruptcy petition. *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

Rent to become due. — Where the landlord of a bankrupt has a lien on the property on the leased premises for "rent due and to become due" by the express terms of the lease, which is entitled to priority under the law of the state, such lien is enforceable against the trustee in bankruptcy. *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454.

Thus it has been held that where the lease expresses an intention to reserve the taxes assessed on the property as part of the rent, the landlord is entitled to the allowance of a claim for the whole amount of the rent due, including taxes as a secured claim. *McCann v. Evans*, (C. C. A. 3d Cir. 1911) 185 Fed. 93.

Property not subject to landlord's claim. — A landlord is not entitled to priority of payment of rent due from a bankrupt out of the proceeds of a license to the bankrupt to sell liquors upon the demised premises, such license not being property subject to execution or to distress under the laws of the state. *In re Myers*, (E. D. Pa. 1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536; *In re McFadgen*, (E. D. Pa. 1907) 156 Fed. 715, 19 Am. Bankr. Rep. 481, affirmed (C. C. A. 3d Cir. 1908) 161 Fed. 914, 20 Am. Bankr. Rep. 540.

Commingled property. — Where property of a bankrupt, a part of which was subject to a landlord's lien and a part not, was sold together in gross without objection, the proceeds cannot be apportioned, so as to entitle the landlord to priority of payment from any part thereof. *Vollmer v. McFadgen*, (C. C. A. 3d Cir. 1908) 161 Fed. 914, 20 Am. Bankr. Rep. 540, affirming (E. D. Pa. 1907) 156 Fed. 715.

A lessee who assigns his interest in his term has no right of distress unless such right is reserved in the assignment, and therefore is not entitled to priority in bankruptcy proceedings. *In re Bayley*, (W. D. Pa. 1908) 22 Am. Bankr. Rep. 249.

Priorities provided for in state insolvency laws. — The rule that the enactment of the federal Bankruptcy Act supercedes all state insolvency or bankruptcy laws relating to persons or acts declared to be subjects of bankruptcy applies merely to the administration of the state laws in proceedings in the state courts; and it does not prevent the enforcement, in federal bankruptcy proceedings, of general priorities recognized by such state laws as substantive rights, and which do not depend on the particular remedies accessible only in the state courts, and are not in conflict with the express priorities declared by the Bankruptcy Act. *In re Standard Oak Veneer Co.*, (E. D. Tenn. 1909) 173 Fed. 103, 22 Am. Bankr. Rep. 883. See also *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167.

Thus it has been held that costs incurred in an action against a bankrupt, prior to the bankruptcy, which would constitute a preferred claim, under the insolvency laws of the

state, are entitled to priority against the estate in bankruptcy. *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699.

Costs in attachment proceedings, if entitled to priority under the state law, will be so allowed in bankruptcy, notwithstanding the annulment of the lien. *In re Lewis*, (D. C. Mass. 1900) 99 Fed. 935, 4 Am. Bankr. Rep. 51; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *In re Iroquois Mach. Co.*, (D. C. R. I. 1909) 166 Fed. 629, 22 Am. Bankr. Rep. 183.

But in *In re The Copper King*, (N. D. Cal. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 148, it was held that attachment costs were not entitled to priority.

Priority under deed of assignment.—A general deed of assignment is so far avoided by an adjudication in bankruptcy as to defeat the right of any claim against the bankrupt's estate to the preferences given by such deed. But, so far as the assignee would be allowed for the payment of the preferences set out in the deed, such claims may be preferred in the right of the assignee. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1. See also *In re Mays*, (S. D. W. Va. 1902) 114 Fed. 600, 7 Am. Bankr. Rep. 764.

Equitable rights.—The bankruptcy law recognizes the equitable rights existing between the parties prior to the institution of the bankruptcy proceedings. *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844; *In re Ballantine*, (C. C. A. 3d Cir. 1911) 186 Fed. 91.

Thus where creditors of a bankrupt fail to insist upon a lien to which they were entitled, because they collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, they will be entitled to have such lien allowed in the bankruptcy court, where no one has changed his position on the faith of their waiver. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382.

And in *McKay v. Hamill*, (C. C. A. 3d Cir. 1911) 185 Fed. 11, it appears that the bankrupt (a corporation) organized the "S" corporation, in another state, to which it transferred all of its personal property in that state, taking all of the stock of the company at a nominal price. Thereafter the "S" company, to secure a debt due claimant, executed a deed of trust on such personal property, and, on the organizing corporation's becoming bankrupt, all of such property was treated as its own and sold as a part of its assets; and it was held that it was no objection to claimant's right to have its lien paid out of the proceeds of such property that he was not a creditor of the bankrupt but of the "S" company, the equity powers of the court being sufficient to authorize it to regard the lien as an incumbrance following the property.

Misappropriation by bankrupt.—Where a bankrupt improperly mingled funds belonging to its principal with its own funds, and it was not shown that the trust funds, either in their original or a substituted form, came into the hands of the bankrupt's trustee, it was held that the principal was not entitled to a prior right of payment therefor. *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653.

The federal decisions control in the determination of equitable rights. *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653.

State may claim priority.—A state is a person, and, under section 64b (5), is entitled to priority for a debt due it from the estate of a bankrupt which is given priority by its own laws. *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167. But see the following paragraph.

Priority provided for decedent's estates.—Where, pending bankruptcy proceedings, the bankrupt dies, his estate is distributable according to the bankruptcy law, and not according to the state statutes of distribution; so that the state is not entitled to a preference in the payment of its claims by virtue of a statute providing therefor in such cases. *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170.

c [After composition set aside or discharge revoked.] In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. [(1898) 30 Stat. L. 563.]

Cross-references: As to

Revocation of discharge, see section 15, *supra*, p. 568.

Setting aside composition, see section 13, *supra*, p. 546.

Title of trustee as affected by revocation of discharge or setting aside composition.

Title of trustee as affected by revocation of discharge or setting aside composition, see section 70d, *infra*, p. 843.

SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS. — *a* [On allowed claims.] Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured. [(1898) 30 Stat. L. 563.]

Cross-references: As to

Trustee's duty to pay dividends, see section 47a (9), *supra*, p. 686.

Unclaimed dividends, see section 66a and b, *infra*, p. 783.

"Dividend" defined. — A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion. *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306.

While it is true that the word "dividend," as commonly used, seems to be so almost inseparably associated with the idea of a percentage of the claim itself, that the proper significance of the term is readily lost sight of, it must be remembered that a dividend is not an aliquot portion of the claim, but an aliquot portion of the estate against which the claim is made. *In re Gerson*, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 355.

Secured and priority creditors are not entitled to participate in the distribution of dividends under section 65a. *In re Ft. Wayne Electric Corp.*, (D. C. Ind. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 706; *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135; *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Sabine*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 322; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344.

Thus it has been held that a creditor holding a mortgage on exempt property cannot receive a dividend on his entire claim, and resort to the security only to satisfy a balance unpaid. *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720.

The term "dividends" can have no application to priority claims, for the reason that the statute directs them to be paid out of the estate in full, *seriatim*, before the matter of declaring and paying dividends arises. *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135.

While a secured creditor may ordinarily collect his debt by foreclosure or sale, as if no bankruptcy were pending, yet if, without his request, and solely to realize a surplus for other creditors, the court directs the sale of the property discharged from the incum-

brance, his rights must be conserved; and the satisfaction of his secured debt from the proceeds of such sale may not be regarded as a dividend, nor charged with commission. *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306. See also *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383.

Dividends not subject to attachment. — The law is well settled that the dividends in the hands of a trustee in bankruptcy are not subject to attachment. *In re Hollander*, (D. C. Md. 1910) 181 Fed. 1019.

And see *In re Kranich*, (E. D. Pa. 1910) 182 Fed. 849, wherein it appears that funds in the hands of the trustee were attached, and that an objection was interposed by a creditor, but the trustee did not object, and McPherson, J., said: "The garnishee is an officer of this court, and has more than enough money in his hands to satisfy the judgment; and, while the state tribunal could not compel him to pay over the money, he himself has made no objection either to the judgment or to the order that is now asked for by the creditor. Under such circumstances I see no reason why this court should not pay due respect to a tribunal of the state, and recognize a claim that has thus been conclusively proved — although I repeat that the allowance must be accepted as purely *ex gratia*."

A ruling of the state court permitting the garnishment of dividends, after they have been declared, by an officer of the state court as a receiver, administrator, or trustee, cannot affect the administration by a federal court of an estate in bankruptcy. *In re Argonaut Shoe Co.*, (C. C. A. 9th Cir. 1911) 187 Fed. 784.

Effect of failure to prove claims. — In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts, and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property, whether the debtor likes it or not, and the debtor is released whether the creditor likes it or not. The bankrupt's right of property arises only in the event of a payment of his creditors in full. If a creditor will not prove his claim the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

b [First and subsequent dividends.] The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of

such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: [(1898) 30 Stat. L. 563; (1903) 32 Stat. L. 800.]

Equality essential.—Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt *pro rata* among his creditors. *Atchison, etc., R. Co. v. Hurley*, (8th Cir. 1907) 153 Fed. 503, 508, 82 C. C. A. 453; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542.

Claims enjoying the first dividend are not allowed to share in the second distribution until those that were credited with no part of the first dividend shall have been paid a sum equal in amount to that received by other creditors. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

The referee should withhold from distribution, upon the declaration of dividends, sufficient funds to recover all the expenses of administration and priorities, and claims that will probably be allowed. This includes those claims concerning which he has information such as justifies him in the conclusion that they will be allowed when presented. With these exceptions he should devote the whole sum in the hands of the trustee to the dividend. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

Partial dividends.—*In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662, it was said: "Partial dividends are authorized and required within thirty days

after the adjudication, if the money of the estate in excess of the amount of claims which have priority, and such claims as have not been but probably will be allowed, equals five per centum of the claims that are entitled to dividends. The only way in which this can be determined by the referee is by an examination of the schedules of liabilities filed by the bankrupt. Other dividends are required to be declared upon like terms, and as often as the amount of assets equals ten per centum or more of those claims, and also upon the closing of the estate."

Exceptions to distribution.—Exceptions to a proposed distribution of a bankrupt estate must be filed before the final decree of confirmation is entered; and exceptions, and a petition for review based thereon, not filed until after such confirmation and after the final dividend has been distributed in accordance therewith, will not be considered. *In re Heebner*, (E. D. Pa. 1904) 132 Fed. 1003, 13 Am. Bankr. Rep. 256.

Dividend cannot be set aside.—A dividend in bankruptcy, once declared and paid, cannot be set aside, notwithstanding it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

[*Amount of first dividend.*] *Provided*, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: [(*Inserted 1903*) 32 Stat. L. 800.]

[*Declaration of final dividend.*] *And provided further*, That the final dividend shall not be declared within three months after the first dividend shall be declared. [(*Inserted 1903*) 32 Stat. L. 800.]

Final dividends.—Where all the known assets of a bankrupt estate have been collected and reduced to money, a final dividend may be declared at any time after the expiration of three months from the declaration of the first dividend; and any creditor who has not then proved his claim is debarred from participating in the fund. *In re Bell Piano Co.*, (S. D. N. Y. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183, *following In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

It is the duty of the courts to close estates as soon as practicable. *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

Where a bankrupt's estate is ready for final dividend, it may be closed at any time after four months from the adjudication, on notice to all persons scheduled or appearing in any way in the proceedings as creditors. *In re Eldred*, (E. D. N. Y. 1907) 155 Fed. 686, 19 Am. Bankr. Rep. 52.

c [*Claims subsequent to payment of dividends.*] The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors prov-

ing and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. [(1898) 30 Stat. L. 564.]

Effect of subsequent proof and allowance of claims.—It was evidently contemplated by Congress that claims might be proved after dividends had been declared and paid, and that creditors who had been negligent in proving their claims should thereupon take their chances of obtaining an equal distribution with those creditors who had been more diligent. *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

Effect of laches.—One claiming the right to participate in the distribution of the bankrupt's estate may be barred by laches; thus standing silently by while the trustee pays out all the funds in dividends will preclude a claimant even though, before that time, he could have shown an equitable right to the fund or some part thereof. *Clafin Dry Goods Co. v. Eason*, (E. D. Tex.) 2 Am. Bankr. Rep. 263.

d [Where persons adjudged bankrupt without United States.] Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts. [(1898) 30 Stat. L. 564.]

e [Limit to amount collectible by claimant.] A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act. [(1898) 30 Stat. L. 564.]

SEC. 66. UNCLAIMED DIVIDENDS. — *a* [Payment into court.] Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. [(1898) 30 Stat. L. 564.]

Cross-reference: As to

Dividends generally, see section 65, *supra*, p. 781.

b [Distribution after one year.] Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends. [(1898) 30 Stat. L. 564.]

Purpose of section 66.—*In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135, it was said: "To those familiar with the incidents following the administration of the Bankrupt Act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that Act elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository, remained uncalled for by the distributees for a great number of years; and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned

fund, in equity, should either be distributed *pro rata* among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a *casus omissus* of the Bankrupt Act, which section 66 of the Act of 1898 sought to remedy. Its phraseology strengthens the argument that the term 'dividends' employed in this statute pertains solely to the fund to be distributed *pro rata* among the general creditors. The uncalled-for dividends are to 'be distributed to the creditors whose claims have been allowed, but not paid in full,' etc. As no dividends could arise until after the claims entitled to priority have been paid in full, 'the creditors whose claims have been allowed, but not paid in full' are clearly the general creditors."

SEC. 67. LIENS. — *a* [Claims not valid liens.] Claims which for want of record or for other reasons would not have been valid liens as against the claims

of the creditors of the bankrupt shall not be liens against his estate. [(1898) 30 Stat. L. 564.]

Validity determined by state law.—The decisions all agree that the validity of an alleged lien, attacked as ineffective under section 67a, is to be determined in accordance with the law of the state, whether statutory or existing by force of well-settled principles. Therefore, if an alleged lien be invalid as to creditors under the law of the state, either for want of recording or for any other reason, it will also be invalid as against the trustee in bankruptcy; but if, on the other hand, the transaction is one recognized as valid as against creditors under the state statutes and decisions, its validity will be equally recognized and enforced in bankruptcy proceedings. *In re Booth*, (D. C. Ore. 1900) 98 Fed. 975, 3 Am. Bankr. Rep. 574; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615; *In re Tatem*, (E. D. N. C. 1901) 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re Sewell*, (E. D. Ky.) 111 Fed. 791, 7 Am. Bankr. Rep. 133; *In re Shirley*, (C. C. A. 6th Cir. 1901) 112 Fed. 301, 7 Am. Bankr. Rep. 299; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *Duplan Silk Co. v. Spencer*, (C. C. A. 3d Cir. 1902) 115 Fed. 689, 8 Am. Bankr. Rep. 367; *In re Hull*, (D. C. Vt. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302; *In re Josephson*, (W. D. Ga. 1902) 116 Fed. 404, 8 Am. Bankr. Rep. 423; *In re H. G. Andrae Co.*, (E. D. Wis. 1902) 117 Fed. 561, 9 Am. Bankr. Rep. 135; *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249, 10 Am. Bankr. Rep. 359; *In re Gosch*, (C. C. A. 5th Cir. 1903) 126 Fed. 627, 12 Am. Bankr. Rep. 149; *In re Beede*, (N. D. N. Y. 1903) 126 Fed. 853, 11 Am. Bankr. Rep. 387; *In re Lukens*, (E. D. Pa. 1905) 138 Fed. 188, 14 Am. Bankr. Rep. 683; *Rogers v. Page*, (6th Cir. 1905) 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Doran*, (W. D. Ky. 1906) 148 Fed. 327; *Hanson v. Blake*, (D. C. Me. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; *American Wood Working Machinery Co. v. Norment*, (C. C. A. 4th Cir. 1907) 157 Fed. 801, 19 Am. Bankr. Rep. 679; *Pontiac Buggy Co. v. Skinner*, (N. D. N. Y. 1908) 158 Fed. 858, 20 Am. Bankr. Rep. 206; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Claussen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; *Walther v. Williams Mercantile Co.*, (C. C. A. 6th Cir. 1909) 169 Fed. 270, 22 Am. Bankr. Rep. 328; *Walter A. Wood Co. v. Eubanks*,

(C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Corbitt Buggy Co. v. Ricand*, (C. C. A. 4th Cir. 1909) 169 Fed. 935, 22 Am. Bankr. Rep. 316; *In re Braselton*, (N. D. Ga. 1909) 169 Fed. 960, 22 Am. Bankr. Rep. 419; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Bement*, (C. C. A. 7th Cir. 1909) 172 Fed. 98; *In re McDonald*, (D. C. Mass. 1908) 173 Fed. 99, 23 Am. Bankr. Rep. 51; *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151; *In re Southern Textile Co.*, (C. C. A. 2d Cir. 1909) 174 Fed. 523, 23 Am. Bankr. Rep. 172; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Bailey*, (D. C. S. C. 1910) 176 Fed. 628, 23 Am. Bankr. Rep. 876; *In re Schmidt*, (C. C. A. 2d Cir. 1910) 181 Fed. 73; *In re Duggan*, (S. D. Ga. 1910) 182 Fed. 252; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1.

See also the cases cited under the following subdivisions of this section. Valid liens are considered under subdivision d, p. 786, while void and fraudulent liens generally are discussed under subdivision e, p. 792, and liens obtained through legal proceedings are treated under subdivisions c, p. 785, and f, p. 797.

It has been held that a chattel mortgage, unfiled for a term of five years, is void as against the creditors of a mortgagor whose claims accrued prior to such filing; and although such creditors cannot, under the general rule, attack it until after the recovery of a judgment and issue of an execution, this rule is simply one of procedure and does not affect the right; and, therefore, where the recovery of a judgment is impracticable it is not an indispensable requisite to enforcing the rights of the creditor; hence a trustee in bankruptcy may, for the benefit of creditors, attack such a mortgage, though if a creditor seeks that relief in his own name it would be necessary that his claim be first put in judgment. *Skilton v. Codington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

Notwithstanding the fact that an unfiled chattel mortgage is valid as between the parties, and that a trustee in bankruptcy succeeds only to the rights of his bankrupt, he is not thereby precluded from attacking a mortgage made by his bankrupt for default in filing. *Skilton v. Codington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

b [Trustee subrogated to rights of creditor.] Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate. [(1898) 30 Stat. L. 564.]

Cross-reference: As to

Right of trustee to avoid fraudulent transactions which, prior to bankruptcy, the creditors might have avoided, see section 70e, *infra*, p. 844.

Trustee subrogated to creditor's rights.—

Section 67b is designed to subrogate the trustee to the rights of creditors, as against liens or transfers which exist at the time of the bankruptcy, but it vests him with no additional rights. *Thompson v. Fairbanks*, (1905) 196 U. S. 522, 25 S. Ct. 306, 49 U. S. (L. ed.) 578, 13 Am. Bankr. Rep. 437; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 642; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615; *In re Sentenne, etc., Co.*, (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Rodgers*, (C. C. A. 7th Cir. 1903) 125 Fed. 169, 11 Am. Bankr. Rep. 79, *reversed* on other grounds (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *In re Baird*, (W. D. Va. 1904) 126 Fed. 845, 11 Am. Bankr. Rep. 435; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382, 389; *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467, 18 Am. Bankr. Rep. 760, *modifying* (W. D. Ky. 1906) 17 Am. Bankr. Rep. 799; *Matter of Gerstman*, (S. D. N. Y. 1906) 17 Am. Bankr. Rep. 882.

The statute does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act, like all preceding Bankrupt Acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee in certain cases is subrogated to the rights of that creditor. *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615.

Liens may be enforced, but not created.—The bankruptcy law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication. *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338.

Creditor's bill not abated.—Section 67b does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun; nor does it abate the creditor's right to prosecute such suit. *Taylor v. Taylor*, (1900) 59 N. J. Eq. 86, 45 Atl. 440.

c [Certain liens dissolved.] A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if [(1898) 30 Stat. L. 564.]

Cross-references: As to

Liens obtained through legal proceedings generally, see subdivision f of this section, *infra*, p. 797.

Liens as preferences, see section 60a and b, *supra*, p. 729 *et seq.*

In so far as section 67c is in conflict with section 67f, the former is doubtless superseded by the latter section. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. And see *infra*, subdivision f of this section.

And it has been held that subdivision c is destroyed by subdivision-f of section 67. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

Existing liens only contemplated.—Subdivisions c and f of this section refer only to existing liens created by legal proceedings,

and are not applicable to a case in which such a lien has become merged into a title by the consummation of an execution sale. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

Execution on pre-existing judgment.—Section 67c does not affect the lien of an execution issued and levied within the four months, but founded on a judgment recovered two years before. *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715. And see *infra*, this section, subdivision f, wherein this subject is fully considered.

Attachment under mesne process.—Where, under the state law, a plaintiff attaching under mesne process obtains a lien, though he has obtained no judgment, such lien is entitled to recognition in bankruptcy proceedings. *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

(1) [Defendant insolvent.] it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or [(1898) 30 Stat. L. 564.]

Cross-reference: As to

What constitutes insolvency, see section 1a (15), *supra*, p. 465.

The defendant "permits" the creditor to obtain a lien if he suffers grounds for an attachment to arise and does not in good faith prevent or resist the creditor's proceedings;

and it is not necessary that there should have been, on the part of the defendant, any positive act of consent or assistance in its procurement. *In re Arnold*, (D. C. Ky. 1899) 94 Fed. 1001, 2 Am. Bankr. Rep. 180. And see, *infra*, the annotation under subdivision f of this section.

(2) [*Knowledge of insolvency.*] the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or [(1898) 30 Stat. L. 564.]

(3) [*Fraud — trustee subrogated.*] that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened. [(1898) 30 Stat. L. 564.]

Section 67c refers to a lien obtained in a proceeding at law or in equity for the benefit, not of the bankrupt's creditors in general, but of one or more creditors less than all of them. The words "such lien," in the second sentence of 67c, refer to any "lien created by or obtained in or pursuant to any suit or proceeding at law or in equity," mentioned at the beginning of the section, and not merely to a lien described by the language of clause 1, clause 2, or clause 3. It is not the intent of the section to dissolve a lien where its retention will benefit the general body of the bankrupt's creditors. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187.

Lien permitted in fraud. — A lien obtained by a foreign creditor of a bankrupt within four months prior to the bankruptcy, and while the bankrupt was solvent, on property of the debtor in a foreign country through judicial proceedings in the nature of an at-

tachment, which were not opposed, is one sought and permitted in fraud of the provisions of the Act within the meaning of section 67c (3); and where the creditor realizes therefrom payment of a portion of his debt he is not entitled to prove the remainder as a claim against the estate in bankruptcy in this country without surrendering the amount so received so as to place him on equitable equality with other creditors. *In re Pollmann*, (S. D. N. Y. 1907) 156 Fed. 221, 19 Am. Bankr. Rep. 474.

Preservation of liens. — Liens preserved under section 67 b, c, and f, are thereby rendered inoperative as a preference, but are retained in favor of the trustee that the liens may be distributed among the whole body of creditors. *Reardon v. Rock Island Plow Co.*, (C. C. A. 7th Cir. 1909) 168 Fed. 654, 22 Am. Bankr. Rep. 66; *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187.

d [*Liens given in good faith.*] Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act. [(Amended 1910) 36 Stat. L. 842.]

Cross-reference: As to

Priority of liens and other claims under state and federal laws, see section 64b (5), *supra*, p. 777.

The amendment of June 25, 1910, inserted the words "to the extent of such present consideration only." That is, the security that a creditor has obtained to the extent of the original consideration shall not be affected. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

Valid liens remain undisturbed. — Section 67d, set out above, is clearly in line with the other provisions of the statute which regu-

lates the vesting of title in the trustee. Thus under section 70a (see note, *infra*, p. 811) it has been held that the trustee in bankruptcy takes no better title than the bankrupt had as to *bona fide* lienors; in other words, that the trustee stands in the shoes of the bankrupt in the absence of fraud. And under section 70e (see note, *infra*, p. 844) the trustee is vested with power to avoid any transfer which includes liens fraudulent as to creditors; but in all instances *bona fide* transactions are protected. Therefore it has been held, under section 67d, and in accordance with the language thereof, that liens given

and accepted in good faith, and not in contemplation of or in fraud of the provisions of the statute, and for a present consideration, and which are valid under the laws of the state, as to recording and otherwise, shall be deemed valid and enforceable in bankruptcy proceedings. *Hiscock v. Varick Bank*, (1907) 206 U. S. 23, 27 S. Ct. 681, 51 U. S. (L. ed.) 945, 18 Am. Bankr. Rep. 9; *In re Wright*, (N. D. Ga. 1899) 96 Fed. 187, 2 Am. Bankr. Rep. 366; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 555; *In re Lowensohn*, (S. D. N. Y. 1900) 100 Fed. 776, 4 Am. Bankr. Rep. 29; *Greenville City Nat. Bank v. Bruce*, (C. C. A. 4th Cir. 1901) 109 Fed. 69, 6 Am. Bankr. Rep. 312; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *In re Gerry*, (E. D. Pa. 1902) 112 Fed. 957, 7 Am. Bankr. Rep. 459; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Soudan Mfg. Co.*, (C. C. A. 7th Cir. 1902) 113 Fed. 804, 8 Am. Bankr. Rep. 45; *In re Klapholz*, (E. D. Pa. 1902) 113 Fed. 1002, 7 Am. Bankr. Rep. 703; *In re Standard Laundry Co.*, (C. C. A. 9th Cir. 1902) 116 Fed. 476, 8 Am. Bankr. Rep. 538; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *Davis v. Turner*, (C. C. A. 4th Cir. 1903) 120 Fed. 605, 9 Am. Bankr. Rep. 716; *Farmers' Bank v. Carr*, (C. C. A. 4th Cir. 1904) 127 Fed. 690; 11 Am. Bankr. Rep. 733; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 233; *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; *Savage v. Savage*, (4th Cir. 1905) 141 Fed. 346, 72 C. A. 494, 15 Am. Bankr. Rep. 599; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *Roberts v. Johnson*, (C. C. A. 4th Cir. 1907) 151 Fed. 567, 18 Am. Bankr. Rep. 135; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *National Bank of Commerce v. Williams*, (C. C. A. 5th Cir. 1907) 159 Fed. 615, 20 Am. Bankr. Rep. 79; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *In re Yoke Vitrified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671; *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703; *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579; *In re Times Pub. Co.*, (E. D. Pa. 1910) 183 Fed. 603; *In re Forse*, (N. D. N. Y. 1910) 184 Fed. 85; *In re Milne*, (C. C. A. 2d Cir. 1910) 185 Fed. 244; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Brown*, (E. D. Pa. 1900) 5 Am. Bankr. Rep. 221; *In re Alverson*, (D. C. S. C. 1900) 5 Am. Bankr. Rep. 855; *Harvey v. Smith*, (Mass. 1901) 7 Am. Bankr. Rep. 497; *In re Soudans Mfg. Co.*, (C. C. A. 7th Cir. 1902) 8 Am. Bankr. Rep. 45; *Evans v. Rounsaville*,

(Ga. 1902) 8 Am. Bankr. Rep. 236; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329.

Statute protects vigilant creditors.—It is self-evident that Congress intended by using the words "shall . . . not be affected by this Act" that a vigilant creditor should not be affected; that is, should not be injured by bankruptcy proceedings. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

The security given for a present loan is not avoided by the fact that it actually hinders or delays creditors by the withdrawal of the security from application to the payment of their claims, unless it was given with an actual intent to defraud such creditors and the recipient had actual or legal notice of that purpose. Actual fraud in which the recipient of the lien or security participates is indispensable to the avoidance of a transaction of this nature. *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609.

Lienor not party to bankruptcy proceedings.—The taking possession of the property of a bankrupt by the bankruptcy court does not operate as a caveat or sequestration of property owned by the bankrupt subject to valid liens, so as to make the holder of the lien a party to the proceedings. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Thus it has been held that lienholders, unless they surrender their securities and prove their claims, are strangers to the bankruptcy proceedings, and are entitled to have their property rights adjudicated by the courts of the state in which such property is situated. *Hicks v. Knost*, (1900) 178 U. S. 541, 20 S. Ct. 1006, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178 note; *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346.

Validity of lien determined in bankruptcy proceedings on property in possession of court.—But where property belonging to a bankrupt, subject to valid liens, has been taken possession of by the bankruptcy court, the lien creditor cannot interfere therewith or maintain replevin against the receiver or trustee; but the lienor may petition the bankruptcy court for payment of the amount of his debt, in which case the court will have jurisdiction to determine the validity of the lien. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Proceedings to enforce valid liens.—Where a valid lien has been secured more than four months prior to bankruptcy, proceedings to enforce the same do not conflict with the bankruptcy law, and may be instituted and prosecuted to the end, if that is requisite. *In re Koslowski*, (M. D. Pa. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 727. And see to the same effect, *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35.

Valid lien not lost by taking preferential mortgage.—Where a township was entitled

to a preferential lien on a bankrupt's stock, arising out of the bankrupt's misappropriation of township funds, which he had used to replenish the stock, it was held that the township's lien was not lost by the taking of a mortgage on the stock which was unenforceable as a preference. *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

The state law governs as to the validity of liens asserted thereunder; providing, of course, that there has been no fraud or preferential transfer in contemplation of bankruptcy within the four months period. *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62, 14 Am. Bankr. Rep. 180; *Mott v. Wissler Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *Reardon v. Rock Island Plow Co.*, (C. C. A. 7th Cir. 1909) 168 Fed. 654, 22 Am. Bankr. Rep. 26; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

Section 67d is designed to save and protect from the operation of the Bankruptcy Act liens that are valid under the state law. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same as required by such statute. *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218.

In *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508, it was said that "it would be most unfortunate to have a conflict of decision between the state courts and the courts of bankruptcy in respect to the meaning and effect of a statute affecting the titles to real estate, and if this situation can be averted by following the decision of the highest court of the state which settles the previously doubtful question of statutory construction, this court ought not to refuse, even though that decision may seem to us to be illogical and inconsistent with the previous decisions of that court."

Chattel mortgages.—In absence of fraud (see sec. 67e, *infra*, p. 792) or preferential transfer (see sec. 60a and b, *supra*, p. 729), the validity of a chattel mortgage is to be determined in accordance with the law of the state; and if under the state statutes and decisions a mortgage is good as against creditors, it will be considered effective as against the trustee in bankruptcy of the mortgagor; on the other hand, if under the laws of the state such mortgage is invalid as to creditors, either because of failure to record the same or for any other reason, it may be attacked by the

trustee in bankruptcy because of such invalidity. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 437; *Humphrey v. Tatman*, (1905) 198 U. S. 91, 25 S. Ct. 567, 49 U. S. (L. ed.) 956, 14 Am. Bankr. Rep. 74; *In re Soudan Mfg. Co.*, (7th Cir. 1902) 113 Fed. 804, 51 C. C. A. 476; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *In re Sentenne, etc., Co.*, (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Williams*, (W. D. Ga. 1903) 120 Fed. 542, 9 Am. Bankr. Rep. 731; *Davis v. Turner*, (C. C. A. 4th Cir. 1903) 120 Fed. 605, 9 Am. Bankr. Rep. 704; *In re Ball*, (D. C. Vt. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564; *In re Beede*, (N. D. N. Y. 1903) 126 Fed. 853, 11 Am. Bankr. Rep. 387; *In re Rogers*, (D. C. Vt. 1904) 132 Fed. 560, 13 Am. Bankr. Rep. 75; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 302; *In re Adamant Plaster Co.*, (N. D. N. Y. 1905) 137 Fed. 251, 14 Am. Bankr. Rep. 815; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re National Valve Co.*, (N. D. Ohio 1905) 140 Fed. 679, 15 Am. Bankr. Rep. 524; *In re Burnham*, (W. D. N. Y. 1905) 140 Fed. 926, 15 Am. Bankr. Rep. 548; *In re Marine Constr., etc., Co.*, (C. C. A. 2d Cir. 1906) 144 Fed. 649, 16 Am. Bankr. Rep. 325; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Davis*, (E. D. N. Y. 1907) 155 Fed. 671, 19 Am. Bankr. Rep. 98; *In re McKane*, (E. D. N. Y. 1907) 168 Fed. 647, 18 Am. Bankr. Rep. 594; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758; *In re Beeg*, (E. D. Pa. 1911) 184 Fed. 522; *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329; *In re Birck*, (C. C. A. 7th Cir. 1905) 15 Am. Bankr. Rep. 694; *Zartman v. Waterloo First Nat. Bank*, (1905) 16 Am. Bankr. Rep. 152, 109 App. Div. 406, 96 N. Y. S. 633; *In re Alden*, (N. D. Ohio 1905) 16 Am. Bankr. Rep. 362.

Proceeds of mortgage used to pay debts.—The fact that a mortgagee to whom a bankrupt gave a mortgage for a present consideration within four months prior to his bankruptcy knew that the proceeds were to be used to pay debts, does not impeach his good faith, nor render the mortgage void, unless he also knew, or had reasonable cause to believe, that the borrower was insolvent. *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758.

A chattel mortgage given by an insolvent firm, in good faith within four months prior to its bankruptcy, is not void under the Bankruptcy Act, where it was given for a present loan of money which was used in paying debts of the firm, and was duly re-

corded so as to become effective prior to the bankruptcy, but is expressly protected by section 67d. *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704.

A chattel mortgagor's mere inability to pay debts does not invalidate a chattel mortgage given for a present valid consideration advanced by a mortgagee having no reason to know that a fraud will be thereby committed. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

Mortgage valid as to creditors precludes trustee.—Where a chattel mortgage on a bankrupt's personalty was not fraudulent as to the bankrupt, and there were no creditors in a position to set the same aside, it was held that the bankrupt's trustee could not attack the right of the mortgagee in possession at the time of the adjudication on the ground that the mortgage was fraudulent. *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673.

Consideration going into estate.—A chattel mortgage given upon the payment of cash which goes into the hands of the bankrupt and is used for the purposes of his estate, and of which his creditors have the benefit, is a valid mortgage, even if made within four months prior to the filing of the petition, if no actual fraud be shown. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

Renewal mortgage.—Where a valid mortgage was given as security for a present loan, the fact that a new mortgage on the same property, given within four months prior to the mortgagor's bankruptcy, was made to secure a renewal of the loan, does not render such mortgage voidable. *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751.

Validity confined to present consideration.—It has been held that a mortgage, given within four months of an adjudication in bankruptcy, to secure a pre-existing debt and a cash consideration, is void as a preference to the extent of the prior indebtedness, and valid only for the present cash consideration. *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 857, 6 Am. Bankr. Rep. 384.

Where a defectively executed mortgage, under the local law, amounts to no more than an agreement to give a lien, and the property covered thereby passes into the hands of a trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee takes it in the plight in which it then stood; and in such case the title remains in the bankrupt, but there is an outstanding equity in the mortgagee. *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 1.

Effect of bankruptcy on enforcement of mortgage.—The provision of the Bankruptcy Act that a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and ade-

quate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

Bona fides presents question of fact.—The knowledge of the mortgagee as to the fraudulent intent of the bankrupt, as derived from knowledge of his financial condition, is a question of fact. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

Where a bankrupt's trustee claimed that a chattel mortgagee was not entitled to property of the bankrupt acquired subsequent to the execution of the mortgage, it was held that the burden was on the trustee to show what property, if any, of that seized and sold by the mortgagee was acquired after the execution of the mortgage. *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673.

In re Soudan Mfg. Co., (7th Cir. 1902) 113 Fed. 804, 51 C. C. A. 476, it was held that under section 67d of the Bankruptcy Act the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice of his financial condition by the mortgagee, actual or constructive; but to invalidate such a mortgage it must be shown that the borrower was insolvent, that the purpose of the loan was to accomplish an unlawful preference or otherwise violate the Act, and that the lender knew or was chargeable with knowledge of both of such facts.

Mechanics' and kindred liens.—Under the statutes of practically every state it is provided that mechanics, contractors, sub-contractors, laborers, materialmen, and the like, shall be entitled to a preferential lien for labor or material supplied in and about the erection of buildings or the conducting of mercantile pursuits; and such liens, where valid under the law of the state wherein they are claimed, will be considered of equal validity under the bankruptcy law; but if, under the law of the state, a lien of this character would be ineffective as to creditors, such ineffectiveness will continue in bankruptcy proceedings as against the trustee of the person against whom the lien is claimed. *In re Kerby-Dennis Co.*, (C. C. A. 7th Cir. 1899) 95 Fed. 116, 2 Am. Bankr. Rep. 402; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *In re Georgia Handle Co.*, (C. C. A. 5th Cir. 1901) 109 Fed. 632, 6 Am. Bankr. Rep. 472; *In re Oconee Milling Co.*, (C. C. A. 5th Cir. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 475; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *George Carroll, etc., Co. v. Young*, (C.

C. A. 3d Cir. 1903) 119 Fed. 576, 9 Am. Bankr. Rep. 645; *In re Roeber*, (C. C. A. 2d Cir. 1902) 121 Fed. 449, 9 Am. Bankr. Rep. 303 (decided under New York statute); *In re Goach*, (C. C. A. 5th Cir. 1903) 126 Fed. 627, 9 Am. Bankr. Rep. 610; *In re Lillington Lumber Co.*, (E. D. N. C. 1904) 132 Fed. 886, 13 Am. Bankr. Rep. 153; *Mott v. Wissler Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *Browder v. Hill*, (C. C. A. 6th Cir. 1905) 136 Fed. 821, 14 Am. Bankr. Rep. 619; *In re Hobbs*, (N. D. W. Va. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Starks-Ullman Saddlery Co.*, (C. C. A. 6th Cir. 1909) 171 Fed. 834, 22 Am. Bankr. Rep. 596; *In re Huston*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 95; *John P. Kane Co. v. Kinney*, (1903) 9 Am. Bankr. Rep. 778 note, 174 N. Y. 69, 66 N. E. 619; *Howard v. Cunliff*, (1902) 10 Am. Bankr. Rep. 71, 98 Mo. App. 67, 69 S. W. 737; *Crane Co. v. Smythe*, (1904) 11 Am. Bankr. Rep. 747, 94 App. Div. 53, 87 N. Y. S. 917; *Fehling v. Goings*, (1904) 13 Am. Bankr. Rep. 154, 67 N. J. Eq. 375, 58 Atl. 642; *In re Cramond*, (N. D. N. Y. 1906) 17 Am. Bankr. Rep. 22; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69; *Pike Bros. Lumber Co. v. Mitchell*, (1909) 132 Ga. 675, 64 S. E. 998, 26 L. R. A. N. S. 409.

Mechanics' liens are not created or obtained through legal proceedings, either according to the strict definition or in the ordinary meaning of the term. The filing of notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. The filing is essential in order to maintain the action to foreclose the lien, because otherwise the lien does not attach; but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. It is a proceeding of the same kind as filing a chattel mortgage or recording a deed. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126. See also *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508.

Landlord's liens.—The lien or preference given to a landlord under the law of the state will be, under section 67d, recognized and enforced in bankruptcy proceedings. *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 558; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re D. H. Dougherty Co.*, (N. D. Ga. 1901) 109 Fed. 480, 6 Am. Bankr. Rep. 457; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Mitchell*, (D. C. Del. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 324; *Keyser v. Wessel*, (C. C. A. 3d Cir. 1904) 128 Fed. 281, 12 Am. Bankr. Rep. 126; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr.

Rep. 264; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635; *In re Robinson*, (C. C. A. 7th Cir. 1907) 154 Fed. 343, 18 Am. Bankr. Rep. 563; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289, reversing (C. C. A. 3d Cir. 1908) 20 Am. Bankr. Rep. 660; *In re DeLancey Stables Co.*, (E. D. Pa. 1909) 170 Fed. 860, 22 Am. Bankr. Rep. 406; *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454; *In re Potee Brick Co.*, (D. C. Md. 1910) 179 Fed. 525; *In re Gerson*, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 170; *In re Goldstein*, (W. D. Pa.) 2 Am. Bankr. Rep. 603; *In re Byrne*, (S. D. Ia. 1899) 3 Am. Bankr. Rep. 268; *McFarland Carriage Co. v. Solanas*, (E. D. La. 1901) 6 Am. Bankr. Rep. 221; *In re Hoover*, (D. C. Pa. 1902) 7 Am. Bankr. Rep. 330; *In re McIntyre*, (N. D. W. Va. 1906) 16 Am. Bankr. Rep. 80.

An adjudication in bankruptcy does not terminate a lease or change the legal relation of landlord and tenant, unless the landlord re-enters, or the trustee assumes the lease, in which event the adjudication operates like any other assignment and all liability of the tenant ceases. *Witthaus v. Zimmerman*, (1904) 11 Am. Bankr. Rep. 314, 91 App. Div. 202, 86 N. Y. S. 315. And see the annotation, *infra*, p. 833, under section 70a (5), IX.

Property subject to lien cannot be removed.—Where a bankrupt is indebted to his landlord for rent, neither the bankrupt nor his trustee may remove from the rented premises such fixtures, placed thereon by the bankrupt, as are annexed to the freehold, without paying the rent due. *In re Potee Brick Co.*, (D. C. Md. 1910) 179 Fed. 525.

Unaccrued rent.—In some jurisdictions a landlord is given a lien for rent, whether accrued or not, on the tenant's goods carried on the premises. *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593, 16 Am. Bankr. Rep. 85.

Landlord must proceed in bankruptcy court.—On an adjudication of bankruptcy against a tenant the latter's property is in *custodia legis*; the landlord, being thereupon precluded from enforcing his rent claim by distress, is only entitled to proceed against the trustee in the bankruptcy court. *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635.

Sale in bulk.—Where a bankrupt's property was sold in bulk without objection by his landlord, so that it was impossible to determine the proportional value of the property covered by the landlord's lien, it was held to be proper to refuse to pay the rent in full out of the proceeds of the sale. *Keyser v. Wessel*, (C. C. A. 3d Cir. 1904) 128 Fed. 281, 12 Am. Bankr. Rep. 126.

Rents collected by a trustee from property of a bankrupt which is subject to valid liens belongs to the lienholders and not to the general estate. *In re Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207.

Pledges.—The rights of a pledgee in respect to his lien are not affected by the adjudication of bankruptcy of the pledgor or the appointment of his trustee. *In re Mayer*, (C. C. A. 2d Cir. 1907) 157 Fed. 836, 19 Am. Bankr. Rep. 356; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844; *Christ v. Zehner*, (1905) 16 Am. Bankr. Rep. 788, 212 Pa. St. 188, 61 Atl. 822.

It has been held that pledges to secure money loaned at the time are valid; that an exchange of a security validly held for a new security, the old one being released, is not a preference; that a fair exchange of values may be made at any time notwithstanding insolvency; that an insolvent is not bound to abandon all dealing with his property, provided he does not give preference to antecedent debts, and does not so deal with it as to evidence a purpose to defraud or delay his creditors, and that preferences can only arise in case of antecedent debts. *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115.

In Gordon v. Ware Nat. Bank, (8th Cir. 1904) 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550, it was held that the owner of a policy of life insurance may lawfully and in good faith assign the same to a creditor who has no insurable interest in the assignor to secure the payment of a debt, and that on default of payment the creditor may foreclose the pledge and sell the policy at judicial sale. And see to the same effect *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57.

Collateral security.—So, also, as with the other liens specified under the present subdivision of the statute, the giving of collateral security to secure the repayment of a bona fide indebtedness will be binding in bankruptcy upon the trustee of the pledgor. *Young v. Upson*, (S. D. N. Y. 1902) 115 Fed. 192, 8 Am. Bankr. Rep. 377.

Property transferred by a borrower at the time of receiving a loan and for the purpose of making the lender safe is security; and the validity of such a transfer, if not accompanied by positive fraud, will be recognized and enforced in bankruptcy. *McDonald v. Clearwater Shortline R. Co.*, (D. C. Idaho 1908) 164 Fed. 1007, 21 Am. Bankr. Rep. 182.

Assignment for creditors.—An assignee in a general deed of assignment, which has been avoided by an adjudication in bankruptcy against his assignor on a petition filed within four months after the making of the assignment, has a lien on the bankrupt's estate for the sum paid by him for such services rendered to him prior to such adjudication as were beneficial to the estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

Trust deeds.—Whether a deed of trust is valid or not is a local question, in the determination of which the federal courts will follow the decisions of the state court of last resort. *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530. See also *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302.

In American Wood Working Machinery Co. v. Norment, (C. C. A. 4th Cir. 1907) 157 Fed. 801, 19 Am. Bankr. Rep. 679, it was held that a deed of trust, made by a corporation as security, was void as being *ultra vires*.

Equitable liens.—It has been held, under section 67d, that the court will recognize and enforce the equitable lien of a party justly entitled thereto as against the estate of the bankrupt. *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Oliver*, (N. D. Tex. 1904) 132 Fed. 588, 12 Am. Bankr. Rep. 694; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966; *Smith v. Au Gres Tp.*, (8th Cir. 1906) 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. N. S. 876; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Teter*, (N. D. W. Va. 1909) 173 Fed. 798, 23 Am. Bankr. Rep. 223; *In re Yoke Vitriified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 236.

An equitable lien upon personal property may be created by a verbal agreement where the intention is clear to charge some particular property. *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244. See also *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 805.

Attorney's lien.—The institution of bankruptcy proceedings will not invalidate an attorney's lien on securities belonging to the bankrupt in possession of the attorney. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Eurich's Ft. Hamilton Brewery*, (E. D. N. Y. 1908) 158 Fed. 644, 19 Am. Bankr. Rep. 798; *In re Pennell*, (D. C. N. J. 1907) 159 Fed. 500, 18 Am. Bankr. Rep. 909.

Where a creditor claims priority of payment out of the estate of a bankrupt on the ground of his having a lien on property of the bankrupt, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy, and secures its allowance, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

Where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any warrant or order of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

Lien of banks.—Under some state statutes the lien given to a banker is limited to property taken by a banker in the usual course of the banking business, such as banks are in the habit of dealing in, or in taking on deposit, or for collection, or otherwise, as

notes, bonds, stocks, and other choses in action; and does not include stocks of merchandise, etc., which cannot conveniently pass into the actual possession of the bank. *In re Geasas*, (C. C. A. 9th Cir. 1906) 146 Fed. 734, 16 Am. Bankr. Rep. 872.

Depositor not entitled to lien.—Where a check drawn against a sufficient deposit and presented two days before the filing of a petition in bankruptcy by the drawer was not paid or accepted by the bank because of rumors that such proceedings were contemplated, it was held that the payee of such check acquired no claim against the bank or upon the fund; nor did a statement by the bank that it would take advice and pay the check if it could, amount to an acceptance, where it subsequently refused to accept or pay it. *In re Grive*, (D. C. Conn. 1907) 151 Fed. 711, 18 Am. Bankr. Rep. 202, 737.

As to the right of set-off between a bank and its depositors, see the annotation under section 68a, *infra*, p. 805.

Maritime lien.—In *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 167 Fed. 875, 21 Am. Bankr. Rep. 685, it was held that a tug owner was entitled to a maritime lien for the value of the service on a barge and its cargo.

A liveryman's lien is not affected by bankruptcy proceedings. *In re Pratesi*, (D. C. Del. 1903) 126 Fed. 588, 11 Am. Bankr. Rep. 319; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

Artisans' liens will be recognized and enforced in bankruptcy proceedings. *In re Lowensohn*, (S. D. N. Y. 1900) 100 Fed. 776, 4 Am. Bankr. Rep. 79; *In re Rich*, (S. D. Ohio 1906) 17 Am. Bankr. Rep. 893.

Auctioneer's lien.—An auctioneer employed by a stable company to sell its prop-

erty, who made an advance to the company, taking a receipt which authorized him to deduct the amount from the proceeds of the property when sold, does not thereby acquire a lien which entitles him to priority over other creditors, on the bankruptcy of the company before the time for sale arrived, the bankrupt having retained possession of the property. *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381.

Warehouse receipt.—Whether an instrument constitutes a valid and negotiable warehouse receipt so that its transfer operates as delivery is to be determined by the law of the state. *Union Trust Co. v. Wilson*, (1905) 198 U. S. 530, 25 S. Ct. 766, 49 U. S. (L. ed.) 1154, 14 Am. Bankr. Rep. 109; *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171; *Security Warehousing Co. v. Hand*, (C. C. A. 7th Cir. 1906) 143 Fed. 32, 16 Am. Bankr. Rep. 49.

A contract of conditional sale, if the language thereof and the facts warrant it, may give rise to a lien in the interest of the seller which will be recognized in bankruptcy. *National Bank of Commerce v. Williams*, (C. C. A. 5th Cir. 1907) 159 Fed. 615, 20 Am. Bankr. Rep. 79.

Bill of sale.—So, also, a bill of sale has been held to create a valid lien which will be enforceable in bankruptcy proceedings. *In re Bartlett*, (M. D. Pa. 1909) 172 Fed. 679, 22 Am. Bankr. Rep. 891.

Waiver of lien.—A valid lien may, however, be waived by the proof and allowance of a claim therefor, as unsecured, in the bankruptcy proceedings. *Dunn Salmon Co. v. Pillmore*, (1907) 19 Am. Bankr. Rep. 172, 55 Misc. 546, 106 N. Y. S. 88. And see the annotation under section 57e, *supra*, p. 704.

e [Conveyances, etc., within four months of petition.] That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. [(1898) 30 Stat. L. 564.]

Cross-references: As to

Fraudulent transfers not within the four months period, see section 70 a (4) and *e. infra*, pp. 821, 844.

Fraudulent transfer as an act of bankruptcy, see section 3a (1), *supra*, p. 481.

Fraud as affecting right to discharge, see section 14b (3), (4), and (5), *supra*, pp. 560-567.

Voidable preferences, see section 60b, *supra*, p. 739.

Purpose of section 67e.—The primary purpose of section 67e is to prohibit the disposition of property by the debtor, to persons other than creditors, in fraud of the Act. *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748.

The incumbrances which are invalidated by section 67e are those which are "made or given" by the person adjudged a bankrupt; and they include not only those specifically mentioned, "conveyances, transfers, and assignments," but all incumbrances, of whatever form, derived from his contractual act. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

Thus a conveyance of property by a bankrupt within four months before bankruptcy, which would be fraudulent at the common law, is a void conveyance under section 67e, and the title vests in the bankrupt's trustee. *Belding-Hall Mfg. Co. v. Mercer, etc.*, Lumber Co., (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

Transfer must be within four months period.—Section 67e is not applicable to a transfer by a bankrupt which was not made within four months prior to the filing of the petition in bankruptcy. *Little v. Holley-Brooks Hardware Co.*, (C. C. A. 5th Cir. 1904) 133 Fed. 874, 13 Am. Bankr. Rep. 422; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App. Div. 851, 107 N. Y. S. 473. And see the annotation on this question under subdivision f of this section, *infra*, p. 797.

Intent to hinder, delay, or defraud, essential.—The general rule, under section 67e, is that transfers made, liens created, and securities given, for a present consideration, are valid unless (1) they actually hinder, delay, or defraud creditors; and (2) unless the grantee knew, or had reasonable notice when he took them, that they were intended to hinder, delay, or defraud the creditors of the grantor, or were made in contemplation of bankruptcy, or in fraud of the statute. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *Little v. Holley-Brooks Hardware Co.*, (C. C. A. 5th Cir. 1904) 133 Fed. 874, 13 Am. Bankr. Rep. 422; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *Sargent v. Blake*, (C. C. A. 8th Cir. 1908) 160 Fed. 57, 20 Am.

Bankr. Rep. 115; *Henkel v. Seider*, (E. D. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773; *Fouche v. Shearer*, (N. D. Ga. 1909) 172 Fed. 592, 22 Am. Bankr. Rep. 828; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530; *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *In re Zotti*, (S. D. N. Y. 1910) 178 Fed. 304; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 608; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 179 Fed. 929; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *Cowan v. Burchfield*, (N. D. Ala. 1910) 180 Fed. 614; *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910; *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1; *Vollmer v. Plage*, (E. D. N. Y. 1911) 180 Fed. 598; *Halbert v. Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620; *Deland v. Miller, etc.*, Bank, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304.

It was not intended to authorize an action to set aside any and all conveyances executed by the bankrupt within four months of the filing of his petition in bankruptcy, but only such as were made within that time for the purpose of hindering, delaying, or defrauding creditors. The Act does not make conveyances executed within that period *prima facie* fraudulent, and the burden is upon the person bringing an action thereunder to show as an essential element of his cause of action that the transfer was made for the purpose of defrauding creditors. *Halbert v. Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620.

It is every intent to hinder, delay, or defraud creditors unlawfully only, and not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under section 67e. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513.

Statute does not affect *jus disponendi*.—An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or the payment is not violative of any of the Acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay, and defraud as will make it void or voidable under section 67e. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513.

Effect of transaction insufficient.—The necessary effect upon other creditors of a mortgage executed by an insolvent within four months of the filing of a petition in bankruptcy, to secure a pre-existing debt, does

not dispense with the necessity of showing the actual intent to hinder, delay, or defraud creditors, which is essential under section 67e, in order to avoid such mortgage, where the mortgagee was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 15, affirming (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758.

Consideration going into estate.—A transfer for a valid consideration, which consideration goes into the bankrupt estate, is not void, unless it be made with the intent to defraud other creditors. *Vollmer v. Plage*, (E. D. N. Y. 1911) 186 Fed. 598.

Payment by bank.—Where a bank, in ignorance of the filing of a petition in bankruptcy, paid the bankrupt's checks drawn on his deposit on the day the petition was filed, it was held that such payment was not a transfer by the bank of the bankrupt's assets, nor an improper meddling with a *res* over which the court of bankruptcy had jurisdiction, which would permit recovery by the trustee in bankruptcy against the bank. *In re Zotti*, (S. D. N. Y. 1910) 178 Fed. 304.

Payment of wife's debt.—A payment made by a bankrupt, while insolvent, on his wife's separate debt, cannot be recovered by the bankrupt's trustee as fraudulent in the absence of evidence and a finding that the bankrupt was actuated by a fraudulent intent. *In re Kayser*, (C. C. A. 3d Cir. 1910) 177 Fed. 383, 24 Am. Bankr. Rep. 174.

Consideration for deferred annuity contract.—An insurance contract, entered into by the company with one who was then insolvent and was subsequently adjudged a bankrupt, by which the insurer obligated itself to pay the insured a certain sum yearly, commencing in the future and continuing during the life of the insured, is not void; and the sum paid for such insurance cannot be recovered by the trustee in bankruptcy of the insured, on the theory that such payment was a transfer in fraud of creditors, and that the insurance company, though acting *bona fide*, was not a purchaser for value, because it had not paid the purchase money or secured it in such a manner that it could not be relieved against payment. In such case, however, a bill, asking that the company be compelled to pay the trustee the sum received from the bankrupt upon the surrender of the contract, will be dismissed without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may thereafter have, under the contract. *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1.

Evidence of fraudulent intent.—An intent to hinder, delay, or defraud creditors is to be proven from the facts surrounding the transaction, either from the appearance of the transfer attacked or from evidence *altunde*. If from the latter, the burden of proof is on the plaintiff. *In re Elletson Co.*, (N. D. W.

Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530.

Agreement to withhold transfer from record.—An agreement between the mortgagor and mortgagee to withhold a chattel mortgage from record is evidence of a fraudulent intent. *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682.

Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, but give no reasonable ground for him to believe that the debtor intends a preference by his payment or security, do not make such a transfer voidable. *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399.

A sale of the bankrupt's stock and fixtures in bulk is not, in an action by the trustee, prima facie fraudulent in the sense that such sale alone establishes the bad faith of the purchaser; the sale being merely a circumstance reflecting on the bona fides of the transaction. *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431.

Transfer of partnership property.—An application of partnership property, by consent of all the members of the firm, to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e. *Sargent v. Blake*, (C. C. A. 8th Cir. 1908) 160 Fed. 57, 20 Am. Bankr. Rep. 115.

A general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against a trustee in bankruptcy, in so far as it interferes with his administering the property assigned. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. A. 282, 5 Am. Bankr. Rep. 171; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Cohen v. American Surety Co.*, (1908) 20 Am. Bankr. Rep. 65, 192 N. Y. 227, 84 N. E. 947. And see annotation under section 3a (4), *supra*, p. 488, as to an assignment for the benefit of creditors as an act of bankruptcy.

Voluntary general assignments for the benefit of creditors made in conformity with the laws of the state are voidable by the trustee of the debtor in bankruptcy if made within four months of the adjudication, (1) because they are incompatible with the purpose and policy of the bankruptcy law and the rights of creditors thereunder to the appointment of the trustee and the supervision of the assets in bankruptcy; (2) because in fraud of creditors within section 70 of the Act, as the assignment deprives creditors of the important advantages secured to them under the statute; and (3) because if not voidable the clause of section 3, making such

an assignment *ipso facto* "an act of bankruptcy," would be practically nullified, and rendered of no use to creditors. *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78.

Fraud unnecessary.—A voluntary assignment, though as a matter of fact untainted with any fraudulent purpose, is yet, when made within four months of the filing of a petition in bankruptcy, as matter of law, a constructive fraud upon the Act, and voidable by trustee under section 67e. *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

Validity determined by federal courts.—The question of the effect of the bankruptcy law upon the validity of a general assignment made after its passage, in accordance with the provisions of a state statute, is not one which is governed by any rule or decision in a state, but will be determined independently by the federal courts. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

Transfer of corporate property by corporation officers.—The directors of a corporation who have loaned it money on credit cannot, when they find danger of insolvency pending, transfer its property to themselves as security for their claims. *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910. See also *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

A conveyance by a wife to her husband, made on the eve of bankruptcy, leaving her nothing to pay creditors, is prima facie fraudulent. *Fouche v. Shearer*, (N. D. Ga. 1909) 172 Fed. 592, 22 Am. Bankr. Rep. 828. And see to the same effect *Henkel v. Seider*, (E. D. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773.

Transfers void under state law.—Whether a conditional contract of sale, chattel mortgage, or pledge of personal property, and the like, are valid as against the general creditors of the vendor, mortgagor, or pledgor, or his trustee in bankruptcy, must be determined by the local laws of the state in which the transaction is had. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. And see the annotation under subdivisions *a* and *d* of this section, *supra*, pp. 783, 786. See also section 64b (5), *supra*, p. 777.

Transactions void under federal statutes.—Assignments as collateral security for a loan of unallowed claims against the United States on account of contracts for furnishing materials to the various departments of the government, being in direct opposition to R. S. sec. 3477, 2 Fed. Stat. Annot. 7, making absolutely null and void voluntary transfers of claims against the United States before their allowance, can confer no interest on the assignees, as against the trustee in bankruptcy of the assignors. *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065.

Secret liens, when obnoxious under the law of the state, may be attacked by the trustee in bankruptcy in behalf of the general creditors. *Spencer v. Duplan Silk Co.*, (E. D.

Pa. 1902) 112 Fed. 638, 7 Am. Bankr. Rep. 563.

Chattel mortgages given for the purpose of hindering, delaying, or defrauding creditors, or which are given by an insolvent debtor and are void under the law of the state, within four months prior to the filing of the petition in bankruptcy, are null and void under section 67e. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 558; *Sabin v. Camp*, (D. C. Ore. 1900) 98 Fed. 974, 3 Am. Bankr. Rep. 578; *In re Hugill*, (N. D. Ohio 1900) 100 Fed. 616, 3 Am. Bankr. Rep. 686; *In re Klingaman*, (S. D. Ia. 1900) 101 Fed. 691, 4 Am. Bankr. Rep. 254; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *Stroud v. McDaniel*, (C. C. A. 4th Cir. 1901) 106 Fed. 493, 5 Am. Bankr. Rep. 695; *City Nat. Bank v. Bruce*, (C. C. A. 4th Cir. 1901) 109 Fed. 69, 6 Am. Bankr. Rep. 311, *affirming In re Alverson*, (D. C. S. C. 1900) 5 Am. Bankr. Rep. 855; *In re Howland*, (N. D. N. Y. 1901) 109 Fed. 869, 6 Am. Bankr. Rep. 495; *In re Davidson*, (S. D. Ia. 1901) 109 Fed. 882, 5 Am. Bankr. Rep. 528; *In re Platts*, (D. C. S. D. 1901) 110 Fed. 126, 6 Am. Bankr. Rep. 568; *In re Tatem*, (E. D. N. C. 1901) 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re Ronk*, (D. C. Ind. 1901) 111 Fed. 154, 7 Am. Bankr. Rep. 31; *In re Sewell*, (E. D. Ky. 1911 Fed. 791, 7 Am. Bankr. Rep. 133; *In re Shirley*, (C. C. A. 6th Cir. 1901) 112 Fed. 301, 7 Am. Bankr. Rep. 299; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *In re Soudan Mfg. Co.*, (C. C. A. 7th Cir. 1902) 113 Fed. 804, 8 Am. Bankr. Rep. 45; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *In re Garcewich*, (C. C. A. 2d Cir. 1902) 115 Fed. 87, 8 Am. Bankr. Rep. 149; *In re Hull*, (D. C. Vt. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302; *In re Josephson*, (W. D. Ga. 1902) 116 Fed. 404, 8 Am. Bankr. Rep. 423; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *Egan State Bank v. Rice*, (C. C. A. 8th Cir. 1902) 119 Fed. 107, 9 Am. Bankr. Rep. 437; *In re Butler*, (N. D. Ga. 1902) 120 Fed. 100, 9 Am. Bankr. Rep. 539; *In re Cannon*, (D. C. S. C. 1903) 121 Fed. 582, 10 Am. Bankr. Rep. 64; *Clayton v. Exchange Bank*, (5th Cir. 1903) 121 Fed. 630, 57 C. C. A. 656, 10 Am. Bankr. Rep. 173; *In re Antigo Screen Door Co.*, (7th Cir. 1903) 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616; *Farmers' Bank v. Carr*, (C. C. A. 4th Cir. 1904) 127 Fed. 690, 11 Am. Bankr. Rep. 733; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *In re Sawyer*, (D. C. Mass. 1904) 130 Fed. 384, 12 Am. Bankr. Rep. 269; *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, 13 Am. Bankr. Rep. 177; *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62, 14 Am. Bankr. Rep. 180; *In re Dismal Swamp Contracting Co.*, (E. D. Va. 1905) 135 Fed. 415, 14 Am. Bankr. Rep. 175; *In re Marine Constr., etc.*,

Co., (E. D. N. Y. 1905) 135 Fed. 921, 14 Am. Bankr. Rep. 466; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; *In re Hill*, (N. D. Cal. 1905) 140 Fed. 984, 15 Am. Bankr. Rep. 499; *In re Birk*, (C. C. A. 7th Cir. 1905) 142 Fed. 438, 15 Am. Bankr. Rep. 694; *In re Marine Constr., etc., Co.*, (C. C. A. 2d Cir. 1906) 144 Fed. 649, 16 Am. Bankr. Rep. 325; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Shaw*, (D. C. Me. 1906) 146 Fed. 273, 17 Am. Bankr. Rep. 196; *In re Arkonia Fabric Mfg. Co.*, (E. D. Pa. 1907) 151 Fed. 914, 18 Am. Bankr. Rep. 470; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *modifying* (S. D. Ia. 1906) 16 Am. Bankr. Rep. 583; *In re Davis*, (E. D. N. Y. 1907) 155 Fed. 671, 19 Am. Bankr. Rep. 98; *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1907) 157 Fed. 106, 19 Am. Bankr. Rep. 491; *In re Tucker*, (E. D. N. C. 1908) 161 Fed. 584; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Columbia Fireproof Door, etc., Co.*, (E. D. N. Y. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 863; *In re Tysor-Cheatham Mercantile Co.*, (S. D. Ga. 1910) 178 Fed. 733; *In re Adams*, (E. D. Mich. 1899) 2 Am. Bankr. Rep. 415; *In re Leigh*, (D. C. Colo.) 2 Am. Bankr. Rep. 606; *In re Barrett*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 48; *Matter of S. B. Hutchinson Co.*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 518; *Skilton v. Codrington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790; *Zartman v. Waterloo First Nat. Bank*, (1905) 16 Am. Bankr. Rep. 152, 109 App. Div. 406, 96 N. Y. S. 633.

A deed of trust executed by a corporation, within four months prior to its bankruptcy, to secure notes which were issued direct to creditors of its principal stockholder and managing officer to secure his personal indebtedness, is in their hands fraudulent and void as against its creditors. *American Wood Working Machinery Co. v. Norment*, (C. C. A. 4th Cir. 1907) 157 Fed. 801, 19 Am. Bankr. Rep. 679; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530. See also *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639.

Transfer of exempt property.—Property, transferred by a bankrupt to a creditor, which is exempted under the laws of the state, cannot be recovered by his trustee. *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666.

Bona fide purchasers protected.—Section 67e expressly excepts from its operation such transfers, etc., as have been made to purchasers in good faith and for a present fair consideration. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 1; *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431; *Halbert v. Franke*, (Minn. 1904) 11 Am. Bankr. Rep. 620. And see also the annotation under

subdivision d of this section, *supra*, p. 786.

The burden rests on the purchaser to show that he took all reasonable and proper steps to ascertain the seller's financial condition and bought in good faith and for a present fair consideration. *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Halbert v. Franke*, (Minn. 1904) 11 Am. Bankr. Rep. 620.

Good faith cannot inhere in a transaction where the transferee knows or has reason to believe that his grantor is insolvent, and that the purpose of the transaction was to defeat the Bankruptcy Act. *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66.

In a fraudulent transaction, the grantee is presumed to be a party to the fraud, and does not occupy the position of an innocent holder for value. If, therefore, an instrument has been made by a bankrupt and recorded within the statutory period, it is a question of fact whether it was done with intent to defraud, hinder, or delay his creditors, or to give a preference to any one of them. *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

Thus where the agent of an insolvent corporation sold its remaining assets without authority, and without the consent of all of the creditors, not in the ordinary course of its regular business, it was held that the purchasers were not purchasers in good faith in a legal sense, and that the sale was subject to vacation by the corporation's trustee in bankruptcy. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136. See also *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910.

Trustee vested with rights of creditor.—Since the enactment of the amendment of 1910, trustees as to all property in the custody or coming into the custody of the bankruptcy court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2), *supra*, p. 682.

Recovery by trustee.—The title to property transferred, assigned, or encumbered, in violation of section 67e, is vested in the trustee upon the adjudication of the debtor as a bankrupt, and, where such course is necessary, the property may be recovered by the trustee in an appropriate legal proceeding brought for that purpose. *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Schwartz*, (S. D. N. Y. 1909) 179 Fed. 767; *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Deland v. Miller*,

etc., Bank, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781. And see also the annotation under section 23b, *supra*, p. 595.

The right of the trustee to have transfers annulled under section 67e is conferred upon him by the due operation of the Bankruptcy Law, and is irrespective of whether any other person might, or might not, have had that right in the absence of that law. *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

Value of property recoverable.—In a plenary suit by a bankrupt's trustee to recover goods alleged to belong to the bankrupt in the fraudulent custody of a third person, the trustee may recover the value of the goods, even if they cannot be precisely identified. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720.

A receiver cannot sue to set aside a fraudulent transfer. *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

Action for recovery—Plenary action.—Where the property claimed by the trustee is in the *bona fide* possession of a third person, a plenary action must be brought. See section 23b and annotation thereof, *supra*, p. 595.

Thus where a sheriff took possession of certain personal property under a replevin writ, in an action pending in a state court prior to the filing of a bankruptcy petition against the defendant, the plaintiff in such replevin suit claiming title on the ground that the property was purchased by means of the bankrupt's fraudulent representations, it was held

that the bankruptcy court had no jurisdiction by a summary order to compel the sheriff to deliver the property to a receiver in bankruptcy, under section 67e, as such section only applies to property of the bankrupt. *In re Rudnick*, (C. C. A. 2d Cir. 1908) 160 Fed. 903, *reversing* (S. D. N. Y. 1907) 158 Fed. 223, 18 Am. Bankr. Rep. 750.

The trustee may maintain a suit in equity for an accounting in the United States District Court against fraudulent transferees of the bankrupt, where the transfer consists of a large number of items, the actual value of which can only be ascertained by an accounting, though the complainants knew the face value of such items. *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338.

Pleading must set out facts.—An allegation in a petition by a bankrupt's trustee that a preference sought to be set aside was fraudulent, without any facts showing fraud other than that the transfer constituted a preference, was held to be insufficient. *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599.

An allegation of insufficiency of assets to meet the claims of creditors, it has been held, is necessary in an action to recover a fraudulent conveyance under section 67e. *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781.

Finding of special master.—On the question whether or not a transfer was fraudulent the findings of a special master should be given great weight, though the district judge from a perusal of the evidence might have come to a different conclusion. *In re Schwartz*, (S. D. N. Y. 1909) 179 Fed. 767.

[*Jurisdiction.*] For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(*Inserted 1903*) 32 Stat. L. 800.]

Concurrent jurisdiction.—Since the enactment of the amendment of 1903 the federal district courts have concurrent jurisdiction with the state courts of actions to set aside alleged fraudulent conveyances by a bankrupt made within four months prior to the filing of the bankruptcy petition. *Johnston v. Forsyth Mercantile Co.*, (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Hornor-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; *In re McMahon*, (C. C. A. 6th Cir. 1906) 147 Fed. 684, 17 Am. Bankr. Rep. 530; *Lynch v. Bronson*, (D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409; *In re Kerski*, (E. D. Wis.) 2 Am. Bankr. Rep. 79; *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923. And see also the annotation under section 23b, *supra*, p. 595.

Property in possession of court.—A court of bankruptcy which, by its trustee, has pos-

sessed of the property of a bankrupt, has jurisdiction to determine all questions in respect to title or to liens thereon, and may entertain and determine a suit or petition by the trustee against a mortgagee of the property to set aside the mortgage as one given within four months prior to the bankruptcy and void under section 67e. *In re McMahon*, (C. C. A. 6th Cir. 1906) 147 Fed. 684, 17 Am. Bankr. Rep. 530.

Where a trustee proceeds in the state courts to recover property of the bankrupt fraudulently conveyed, he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts. *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923.

Ancillary jurisdiction also has been provided for by the amendment of 1910. See section 2 (20) and the annotation thereunder, *supra*, p. 480.

f [*Liens, etc., created through legal proceedings.*] That all levies, judgments, attachments, or other liens, obtained through legal proceedings against

a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. [(1898) 30 Stat. L. 565.]

Cross-reference: As to

Legal proceedings resulting in preference, as an act of bankruptcy, see section 3a (3), *supra*, p. 386.

- I. ANNULMENT OF LIENS GENERALLY, 798.
- II. TIME OF ACQUIRING LIEN, 799.
- III. JUDGMENT LIENS, 800.
- IV. ATTACHMENT AND GARNISHMENT LIENS, 801.
- V. LIENS OF EXEMPT PROPERTY, 803.
- IV. ENFORCEMENT OF PRE-EXISTING LIENS, 803.

I. ANNULMENT OF LIENS GENERALLY.

Legal proceeding defined.—A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defense of a suit. In section 67f it obviously refers to the use of judicial process, the phraseology being "levies, judgments, attachments, or other liens obtained through legal proceedings." *In re Emalie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

The term "all levies" has been used in its most comprehensive sense, and it covers any and all seizures of the property of the bankrupt within the four months period, under legal process, looking to the enforcement of claims against the bankrupt which would be released by his final discharge. *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477.

A proceeding, under a state law, whereby a trust fund is subjected to the payment of the claims of creditors, is a lien obtained through legal proceedings, which if acquired within four months prior to the filing of the petition in bankruptcy would have been rendered void by section 67f. *In re Tiffany*, (S. D. N. Y. 1904) 133 Fed. 799, 13 Am. Bankr. Rep. 310. See also *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11.

Replevin.—It has been held that the goods of a bankrupt taken on a replevin suit, brought by a creditor within four months of the bankruptcy proceedings, must be returned to the trustee; such proceeding being within the meaning of section 67f. *In re Haynes*, (D. C. Vt. 1903) 123 Fed. 1001, 10 Am. Bankr. Rep. 716; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477;

In re Rudnick, (S. D. N. Y. 1907) 158 Fed. 223, 18 Am. Bankr. Rep. 750.

A mechanic's lien is not one "obtained through legal proceedings," within the meaning of section 67f. *In re Emalie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126. And see cases cited to this effect under section 67d, *supra*, p. 786.

A livery stable keeper's lien, given by statute, is not a lien "obtained through legal proceedings," and is not dissolved by an adjudication in bankruptcy. *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171. See also cases cited to this effect under section 67d, *supra*, p. 786.

Annulment of liens obtained through legal proceedings.—Under the express terms of section 67f all liens obtained through legal proceedings, within four months prior to the filing of the petition in bankruptcy, against a person who is insolvent, shall be deemed null and void in the event of such insolvent being adjudged a bankrupt, unless such lien has been preserved by the court for the benefit of the estate. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 43; *In re Brown*, (D. C. Ore. 1898) 91 Fed. 359; *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Francis-Valentine Co.*, (C. C. A. 9th Cir. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522; *In re Fellerath*, (N. D. Ohio 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 506; *In re Kenney*, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Kenney*, (S. D. N. Y. 1899) 97 Fed. 557, 3 Am. Bankr. Rep. 353; *In re Vaughan*, (S. D. N. Y. 1899) 97 Fed. 560, 3 Am. Bankr. Rep. 362; *In re Higgins*, (D. C. Ky. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re Darwin*, (C. C. A. 6th Cir. 1902) 117 Fed. 407, 8 Am. Bankr. Rep. 703; *In re Breslauer*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 427; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187; *In re*

Oxley, (W. D. Wash. 1910) 182 Fed. 1019; *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79; *In re Monroe Lumber Co.*, (S. D. Miss. 1910) 186 Fed. 252; *In re Richards*, (W. D. Wis. 1899) 2 Am. Bankr. Rep. 518; *In re Hammond*, (D. C. Mass. 1899) 3 Am. Bankr. Rep. 490; *Schmilovitz v. Bernstein*, (R. I. 1901) 5 Am. Bankr. Rep. 265; *Lever v. Seiter*, (N. Y. 1901) 5 Am. Bankr. Rep. 576; *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734; *Watschke v. Thompson*, (Minn. 1901) 7 Am. Bankr. Rep. 504; *Matter of Benedict*, (N. Y. 1902) 8 Am. Bankr. Rep. 463; *Hardt v. Schuykill Plush, etc., Co.*, (N. Y. 1902) 8 Am. Bankr. Rep. 479; *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433.

The statute makes no exceptions in favor of any lien creditor whose lien has been obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition, other than such person who may have obtained title by virtue of such proceedings, and has been a *bona fide* purchaser for value without notice or reasonable cause for inquiry. *In re Green*, (W. D. Pa. 1910) 179 Fed. 870.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639.

The costs, when dependent on the lien, fall with it in so far as any right of lien therefor is concerned. *In re Young*, (E. D. N. Y. 1899) 96 Fed. 606, 2 Am. Bankr. Rep. 673; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 107 Fed. 98; *In re The Copper King*, (N. D. Cal. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 149; *In re Francis-Valentine Co.*, (C. C. A. 9th Cir. 1899) 2 Am. Bankr. Rep. 522; *Matter of Jennings*, (W. D. N. Y. 1902) 8 Am. Bankr. Rep. 358; *Matter of Thompson Mercantile Co.*, (D. C. Minn. 1904) 11 Am. Bankr. Rep. 579.

Thus it has been held that a sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the proceedings in bankruptcy, has no right, as against the trustee, to retain possession of such property until payment of his costs. *In re Francis-Valentine Co.*, (N. D. Cal. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188.

Fees.—But section 67f was not intended to deprive a state officer of his statutory fees, accruing prior to bankruptcy, under proceedings in the state courts, which were in all respects regular and in accordance with the state law and practice. *In re Schmidt*, (C. C. A. 2d Cir. 1908) 165 Fed. 1006, 21 Am. Bankr. Rep. 593.

Voluntary and involuntary proceedings included.—It is now well settled that section 67f applies to voluntary as well as involuntary proceedings; the nullification of liens obtained within the four months period being the same in both cases. *In re Brown*, (D. C.

Ore. 1898) 91 Fed. 359, 1 Am. Bankr. Rep. 107; *In re Fellerath*, (N. D. Ohio 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518, *affirmed* (C. C. A. 7th Cir. 1899) 96 Fed. 935, 3 Am. Bankr. Rep. 145; *In re O'Connor*, (E. D. N. Y. 1899) 95 Fed. 943; *In re Vaughan*, (S. D. N. Y. 1899) 97 Fed. 560, 3 Am. Bankr. Rep. 363; *In re Dobson*, (N. D. Ill. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 420; *In re Rhoads*, (W. D. Pa. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re McCartney*, (E. D. Wis. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 367; *In re Friedman*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 510; *Peck Lumber Mfg. Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr. Rep. 701, 1 Nat. Bankr. N. 262; *In re Higgins*, (D. C. Ky. 1899) 3 Am. Bankr. Rep. 367; *In re Dobson*, (N. D. Ill. 1899) 3 Am. Bankr. Rep. 420; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl. 213; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *In re Blair*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 206; *Brown v. Case*, (Mass. 1901) 6 Am. Bankr. Rep. 744; *Matter of Benedict*, (N. Y. 1902) 8 Am. Bankr. Rep. 463; *Menneke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; *Mohr v. Mattox*, (Ga. 1904) 12 Am. Bankr. Rep. 332.

It was, however, formerly held that voluntary proceedings were not within the contemplation of the statute in so far as the annulment of liens obtained through legal proceedings was concerned. See *In re De Lue*, (D. C. Mass. 1899) 91 Fed. 510, 1 Am. Bankr. Rep. 387; *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715; *In re O'Connor*, (E. D. N. Y. 1899) 95 Fed. 943.

II. TIME OF ACQUIRING LIEN.

Time of acquiring lien.—In order to be affected by the provisions of 67f, a lien obtained through legal proceedings must have been acquired within the four months immediately preceding the filing of the petition in bankruptcy. *Metcalf v. Barker*, (1902) 187 U. S. 165, 174, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *In re Richards*, (C. C. A. 7th Cir. 1899) 96 Fed. 935, 3 Am. Bankr. Rep. 145; *In re Engle*, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 110 Fed. 630; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990; *Pepperdine v. Seymour*, (Mo. 1903) 10 Am. Bankr. Rep. 570; *Wrede v. Clark*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5; *Woods v. Klein*, (1909) 22 Am. Bankr. Rep. 722, 223 Pa. St. 257, 72 Atl. 523; *Fairlamb v. Smedley Constr.*

Co., (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17.

Where the lien has been obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36. And see to the same effect, *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *Frazier v. Southern L. & T. Co.*, (C. C. A. 4th Cir. 1900) 99 Fed. 707, 3 Am. Bankr. Rep. 710; *In re Kavanaugh*, (D. C. Ky. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832; *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re Beaver Coal Co.*, (C. C. A. 9th Cir. 1902) 113 Fed. 889, 7 Am. Bankr. Rep. 542; *Owen v. Brown*, (C. C. A. 8th Cir. 1903) 120 Fed. 812, 9 Am. Bankr. Rep. 717; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re Koslowski*, (M. D. Pa. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 723; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *Continental Nat. Bank v. Katz*, (Ill.) 1 Am. Bankr. Rep. 19; *Reid v. Cross*, (Ill.) 1 Am. Bankr. Rep. 34; *Taylor v. Taylor*, (1900) 4 Am. Bankr. Rep. 211, 59 N. J. Eq. 86; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl. 213; *New York City Ninth Nat. Bank v. Moses*, (N. Y. 1903) 11 Am. Bankr. Rep. 772; *Batchelder v. Wedge*, (Vt. 1907) 19 Am. Bankr. Rep. 268.

A lien acquired subsequent to the filing of the petition in bankruptcy, it has been held, is not annulled by section 67f. *In re Engle*, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *Kinmouth v. Braeutigam*, (1900) 4 Am. Bankr. Rep. 345, 65 N. J. L. 165, 46 Atl. 769; *Kinmouth v. Braeutigam*, (1902) 10 Am. Bankr. Rep. 85, 63 N. J. Eq. 103, 52 Atl. 226.

The time is to be computed, in accordance with section 31, from the time the lien actually accrues to the time of the filing of the petition. *Dutcher v. Wright*, (1876) 94 U. S. 553, 24 U. S. (L. ed.) 130; *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; *Parmenter Mfg. Co. v. Stoeve*, (C. C. A. 1st Cir. 1899) 97 Fed. 330, 3 Am. Bankr. Rep. 220; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Peck Lumber Mfg. Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr. Rep. 701; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38; *In re Warner*, (D. C. Conn. 1906) 16 Am. Bankr. Rep. 519. And see also the cases cited under section 31, *supra*, p. 653.

Thus it has been held that an attachment made on Feb. 8th was dissolved by an adjudication on a petition filed on June 8th following, and that the time of day when the attachment was made or the petition filed is

immaterial. *In re Warner*, (D. C. Conn. 1906) 144 Fed. 987, 16 Am. Bankr. Rep. 519.

And in *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170, it appears that an attachment was made on Sept. 9th, at 10 A. M., and the petition was filed on Jan. 9th following, at 2 P. M.; and it was held that, in accordance with section 31, in order to determine whether or not the attachment was within four months prior to the filing of the petition the time must be reckoned back from the 9th day of January, 1899, and so reckoned the 9th day of the preceding September was held to be clearly within the four months period.

III. JUDGMENT LIENS.

Judgment liens. — The statute does not affect a mere judgment which has not resulted in the creation of a lien; but where a judgment, either of itself or by virtue of any process issued thereon, or statutory authority therefor, has culminated in a lien within the four months immediately preceding the filing of the petition in bankruptcy, the lien so created is rendered null and void by virtue of the provisions of section 67f. *Wilson v. Nelson*, (1904) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Clarke v. Larremore*, (1903) 189 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 477; *In re Francis-Valentine Co.*, (N. D. Cal. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188; *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; *In re Kenney*, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494, 97 Fed. 554, 3 Am. Bankr. Rep. 353, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re Franks*, (S. D. Ala. 1899) 95 Fed. 635; *In re Kavanaugh*, (D. C. Ky. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832; *In re Blair*, (S. D. N. Y. 1900) 102 Fed. 987, 4 Am. Bankr. Rep. 220; *In re Storm*, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Beaver Coal Co.*, (C. C. A. 9th Cir. 1902) 113 Fed. 889, 7 Am. Bankr. Rep. 542; *In re Darwin*, (C. C. A. 6th Cir. 1902) 117 Fed. 407, 8 Am. Bankr. Rep. 703; *Owen v. Brown*, (C. C. A. 8th Cir. 1903) 120 Fed. 812, 9 Am. Bankr. Rep. 717; *In re Breslauer*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Thackara Mfg. Co.*, (E. D. Pa. 1905) 140 Fed. 126, 15 Am. Bankr. Rep. 268; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Green*, (W. D. Pa. 1910) 179 Fed. 870; *In re Sharp*, (D. C. Ky. 1898) 1 Am. Bankr. Rep. 379; *In re Chapman*, (N. D. Ga. 1900) 3 Am. Bankr. Rep. 607; *In re Pease*, (N. D. N. Y.) 4 Am. Bankr. Rep. 550; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl.

213; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 5 Am. Bankr. Rep. 787; *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734; *Matter of Benedict*, (1902) 8 Am. Bankr. Rep. 463, 37 Misc. 230, 75 N. Y. S. 165; *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Kinmouth v. Braeutigam*, (1902) 10 Am. Bankr. Rep. 85, 63 N. J. Eq. 103, 52 Atl. 226; *Mohr v. Mattox*, (Ga. 1904) 12 Am. Bankr. Rep. 330; *Matter of S. Ah Mi*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 138; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17.

A judgment itself does not necessarily constitute a lien upon property, unless made so by statute. *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289.

And a judgment which does not create a lien upon the bankrupt's estate is not annulled by section 67f. *Plaut v. Gorham Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

Judgment authorized by power of attorney.—It has been held that a lien acquired within the four months period, on a judgment recovered by virtue of a warrant of attorney which was given more than four months before the institution of proceedings in bankruptcy, was annulled under section 67f. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

A judgment for a fine, imposed under a state liquor law for a violation thereof, comes within the language of section 67f; and an execution issued on such a judgment, at the instance of the state, will be restrained; it is immaterial, in such case, whether the claim for which the judgment was recovered was provable in bankruptcy, or whether it would be affected by a discharge of the bankrupt. *In re Green*, (W. D. Pa. 1910) 179 Fed. 870.

Judgment appointing receiver in state court.—The word "judgment," in section 67f, is sufficiently broad to apply to the judgment of a state court in appointing a receiver of an insolvent corporation, obtained within three months of an adjudication as an involuntary bankrupt. *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734.

Lien by creditor's bill dependent on acquiring judgment.—Where, under the state law, a judgment creditor who files a creditor's bill to reach equitable assets or to set aside fraudulent conveyances thereby acquires an equitable lien, depending for its perfection and enforcement upon the recovery of a valid judgment in his suit, such judgment is annulled by the adjudication of the debtor as a bankrupt within four months thereafter, and the creditor's lien falls with it, and he has no rights in the fund superior to those of other creditors. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

Judgment acquired after adjudication.—Property of a bankrupt, the title to which has vested in his trustee under section 70, is not subject to seizure on execution against the bankrupt issued on a judgment recovered after the adjudication. *In re Franklin Lumber Co.*, (D. C. N. J. 1906) 147 Fed. 852, 17

Am. Bankr. Rep. 443. And see *supra*, p. 799, *II. Time of Acquiring Lien*.

Judgment acquired prior to four months period.—Where a mortgage lien was obtained long prior to a period of four months next preceding the date of filing of the petition in bankruptcy, although suit was commenced and a decree of foreclosure rendered within that period, it was held that neither the mortgage lien nor the judgment lien was denounced by any provision of the bankruptcy statute. *In re Rohrer*, (C. C. A. 8th Cir. 1910) 24 Am. Bankr. Rep. 52. And see *supra*, p. 799, *II. Time of Acquiring Lien*.

So, also, it has been held that where a judgment, recovered against a bankrupt and claimed to be a lien on his remainder interest in certain real estate, was entered more than four months before the filing of the bankruptcy petition, it was not affected by section 67f, though the bankruptcy court had jurisdiction to control the disposition of the property subject to the lien in the interest of the entire estate. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

IV. ATTACHMENT AND GARNISHMENT LIENS.

Attachment and garnishment liens.—Whether or not an attachment or garnishment proceeding has resulted in a lien is a question to be determined from the state statutes and decisions. The bankruptcy law reaches only the lien, not the preliminary steps; and whenever it appears that the proceeding has become a lien, and such lien has been obtained within the four months immediately preceding the filing of the petition in bankruptcy, the provisions of section 67f are applicable, and the lien becomes void, unless preserved by the court for the benefit of the estate. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *In re Higgins*, (D. C. Ky. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re Kaupisch Creamery Co.*, (D. C. Ore. 1901) 107 Fed. 93, 5 Am. Bankr. Rep. 790; *In re McCartney*, (E. D. Wis. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 366; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35; *Klipstein v. Allen-Miles Co.*, (5th Cir. 1905) 136 Fed. 385, 69 C. C. A. 229; *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Pollmann*, (S. D. N. Y. 1907) 156 Fed. 221, 19 Am. Bankr. Rep. 474; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re Maher*, (N. D. Ga. 1909) 169 Fed. 997; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *Staunton v. Wooden*, (C. C. A. 9th Cir. 1910) 179 Fed. 61; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *Peck Lumber Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr.

Rep. 701; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *Hardt v. Schuykill Plush, etc., Co.*, (N. Y. 1902) 8 Am. Bankr. Rep. 481; *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577; *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251; *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408; *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102; *Crook-Horner Co. v. Gilpin*, (Md. 1910) 23 Am. Bankr. Rep. 350; *Hobbs v. Thompson*, (1909) 160 Ala. 360, 49 So. 787, 18 Ann. Cas. 381; *National Surety Co. v. Medlock*, (1907) 2 Ga. App. 672, 58 S. E. 1135; *Albany, etc., R. Co. v. Dunlap Hardware Co.*, (1910) 8 Ga. App. 171, 68 S. E. 871; *Lamorelle v. Nass*, (1906) 30 Pa. Super. Ct. 190; *Fairlamb v. Smedley Constr. Co.*, (1908) 36 Pa. Super. Ct. 17.

Thus it has been held that an adjudication in bankruptcy, whether in voluntary or involuntary proceedings, renders void a judgment against a garnishee rendered in an action brought against the bankrupt within four months prior to the filing of the petition, and when he was insolvent, and discharges the garnishee from liability thereon; and such judgment must thereafter be treated as a nullity whenever drawn in question, whether directly or collaterally. *In re Beals*, (D. C. Ind. 1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639; *Cavanaugh v. Fenley*, (1905) 94 Minn. 507, 103 N. W. 711, 110 Am. St. Rep. 382.

Attachments sued out in either state or federal courts are covered by section 67f. *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577.

The bond upon which the attachment issued falls with it. *Crook-Horner Co. v. Gilpin*, (Md. 1910) 23 Am. Bankr. Rep. 350.

But where a warrant of attachment, issued within four months of the filing of a petition in bankruptcy of the defendant, was discharged by an undertaking for which the surety took no security, it will not be vacated after the adjudication in bankruptcy so as to discharge the surety. *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102.

Attachment writ not vacated.—But, while section 67f discharges the lien of an attachment, it does not vacate the writ. *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102.

Section 67f makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or, second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the

trustee for the benefit of the entire body of creditors, that is, "for the benefit of the estate"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors. The first provision contemplates the attachment of property to which the bankrupt has the complete legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639. See also *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803.

Dissolution of attachment not impairment of contractual obligation.—The dissolution of an attachment lien under section 67f is not in any sense an impairment or divestiture of contractual rights. *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577.

Interference with attached property in possession of bankruptcy court.—Where a sheriff, after having attached property of a bankrupt, was informed of the adjudication and requested by the referee to hold the property for the referee until a trustee could be appointed, the attachment having been dissolved by the adjudication, it was held that the sheriff was in possession as custodian of the property. *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

Enjoining proceedings on attachment.—Where the act of bankruptcy alleged in an involuntary petition, on which an adjudication is made, is that the debtor suffered certain creditors to obtain a preference through the levy of attachments on his goods, and failed to discharge such levy before sale, the court of bankruptcy has jurisdiction upon a rule to show cause, entered in the bankruptcy proceedings, to enjoin the attaching creditors from the further prosecution of their attachment suits. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

Prosecution of attachment proceeding as against surety.—A court of bankruptcy may

properly permit an attachment creditor, where the bankrupt had given a bond, to prosecute his action to judgment against the bankrupt for the purpose of perfecting his right of action against the surety, where the estate is protected from loss. *In re Maaget*, (S. D. N. Y. 1909) 173 Fed. 232, 23 Am. Bankr. Rep. 14.

Lien obtained prior to four months period.—Where a lien is obtained at the time the attachment is made, it is not avoided by the provisions of section 67f if the attachment is made more than four months before bankruptcy, though the judgment or decree in enforcement of the lien is not obtained until within the four months period referred to. *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931, following *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529.

So, also, where a foreign attachment was levied on the property of a bankrupt more than four months prior to the commencement of the bankruptcy proceedings, it was held that the lien of a *fi. fa.*, on a judgment subsequently obtained, related back to the date of the attachment and was not divested by the Bankruptcy Act. *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573. And see *supra*, p. 799, II. *Time of Acquiring Lien*.

Fund in custody of state court.—Irrespective of whether the lien upon the funds impounded by the service of the summons of garnishment attaches before final judgment or not, the service of the summons of garnishment so far places the funds found in the hands of the garnishee (especially when the money is paid into court, or in lieu thereof a dissolving bond given) into the custody and control of the court administering the case that it will be entitled to hold and subject the fund, despite the subsequent bankruptcy of the defendant, if the petition in bankruptcy be filed more than four months after such custody is obtained. *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

Attachment of exempt property.—As to the attachment of exempt property, see *infra*, this page, V. *Liens on Exempt Property*.

V. LIENS ON EXEMPT PROPERTY.

A lien acquired on exempt property, it has been quite generally held, is not annulled by section 67f. *Powers Dry Goods Co. v. Nelson*, (N. D. 1901) 7 Am. Bankr. Rep. 506; *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408. See also *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251.

Thus it has been said that the lien of an attachment on the personal property of a bankrupt is not destroyed by a mere discharge of the debt secured by the lien, through a discharge in bankruptcy; and unless such lien is one which is itself declared void by said act it may be enforced, through a modified form of judgment, as against the property on

which the lien exists. *Powers Dry Goods Co. v. Nelson*, (1901) 7 Am. Bankr. Rep. 506, 10 N. D. 580, 88 N. W. 703.

But it has also been held that section 67f is applicable to liens acquired through legal proceedings against the bankrupt within four months prior to the filing of the bankruptcy petition without reference to whether the lien was acquired on exempt or nonexempt property; so that an attachment on property of the bankrupt, subsequently exempted to him as a homestead, is dissolved by bankruptcy proceedings, although the property did not pass to the trustee. *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79, following *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, and *distinguishing Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061. See also *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

VI. ENFORCEMENT OF PRE-EXISTING LIENS.

Enforcement of pre-existing lien.—There is a clear distinction between the bald creation of a lien within the four months and the enforcement of one previously acquired. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 437; *Woods v. Klein*, (1909) 22 Am. Bankr. Rep. 722, 223 Pa. St. 257, 72 Atl. 523.

And where a valid lien was in existence more than four months prior to the filing of the petition in bankruptcy the lawful enforcement of such lien is not prohibited by the statute. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Hillyer v. Le Roy*, (1904) 12 Am. Bankr. Rep. 733, 179 N. Y. 369, 72 N. E. 237. See also *Menneke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17.

Thus it has been held that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated; and where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36.

Lien created by enforcement.—But where the enforcement of a pre-existing lien is, in itself, the creation of a new lien, such new lien is rendered void under the provisions of section 67f of the Bankruptcy Act. Thus, under a Pennsylvania statute it has been held that a judgment lien entered of record in the County Court does not create a lien on the goods or chattels, or on the rights and credits, of the debtor in such county, or on his real

estate in a neighboring county. To secure a lien upon these, the plaintiff must resort to the legal process the law has placed at his command; that is, to his writs of *f. fa.*, attachment execution, or *testatum f. fa.* But all of these liens are "obtained through legal proceedings," and if so obtained within four months of the filing of a petition in bankruptcy they will be stricken down by the paramount law. *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17. See also *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476.

Enforcement enjoined.—A court of bankruptcy has jurisdiction over a judgment creditor of the bankrupt, for the purpose of enjoining him from proceeding in a state court for the enforcement of his judgment against property of the debtor, where the judgment was rendered null or inoperative by the adjudication of the debtor as a bankrupt within four months after its rendition, because all creditors are parties to the proceedings in bankruptcy, and because the court has power to restrain any person from illegally possessing himself of assets of the estate. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

In re Oxley, (N. D. Wash. 1910) 182 Fed. 1019, it was held that, in order to give effect to section 67f, a court of bankruptcy has full jurisdiction over property held under liens obtained through legal proceedings, and may enjoin a sale thereon. And see the annotation under section 11a, *supra*, p. 531.

Proceeds of execution sale in sheriff's hands.—The proceeds of an execution sale remaining in the sheriff's hands at the time of the adjudication do not belong to the judgment creditor, but to the estate of the bankrupt, and the court of bankruptcy has power and jurisdiction to order the sheriff to pay over such proceeds to the trustee when appointed. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355, *affirming* (S. D. N. Y. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353, 95 Fed. 427, 2 Am. Bankr. Rep. 494. And see to the same effect, *In re Franks*, (S. D. Ala. 1899) 95

Fed. 635, 2 Am. Bankr. Rep. 635; *Schmilovitz v. Bernstein*, (R. I. 1901) 5 Am. Bankr. Rep. 265; *In re Kenney*, (C. C. A. 2d Cir. 1900) 5 Am. Bankr. Rep. 355; *Jones v. Stevens*, (Me. 1901) 5 Am. Bankr. Rep. 571.

The trustee in bankruptcy is entitled to the entire proceeds of an execution sale remaining in the sheriff's hands, less costs of sale, after the allowance of the exemption when it is claimed from such proceeds. *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

Proceeds released from claim of execution creditor.—The proceeds in the hands of a sheriff, realized from a sale under an execution, are released from the claim of the execution creditor by the filing of a petition in bankruptcy against the debtor within four months after the judgment is rendered, by virtue of the provisions of section 67f. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476.

Distribution of proceeds enjoined.—The right of the bankruptcy court to restrain a sheriff from paying money collected on an execution, issued against the property of the bankrupt, and invalidated by the bankruptcy proceedings, to a judgment creditor, and to require the sheriff to pay such proceeds to a trustee of the bankrupt estate, while those proceeds still remain in his custody, is now firmly established. *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381.

Proceeds paid over to execution creditor.—Where an execution was issued against an insolvent debtor within four months prior to his bankruptcy, and a levy and sale made, and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within section 67f, and a referee in such case is without power summarily to direct a repayment of the money; the remedy of the trustee, if any, being by a plenary action to recover the amount as a preference under section 60b. *In re Resnek*, (E. D. Pa. 1909) 167 Fed. 574, 21 Am. Bankr. Rep. 740. And see to the same effect, *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Lavor v. Seiter*, (1902) 69 App. Div. 33, 74 N. Y. S. 499, 8 Am. Bankr. Rep. 459, *reversing* (1901) 5 Am. Bankr. Rep. 576.

[*Court may order conveyance.*] And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: [(1898) 30 Stat. L. 565.]

Preservation of liens.—Under the express terms of section 67f, a lien affected thereby may be preserved by the court for the benefit of the estate. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. And see to the same effect the following earlier cases: *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 446; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 997, 15 Am. Bankr. Rep.

639; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re Moore*, (D. C. Vt. 1901) 107 Fed. 234, 6 Am. Bankr. Rep. 175; *In re New York Economical Printing Co.*, (2d Cir. 1901) 110 Fed. 518, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615; *In re Hinsdale*, (D. C. Vt. 1901) 111 Fed. 562, 7 Am. Bankr. Rep. 85; *In re Sentenne, etc., Co.*, (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937; *In re Baird*, (W. D. Va. 1904) 126 Fed. 845, 11

Am. Bankr. Rep. 438; *In re Merrow*, (D. C. Mass. 1904) 131 Fed. 993, 12 Am. Bankr. Rep. 616; *Virginia Iron, etc., Co. v. Staake*, (C. C. A. 4th Cir. 1904) 133 Fed. 717, 13 Am. Bankr. Rep. 281; *In re Lesser*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 326; *In re Howland*, (N. D. N. Y. 1901) 6 Am. Bankr. Rep. 495; *Patten v. Carley*, (N. Y. 1902) 8 Am. Bankr. Rep. 482; *In re Jackson*, (E. D. Pa. 1902) 8 Am. Bankr. Rep. 594; *New York City Ninth Nat. Bank v. Moses*, (N. Y. 1903) 11 Am. Bankr. Rep. 772; *Matter of Ah Mi*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 138.

Order of court necessary. — The trustee in bankruptcy is not, by section 67f, subrogated by mere operation of law to the rights of a levying creditor. But he must obtain an order of court preserving the rights of the levying creditor for the benefit of the bank-

rupt's estate. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. See also *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

Court may order surrender of property affected. — Where the bankrupt's property has been seized by an abuse of process, as where the taking was after the filing of the petition in bankruptcy, on a writ of replevin which did not describe the property, but other and different property, it was held that the court has power to order its surrender by the person in possession to the trustee or receiver in bankruptcy. *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424.

[*Bona fide purchasers.*] *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. [(1898) 30 Stat. L. 565.]

Bona fide purchasers protected. — Section 67f expressly provides for the protection of bona fide purchasers for value. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 556, 9 Am. Bankr. Rep. 478; *In re Kenney*, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; *In re Franks*, (S. D. Ala. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; *In re Breslau*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *In re Kenney*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 494, *affirmed* (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170. And see also the cases cited to the same effect under section 67e, *supra*, p. 792, and section 70a and a (5), *infra*, pp. 811, 823.

Subdivisions c and f of section 67 refer only to existing liens created by legal proceed-

ings, and are not applicable to a case in which such a lien has become merged into a title by the consummation of an execution sale. In such case the property does not belong to the bankrupt, and could not have been levied upon under an execution against him at the time of the initiation of the bankruptcy proceedings. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

The burden of proving the bona fides of a sale of the bankrupt's property within the four months period rests on the purchaser. *Menneke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767.

But in a suit against a sheriff, for the seizure and sale of property on an attachment proceeding within the four months period, the provision for the protection of bona fide purchasers is not applicable. *Jones v. Stevens*, (Me. 1901) 5 Am. Bankr. Rep. 571.

SEC. 68. SET-OFFS AND COUNTERCLAIMS. — a [*Mutual debts and credits.*] In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. [(1898) 30 Stat. L. 565.]

The word "debt," as used in section 68a, includes any debt provable in bankruptcy. *Germania Sav. Bank, etc., Co. v. Loeb*, (C. C. A. 6th Cir. 1911) 188 Fed. 285.

Any debt, liquidated or unliquidated, owing to the bankrupt from a creditor of his, whether for damages or on contract, express or implied, which passes to the trustee, may be used by him to reduce the claim of such creditor when presented, or to extinguish it altogether. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

Thus it has been held that the word "debts," in section 68a, should be construed

to include a right of action against the creditor for injury to the bankrupt's property, which passed to the trustee under section 70a (6), although unliquidated. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

So, also, a creditor may set off a claim which was unliquidated at the commencement of the bankruptcy proceedings, where it has been liquidated subsequently thereto. *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

Surety debts. — A surety who pays the

debt of his bankrupt principal, after the adjudication in bankruptcy, may set off the amount so paid against his own debt to the bankrupt. *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63.

Mutual debts and credits, under the language of the statute, may be set off against each other, the balance only being allowable and payable, in bankruptcy proceedings. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42, reversing (1902) 8 Am. Bankr. Rep. 515; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *Walther v. Williams Mercantile Co.*, (C. C. A. 6th Cir. 1909) 169 Fed. 270, 22 Am. Bankr. Rep. 328; *Booth v. Prete*, (1909) 22 Am. Bankr. Rep. 579, 15 Ann. Cas. 306, 81 Conn. 636, 71 Atl. 938.

If, however, the claim asserted as a set-off does not fall within the language of the Act as a mutual transaction, it will not be allowed as a set-off. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55; *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84; *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228; *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344.

Thus, the mere fact that the stockholders of a bankrupt corporation are also bondholders, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

So, also, where five persons, only one of whom was solvent, had a joint claim against the estate of a bankrupt, and each of them had severally become liable to the trustee in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration for the other, it was held that there could be no set-off of such claims. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55.

Liability to trustee included.—Section 68a includes a liability on the part of a creditor which has accrued to a trustee in bankruptcy as such, though not to the bankrupt himself, when the creditor's claim and such liability are mutual. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55.

Money retained by creditor under agreement.—Where, in a proceeding by a bankrupt's trustee to recover a sum of money from the manager of one of the bankrupt's stores, the answer, admitted to be true, alleged that prior to the bankruptcy there were mutual accounts between the defendant and the bankrupt, and that the defendant applied to the payment of the balance due him by the bankrupt for salary the sum claimed which he was authorized to do in accordance

with his custom and under an agreement with the bankrupt when he undertook the management of the business, it was held that the money so applied did not belong to the bankrupt's estate at the time the petition was filed, and could not, therefore, be recovered in such proceeding. *In re Lebrecht*, (W. D. Tex. 1905) 135 Fed. 878, 14 Am. Bankr. Rep. 445.

Payments on running accounts.—Payments made from time to time to apply on a running account do not constitute mutual debts or credits within the meaning of section 68. *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202.

Cash payments on account, made within four months of the filing of the petition, are not such debts or credits as entitle the creditor to state the account, and hold the bankrupt only for the balance found under section 68a. *In re Ryan*, (N. D. Ill. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396.

Set-off between bank and depositor.—A bank which is a creditor of a bankrupt who has a sum on deposit to his credit at the date of bankruptcy is entitled to apply the same on its claim as a set-off. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380; *In re Myers*, (D. C. Ind. 1900) 99 Fed. 691; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re George M. Hill Co.*, (7th Cir. 1904) 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68; *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631; *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573; *In re Philip Semmer Glass Co.*, (2d Cir. 1905) 135 Fed. 77, 67 C. C. A. 551, appeal dismissed (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Ridge Ave. Bank v. Studheim*, (3d Cir. 1906) 145 Fed. 798, 76 C. C. A. 362; *Irish v. Citizens' Trust Co.*, (N. D. N. Y. 1908) 163 Fed. 880; *Tomlinson v. Lexington Bank*, (4th Cir. 1906) 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469; *Booth v. Prete*, (1909) 81 Conn. 636, 15 Ann. Cas. 306, 71 Atl. 938; *Hooks v. Gila Valley Bank, etc., Co.*, (1909) 12 Ariz. 315, 100 Pac. 806; *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841.

The rule stated in the foregoing paragraph is, however, applicable only in the absence of fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

Set-off prior to filing of petition.—The fact that a set-off was made by the bank prior to the filing of the bankruptcy petition does not affect the question, because, in such case, it did only what the law would have done had the bank waited until the petition was filed. *Booth v. Prete*, (1909) 22 Am. Bankr. Rep. 579, 15 Ann. Cas. 306, 81 Conn. 636, 71 Atl. 938.

Claim maturing subsequent to filing of petition.—A bank has the right to set off a deposit against the debt of the bankrupt whether matured or not at the date of the

adjudication in bankruptcy. *Irish v. Citizens' Trust Co.*, (N. D. N. Y. 1908) 163 Fed. 880; *Germania Sav. Bank, etc., Co. v. Loeb*, (C. C. A. 6th Cir. 1911) 188 Fed. 285; *In re Philip Semmer Glass Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 665, *affirmed* (2d Cir. 1906) 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25, *appeal dismissed* (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Steinhardt v. National Park Bank*, (1907) 120 App. Div. 255, 105 N. Y. S. 23, *reversing* 52 Misc. 464, 102 N. Y. S. 546; *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805, *affirming* 100 App. Div. 449, 91 N. Y. S. 488.

Mistake in failing to claim set-off.—And where a bank pays, by mistake, to the trustee in bankruptcy the amount on deposit to the credit of the bankrupt, instead of setting off the same against a debt due the bank by the bankrupt, the amount so paid the trustee in bankruptcy may be recovered by the bank. *Union Nat. Bank v. McKey*, (7th Cir. 1900) 102 Fed. 662, 42 C. C. A. 583.

One bank assuming rights and liabilities of another.—Although a bank cannot, after the insolvency of the debtor, acquire his obligation for the purpose of using it as a set-off or counterclaim, it has been held that this rule does not apply where the bank acquires the depositor's obligation in the transaction by which it assumes the liability to pay the deposit; i. e., where one bank takes the assets and assumes the liabilities of another bank the former is entitled to the right of set-off belonging to the latter. *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805, *affirming* 100 App. Div. 449, 91 N. Y. S. 488.

Set-off of deposit not preference.—A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, when set off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off; but this fact does not operate to enlarge the scope of the section relating to preferences so as to prevent set-off in cases coming within the terms of section 68a. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42, *reversing* (1902) 8 Am. Bankr. Rep. 515, and *distinguishing* *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 908, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

Set-off as against special deposit.—But where the deposit is made not as a general deposit subject to check, but in trust for some special purpose of which the bank has notice, the bank is not at liberty to set off the deposit against a debt due it from the

depositor. *In re Davis*, (W. D. Tex. 1903) 119 Fed. 950, 9 Am. Bankr. Rep. 670; *Lynam v. Belfast Nat. Bank*, (1904) 98 Me. 448, 57 Atl. 799.

Depositor may set off account.—On the bankruptcy of a banking partnership, a depositor having a credit balance in his account is entitled to set off the same against a note on which he is indebted to the bank. *In re Shultz*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

Claims not due at institution of proceedings.—As claims maturing subsequently to the filing of the petition are provable against the estate, they necessarily are the subject of set-off under the provisions of section 68. *Germania Sav. Bank, etc., Co. v. Loeb*, (C. C. A. 6th Cir. 1911) 188 Fed. 285; *Frank v. Mercantile Nat. Bank*, (1905) 14 Am. Bankr. Rep. 125, 182 N. Y. 264, 74 N. E. 841; *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. And see also the cases cited *supra*, p. 806, to this effect, under the heading *Set-off between bank and depositor*.

Right and duty of trustee to claim set-off.—If a claimant is indebted to the estate, such debt is an asset of the estate, and it is the duty of the trustee to interpose the same as a set-off or counterclaim. *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 258.

A trustee in bankruptcy may set up, as a set-off against a claim filed by a creditor, a claim for unliquidated damages existing in favor of the bankrupt against such creditor which passed to the trustee, and which under the law of the state the bankrupt, but for his bankruptcy, might have pleaded as a counterclaim in an action by the creditor; and the trustee may have such claim liquidated by the referee, unless some other mode of liquidation is directed. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

And where a creditor of a corporation is also a subscriber for its corporate stock, and his subscription has not been fully paid, he will not be allowed to prove his claim against the estate of the corporation in bankruptcy until he has paid the balance remaining due on his subscription. *In re Wiener, etc., Shoe Co.*, (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

Burden of proof.—Where the debt of a creditor against the estate of a bankrupt has been duly proved, the burden of proof rests upon the trustee to establish a set-off pleaded by him. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

Claim of set-off as consent to jurisdiction.—Where a creditor of a bankrupt, who was also a director, on filing his claim, sought to set off his own indebtedness as a credit thereon, and went to trial on such issue, he thereby gave his "consent," within the meaning of section 23b, that the court of bankruptcy should determine the amount due from him and enter judgment thereon for the disallowance of the set-off claimed. *In re White*, (C. C. A. 7th Cir. 1910) 177 Fed. 194, 24 Am. Bankr. Rep. 197.

b [When not allowed.] A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which [(1898) 30 Stat. L. 565.]

(1) [Debts not provable.] is not provable against the estate; or [(1898) 30 Stat. L. 565.]

Unprovable claims may not be set off. — An indebtedness which is not provable against the bankrupt's estate may not, under the statutory inhibition, be allowed as a set-off in the bankruptcy proceedings. *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *In re Philip Semmer Glass Co.*, (C. C. A. 2d Cir. 1905) 135 Fed. 77, 14 Am. Bankr. Rep. 25; *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228. And as to what constitutes provable debts see the annotation under section 63 a and b, *supra*, p. 763 *et seq.*

Unliquidated claim. — Section 68b (1) does not prevent a set-off of a claim which was liquidated at the later moment merely because, for some reason, it did not admit of proof when the proceedings were commenced. *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

But an unliquidated claim, of such a nature as not to be provable in bankruptcy,

cannot be used as a set-off under section 68. *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228. And see the annotation under section 63b, *supra*, p. 765, as to the provability of unliquidated claims.

Failure to prove claim does not prevent its use as set-off. — Section 57a, limiting the time for proving claims to one year, has reference to the bankruptcy proceedings alone; and if the claim of a creditor, who is also a debtor of the estate, is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim, in an action by the trustee to recover his indebtedness to the estate, as a claim "provable against the estate" within the meaning of section 68b. *Norfolk, etc., R. Co. v. Graham*, (C. C. A. 4th Cir. 1906) 145 Fed. 809, 16 Am. Bankr. Rep. 615. See also *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

(2) [Purchase or transfer for purpose of set-off.] was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy. [(1898) 30 Stat. L. 565.]

Claims procured for purpose of set-off. — A set-off will not be allowed to one who, with knowledge of the bankrupt's insolvency, purchases claims against such bankrupt with a view to using the same, by way of payment or set-off, so as to obtain an advantage over other creditors. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447. See also *In re Shults*, (W. D. N. Y. 1905) 135 Fed. 623, 14 Am. Bankr. Rep. 378.

Thus where an indorser of a bankrupt's paper took it up within four months prior to bankruptcy, knowing that the bankrupt was

insolvent, and for the purpose of setting it off against its debt to the bankrupt, it was held that such paper was not available as a set-off against the bankrupt's trustee. *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733.

Claims based on preferences. — Where a claim for which the right of set-off is sought is based upon a preference, which is voidable under section 60b, it will not be allowed. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

SEC. 69. POSSESSION OF PROPERTY. — a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned

to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition. [(1898) 30 Stat. L. 565.]

Cross-references: As to

Appointment of receiver or marshal to take possession of assets, see section 2 (3), *supra*, p. 472.

Bond required, etc., see section 3e, *supra*, p. 494.

Duty to seize property.—It is the duty of the court on its own motion, in a proper case, to take actual possession and custody of the bankrupt's estate, either through a receiver or by a direction to the marshal. *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44. See also *Davis v. Bohle*, (8th Cir. 1899) 92 Fed. 325, 34 C. C. A. 372.

Wherever it appears that it is necessary for the preservation of the property claimed to be a part of the bankrupt's estate, after a petition in bankruptcy has been filed, that the court should take possession of the same, pending the adjudication of title, it is within the jurisdiction of the court to order the marshal or a custodian to take possession of such property; and wherever the petition, duly verified, avers that the alleged bankrupt has transferred his property for the purpose of hindering, delaying, and defrauding creditors, and sets forth facts tending to show that the transfer is null and void under the Bankruptcy Act, and that the party in possession is financially irresponsible, and that there is danger that goods alleged to belong to the bankrupt will be lost to his estate without the interposition of the court, such court has the power, and it was its duty, to lay its hand upon the property and hold the same until the claims thereto or rights therein can be determined. The object of the bankruptcy law, which is to have the property of the bankrupt equally distributed among his creditors, would be entirely defeated if in such a case the court was compelled to wait for the appointment of a trustee to bring a suit to recover such property, for by the time such suit could be determined the property in the hands of an irresponsible person might have been entirely dissipated. But the power to make such seizure should not be lightly exercised, or abused, so as needlessly to oppress or injure those who claim title; and in all cases creditors who pray for such an order of seizure should be required to give bond to indemnify the party injured, in the event that it should be determined thereafter that the party in whose possession the goods are is lawfully the owner thereof. *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432.

It is not necessary to allege that property to be seized is not exempt from seizure. *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

After adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate,

otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where the creditors and other persons interested make no objection whatever. *In re Huddleston*, (S. D. Ga. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669.

Statutory requirements must be complied with.—A warrant will not be issued, under section 69, excepting where the statutory requirements are strictly complied with. Thus it has been held that the statute does not authorize the court to issue a warrant for the seizure of an alleged bankrupt's property, against whom an involuntary petition is pending, on the application of the petitioning creditors, merely supported by the affidavit of the bankrupt, averring that he waives proof showing that he has committed an act of bankruptcy, that he has neglected his property and that it has thereby deteriorated in value, and that he waives the giving of the required bond, and that he agrees that the warrant may issue. *In re Sarsar*, (W. D. Tenn. 1903) 120 Fed. 40, 9 Am. Bankr. Rep. 576.

A petition must be filed before the warrant of seizure may issue. *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306.

The purpose of requiring a bond, either under section 3e or under section 69, is to indemnify the alleged bankrupt before his property may be taken from his possession by petitioning creditors prior to an adjudication of bankruptcy. *In re Haff*, (C. C. A. 2d Cir. 1905) 135 Fed. 742.

Property in possession of adverse claimant.—Section 69 does not authorize the court to issue a warrant to the marshal to take property away from the possession of a third party who holds it under a *bona fide* claim of right or title. *In re Rockwood*, (N. D. Ia. 1899) 91 Fed. 363, 1 Am. Bankr. Rep. 272; *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306; *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep. 632; *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132.

Thus in *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306, it was said that section 69 was not designed as a general grab-all attachment proceeding, nor a statutory remedy for the seizure of property fraudulently conveyed by an alleged insolvent debtor, nor is it in any sense to be made a summary proceeding against anybody but the alleged bankrupt, nor against any property except that which is in his own hands or those of his acknowledged agents.

It has also been held that it is error for a court of bankruptcy to appoint a receiver to take possession of property, and to make a summary order for the sale thereof, without the consent of an adverse claimant who is in actual possession of such property claiming

it as owner. *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751.

The amendment of section 23 by the Act of Feb. 5, 1903, does not affect the original meaning of section 69, nor enlarge its scope so as to authorize a court of bankruptcy to make a summary order directing the transfer of property in the possession of a *bona fide* adverse claimant. *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132.

The mere filing of a petition does not give the bankruptcy court constructive possession of property held under an adverse claim; and such a claimant cannot be summarily deprived of his possession by the trustee in bankruptcy of an alleged owner. *Morning Tel. Pub. Co. v. S. B. Hutchinson Co.*, (Mich. 1906) 17 Am. Bankr. Rep. 425.

But see *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432, where in it was held that whenever, after the filing of a petition in bankruptcy, it appears to be necessary for the preservation of property claimed to be a part of the bankrupt's estate, it is within the jurisdiction of the court to order the marshal, or a custodian, to take possession of such property, although in possession of an adverse claimant, pending the adjudication of title; such proceeding being one in bankruptcy, and not a controversy at law or in equity.

But where the possession of an adverse claimant was acquired subsequent to the filing of the petition in bankruptcy the property may be seized under an order of court. Thus in *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623, it was held that a court of bankruptcy has authority, after the adjudication, to order the marshal or receiver to take possession of the property of the bankrupt from a third party who acquired his possession and alleged right thereto after the filing of the petition, and before the adjudication of bankruptcy. *In re Moody*, (N. D. Ia. 1904) 131 Fed. 525, 12 Am. Bankr. Rep. 718.

Determination of adverse claim.—In *In re Young*, (C. C. A. 8th Cir. 1901) 111 Fed. 158, 7 Am. Bankr. Rep. 14, it was said that when third parties claim title to property which has been seized by the marshal under a warrant, as forming part of a bankrupt's estate, it will sometimes be found most convenient to settle the controversy summarily on a mere motion filed in the bankruptcy proceedings; but in other cases, where the claimant's right depends upon a decision of contested issues of fact or disputable questions of law, it will be found most expedient to require the controversy to be determined by a plenary action either in the bankruptcy court or in some other court of competent jurisdiction. As such controversies arise the bankruptcy courts can best determine how the issues involved can be tried with least delay, inconvenience, and expense, and with the greatest assurance of reaching a correct result. Therefore they should be allowed to direct the course of procedure in such cases,

and orders made in that behalf should not be disturbed unless the case discloses a clear abuse of this discretionary power.

Thus where a marshal took possession of property which he found in the bankrupt's possession, and which was surrendered to him by the bankrupt as his own, it was held that there was no error in refusing, on a mere motion, to order such property returned to a mortgagee, upon his claim that he was legally in possession under his mortgage when it was seized, the validity of his mortgage being denied by creditors; and that the court acted within its discretion in requiring such claimant to assert his rights by a plenary action in which they could be more properly tried and determined. *In re Young*, (C. C. A. 8th Cir. 1901) 111 Fed. 158, 7 Am. Bankr. Rep. 14. And see to the same effect *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep. 632.

Summary determination.—Although section 69 extends only to the taking custody of property belonging to the bankrupt, or which is in his possession, or that of a third person as his bailee or agent, and not to property in the possession of an adverse claimant, this power, nevertheless, confers jurisdiction upon the bankruptcy court to ascertain whether the property is in the possession of the bankrupt, or his bailee or agent, or whether it is in the possession of an adverse claimant, and to institute and entertain an appropriate proceeding for that purpose; and such proceeding must necessarily be a summary one because, as no trustee has been appointed, there is no person to represent the estate as a party to a formal suit. *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132. And see to the same effect *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182.

But it is the duty of all courts to see that such process as they may issue directing the seizure of property is not abused or so executed as to needlessly oppress or injure third persons who are strangers to the litigation. Ordinarily they should act with as much expedition as possible when complaint is made that under color of process the rights of third parties have been invaded. *In re Young*, (C. C. A. 8th Cir. 1901) 111 Fed. 158, 7 Am. Bankr. Rep. 14.

Interference with property restrained.—Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein. *In re Smith*, (N. D. Ga. 1902) 113 Fed. 903, 8 Am. Bankr. Rep. 55, relying on *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623. And see also the annotation under section 11a, *supra*, p. 531.

And where an ancillary receiver was properly appointed in bankruptcy proceedings, it was held that the property in his hands, as such receiver, was *in custodia legis*, and was not subject to attachment. *In re John L.*

Nelson, etc., Co., (S. D. N. Y. 1907) 149 Fed. 590, 18 Am. Bankr. Rep. 66.

So, also, it has been held that after an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the

action of replevin was begun. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178.

But see *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215, wherein it was held that the court had no power to enjoin a third party from disposing of property in his possession and claimed by him adversely to the bankrupt.

SEC. 70. TITLE TO PROPERTY. — *a* [*Vested in trustee.*] The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all [(1898) 30 Stat. L. 565.]

Cross-references: As to

Downer rights, see section 8a, *supra*, p. 527.

Duty of trustee to collect assets, see section 47a (2), *supra*, p. 682.

Recovery of voidable preferences, see section 60b, *supra*, p. 739.

Recovery of property fraudulently transferred, see section 67a, *supra*, p. 792, and subdivision e of this section, *infra*, p. 844.

- I. NATURE OF TRUSTEE'S TITLE, 811.
- II. TIME WHEN TITLE PASSES, 813.
- III. BURDENSOME PROPERTY, 816.
- IV. EXEMPT PROPERTY, 817.
- V. RECLAMATION PROCEEDINGS, 818.

I. NATURE OF TRUSTEE'S TITLE.

Section 70 is to be construed with section 47a (2) as amended by the Act of June 25, 1910, which vests the trustee with the rights of a creditor holding a lien. *In re Hammond*, (N. D. Ohio 1911) 188 Fed. 1020.

Trustee takes bankrupt's title. — Section 70a vests the trustee, by operation of law, with such title as the bankrupt had prior to his adjudication; and, in the absence of fraud, the trustee takes no better title. So, also, it has been uniformly held that, with respect to the character of his title, the trustee occupies the same relation to creditors that the bankrupt sustained prior to the inception of the proceedings. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368; *In re Adams*, (D. C. Conn. 1905) 134 Fed. 142, 14 Am. Bankr. Rep. 23; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *In re Chantler*

Cloak, etc., Co., (D. C. R. I. 1907) 151 Fed. 952, 18 Am. Bankr. Rep. 498; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 259; *Dunlop v. Mercer*, (C. C. A. 8th Cir. 1907) 156 Fed. 545, 19 Am. Bankr. Rep. 361; *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545; *In re Cincinnati Iron Store Co.*, (6th Cir. 1909) 167 Fed. 498, 498, 93 C. C. A. 122; *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124; *In re National Grocer Co.*, (C. C. A. 6th Cir. 1910) 181 Fed. 33; *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810; *Hobbs v. Frazier*, (Fla. 1908) 22 Am. Bankr. Rep. 684.

Thus it has been held that the trustee in bankruptcy stands in the shoes of the bankrupt. *In re English*, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668.

The statute does not undertake to vest the bankrupt with title to property to which he had no title prior to his adjudication, but only relates to property the title to which he had acquired to such an extent as to render the same liable to seizure and sale under execution for his debts; thus the statute does not cover property which the bankrupt held as bailee only, although he may have had an option to purchase any part of the same at any time. *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740.

Nor does the statute cover property the title to which has vested, *bona fide*, in third parties prior to the institution of the bankruptcy proceedings. *In re Ozark Coöperage, etc., Co.*, (C. C. A. 8th Cir. 1910) 180 Fed. 105.

A title or lien acquired by an assignee under a general assignment, valid according to the law of the state where it is made, that is to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the suppression of

the assignment proceeding; but upon the order of the court of bankruptcy it may be retained by the trustee for the benefit of the creditors. *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149. And see to the same effect *In re H. G. Andras Co.*, (E. D. Wis. 1902) 117 Fed. 561.

The provisions of section 70 are in themselves sufficient to vest the trustee in bankruptcy, when appointed, with the title to property of the bankrupt held by an assignee under a general assignment for the benefit of creditors, executed prior to proceedings in bankruptcy, if an adjudication subsequently follows within the statutory period of four months. *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475; *Davis v. Bohle*, (C. C. A. 8th Cir. 1899) 92 Fed. 325.

And a sale of property by an assignee for the benefit of creditors vests the purchaser with no title as against the trustee in bankruptcy of the assignor, subsequently appointed on an adjudication based on the assignment, where such purchaser has made no payment for the property. *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6.

Title as against state receiver.—The trustee takes title as against a receiver, appointed by a state court, who fails to comply with the requirements of the state law as to the filing of his order of appointment. *In re Tyler*, (W. D. N. Y. 1900) 104 Fed. 778, 5 Am. Bankr. Rep. 152.

So, also, it has been held that the title to the property of a bankrupt in possession of a state court receiver, appointed within the four months period, passes to and becomes vested in the trustee in bankruptcy, by operation of law, as of the date of the adjudication; and the rights of the trustee will be enforced by the bankruptcy court, if not recognized by the receiver. *In re Hecox*, (C. C. A. 8th Cir. 1908) 21 Am. Bankr. Rep. 314.

Title subject to existing equities.—A trustee in bankruptcy takes the bankrupt's property, in cases unaffected by fraud, in the same condition that the bankrupt held it, and subject to the equities thereon in the bankrupt's hands. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 437; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Macdougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 805.

Equitable assignment.—Thus if there has been an equitable assignment of part of a fund by a bankrupt, valid as between him and the assignee, the trustee in bankruptcy takes the fund subject to the assignment, even if for reasons of public policy it could not have been enforced against the holder of the fund. *In re Hanna*, (E. D. Pa. 1900) 105 Fed. 587, 5 Am. Bankr. Rep. 127.

Where bankrupt had not paid purchase price.—The trustee of a bankrupt has no

equitable standing to enjoin the removal, from a building, of a steam engine which the bankrupt had not paid for, nor acquired the legal title to, without an offer to pay to the owner the unpaid purchase price. *In re Smith*, (D. C. R. I. 1903) 119 Fed. 1004, 9 Am. Bankr. Rep. 590. See also *In re Manuel J. Portuondo Co.*, (E. D. Pa. 1905) 135 Fed. 592.

The validity of such rights, claims, and equities of third persons, as are impressed upon the estate of the bankrupt while in his hands, and which his trustee must take with the property, must, in the absence of federal regulation therefor, be determined by the local law. *In re Wade*, (W. D. Mo. 1911) 185 Fed. 664. See also *Godwin v. Murchison Nat. Bank*, (1907) 22 Am. Bankr. Rep. 703, 145 N. C. 320, 59 S. E. 154.

Valid liens and incumbrances.—It is well settled that the trustee in bankruptcy takes title to the assets of the estate subject to all such liens, claims, and incumbrances thereon as are valid as against the creditors whom he represents. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Moore*, (D. C. Vt. 1901) 107 Fed. 234, 6 Am. Bankr. Rep. 175; *In re Standard Laundry Co.*, (N. D. Cal. 1901) 112 Fed. 126, 7 Am. Bankr. Rep. 254; *Virginia Iron, etc., Co. v. Staake*, (C. C. A. 4th Cir. 1904) 133 Fed. 717, 13 Am. Bankr. Rep. 281; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 16 Am. Bankr. Rep. 825; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *In re Columbia Fireproof Door, etc., Co.*, (E. D. N. Y. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714; *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538; *Continental Nat. Bank v. Katz*, (Ill.) 1 Am. Bankr. Rep. 19; *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 805; *Godwin v. Murchison Nat. Bank*, (1907) 22 Am. Bankr. Rep. 703, 145 N. C. 320, 59 S. E. 154.

Thus it has been held that where the claimant sold tobacco to a bankrupt, receiving the bankrupt's notes as a conditional payment, and the claimant retained possession of the tobacco in question until after the bankrupt's adjudication, and until the notes matured and were unpaid, the title to the property so retained did not pass to the bankrupt's trustee except subject to the claimant's existing lien for the unpaid portion of the price. *In re Manuel J. Portuondo Co.*, (E. D. Pa. 1905) 135 Fed. 592. See also *In re Smith*, (D. C. R. I. 1903) 119 Fed. 1004, 9 Am. Bankr. Rep. 590.

And though the claimant waived his right to a vendor's lien by extending credit to the bankrupt, it was held that such lien was im-

mediately revived, on the bankrupt's becoming insolvent, as to so much of the tobacco as remained in the claimant's possession. *In re Manuel J. Portuondo Co.*, (E. D. Pa. 1905) 135 Fed. 592.

The trustee is in no sense a bona fide purchaser for value, nor entitled to protection as such. *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, *affirming* (1907) 189 N. Y. 267, 82 N. E. 127; *Allen v. Hollander*, (C. C. Mass. 1904) 128 Fed. 159, 11 Am. Bankr. Rep. 753.

Thus it has been held that the trustee of a bankrupt corporation, which took title to property expressly subject to certain chattel mortgages, cannot attack the validity of such mortgages on the ground that they were not recorded in a county where one of the original mortgagors resided, as required by the state statute; his rights being measured by those of the bankrupt. *In re Columbia Fireproof Door, etc., Co.*, (E. D. N. Y. 1909) 168 Fed. 169, 21 Am. Bankr. Rep. 714.

But a trustee in bankruptcy is entitled to possession of all of the bankrupt's property, and to administer the same, although it may be subject to liens or in possession of a state court in proceedings to enforce a lien instituted within four months prior to the bankruptcy. *In re Kaplan*, (N. D. Ga. 1905) 144 Fed. 159, 16 Am. Bankr. Rep. 267, *explaining* *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122.

Trustee vested with rights of creditor.—Since the enactment of the amendment of 1910, trustees as to all property in the custody or coming into the custody of the bankruptcy court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2), *supra*, p. 682.

Liens invalid as to creditors.—But the rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *In re Rudnick*, (D. C. Wash. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442. See also the annotation under sections 60b and 67e, *supra*, pp. 739, 792, and subdivision c of this section, *infra*, p. 844.

Unlike an assignee for the benefit of creditors, who has no rights beyond those of his assignor, by whose voluntary act the assignment was made, a trustee in bankruptcy takes title by operation of law entirely independent of the bankrupt, and is expressly invested with the rights of creditors, and with authority to avoid any transfer by the bank-

rupt of his property which any creditor might have avoided. *Fourth St. Nat. Bank v. Millbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442.

II. TIME WHEN TITLE PASSES.

Effect of commencement of proceedings—Generally.—In *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209, it was said that on the day of the filing of the petition in bankruptcy the property of the bankrupt passes from his control to the court or to its officers, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor, as a *cestui que trust*, an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankruptcy law deprives the creditor of all his common-law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claim against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt. Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him" in *custodia legis*. From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim may be stayed from the date of the filing of the petition (see sec. 11a, *supra*, p. 531). Every person is forbidden to receive from the bankrupt any material amount of property after that date with intent to defeat the Act (see sec. 29b, *supra*, p. 646). Every intentional preference after that date is voidable (see sec. 60b, *supra*, p. 739). Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value (see sec. 69a, *supra*, p. 808). And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been seized or sold under judicial process against him, passes to this officer of the court (see sec. 70a (5), *infra*, p. 823). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt, and all parties interested in the property, throughout all the provisions of the law.

It is the established doctrine that bankruptcy proceedings are *in rem*, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that, when bank-

ruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as "a caveat to all the world," preventing interference by attachments or other means in derogation of the interests of the estate. While title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable. *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32. See also *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464.

Section 70a is not antagonistic to clause (5) thereof in respect to the time the trustee's title takes effect. The words "as of the date he was adjudged" refer to time merely, while the apparently contradictory words "property which prior to the filing of the petition he could by any means have transferred," etc., used in clause (5), refer to what title passes, rather than the time of vesting. This view protects *ad interim* purchasers and keeps going concerns alive, for the benefit of the creditors if adjudications follow, and the benefit of the debtors themselves if dismissals result. Nor can it be said that, by recognizing a valid title in the bankrupt until adjudication, creditors may be at the mercy of a dishonest debtor; Congress, foreseeing that, also enacted section 69, by which creditors may take possession of the property of debtors likely to take advantage of the situation. *In re Pease*, (W. D. N. Y. 1900) 4 Am. Bankr. Rep. 578, *disapproving In re Harris*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 359.

The commencement of bankruptcy proceedings marks the division of the bankrupt's old financial condition and his new financial condition. The alleged bankrupt is supposed to give up everything and to be freed of his debts, and it is not in the spirit of the bankruptcy law to allow him, subsequent to the commencement of bankruptcy proceedings, to change his *status* so as to claim any greater rights out of the property than he possessed at the time the proceedings were commenced. *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491.

Where a bankrupt was designated as beneficiary in a policy on the life of his mother, which directed that it should be paid to the beneficiary of the insured last designated on the back of the policy, if living, and the insured died four days after the filing of the bankruptcy petition, leaving the bankrupt as a designated beneficiary, it was held that his interest in the policy was one which he could have transferred under the state law, and therefore it vested in the trustee in bankruptcy of the beneficiary. *In re Hogan*, (W. D. Wis. 1911) 186 Fed. 537.

Although property fraudulently conveyed before the passage of the Bankruptcy Act, by a debtor who is subsequently adjudged bankrupt, would be beyond the reach of the court of bankruptcy, yet if the title to the same has reverted in the bankrupt, and is in him at the time of the filing of the petition, it is

a part of his estate to be administered in bankruptcy. *In re Brown*, (D. C. Ore. 1898) 91 Fed. 358.

Removal of property enjoined. — Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person, who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein. *In re Smith*, (N. D. Ga. 1902) 113 Fed. 993, 8 Am. Bankr. Rep. 55. See also the annotation to this effect, *supra*, under sec. 2 (3), p. 472; sec. 11a, p. 531; sec. 23b, p. 595; and sec. 69, p. 808.

But see *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729, wherein it was said that bankruptcy proceedings undoubtedly put the property within the control of the court, if it sees fit to exercise the power; but pending and prior to an adjudication, it is still the bankrupt's, title only vesting in the trustee, as of that date, after an adjudication has been obtained. Subject then to the right of the trustee to avoid it as a preference, an honest disposition of his property by the bankrupt, even after proceedings have been instituted, therefore stands.

Property in custodia legis. — It seems to be generally conceded that from the time of the filing of the petition in bankruptcy the estate of the alleged bankrupt is in *custodia legis*. *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729; *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464; *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209; *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289; *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44; *Rand v. Sage*, (1905) 94 Minn. 344, 102 N. W. 864.

On the filing of a petition in bankruptcy all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and upon adjudication that court is vested with jurisdiction thereover coextensive with the United States. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132, decree vacated (8th Cir. 1910) 178 Fed. 1005, 101 C. C. A. 664.

No other court, and no person acting under process, can, without permission of the bankruptcy court, interfere with the property of the bankrupt's estate. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Dobert*, (W. D. Tex. 1908) 165 Fed. 749, 21 Am. Bankr. Rep. 634.

Effect of want of notice. — Where a bank paid checks drawn by a depositor, in ignorance of the filing late the day before of an involuntary petition in bankruptcy against the depositor, and the receiver, who qualified on the day of the payment of the checks, made no demand for the depositor's funds until

after the checks were honored, it was held that the trustee, subsequently elected, could not recover from the bank the amount paid on the checks. *In re Zotti*, (C. C. A. 2d Cir. 1911) 186 Fed. 84, wherein it was said that the rule that the filing of a petition is a caveat to all the world cannot be applied to a bank which has honestly paid checks of a depositor without notice that any petition in bankruptcy has been filed against him and who may never be adjudicated a bankrupt at all. On the other hand, it would apply if the bank had refused to pay moneys which it had received prior to the filing of the petition and still had, or moneys which it had conclusively transferred.

Effect of adjudication.—It has been frequently decided that the title to the bankrupt's property formally passes to his trustee by operation of law as of the date of the adjudication. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Goldman*, (S. D. N. Y. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100; *In re Corbett*, (E. D. Wis. 1900) 104 Fed. 872, 5 Am. Bankr. Rep. 224; *In re Engle*, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re Kellogg*, (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623; *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98, 18 Am. Bankr. Rep. 572; *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289; *In re Nisenon*, (D. C. N. J. 1910) 182 Fed. 912; *In re Hurley*, (D. C. Mass. 1910) 185 Fed. 851; *In re Zotti*, (C. C. A. 2d Cir. 1911) 186 Fed. 84; *Crosby v. Spear*, (1904) 11 Am. Bankr. Rep. 613, 98 Me. 542, 57 Atl. 881.

A trustee is vested with title to the bankrupt's property as of the date of the adjudication; such title relates back to the commencement of the proceedings, and as between courts of different districts, in each of which a petition has been filed, and either of which would have jurisdiction, priority of jurisdiction is determined by the date of the filing of the petitions, and not by the date of adjudication. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484.

An adjudication in bankruptcy operates *in rem*, and from the time it is entered the bankrupt's property is in the custody of the court. *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303.

An adjudication in bankruptcy operates as a seizure of the bankrupt's property, by which it is taken *in custodia legis* wherever situated within the United States, and the title and right of possession pass by operation of law to the trustee, as custodian for the court, at once on his selection and qualification. *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404. And see to the same effect *In re*

Cobb, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *French v. White*, (1905) 18 Am. Bankr. Rep. 905, 78 Vt. 89, 6 Ann. Cas. 479, 62 Atl. 35.

Where the bankrupt's mother died, intestate, at six o'clock in the morning of the day on which, at eleven o'clock, the petition in bankruptcy was filed and an adjudication entered, it was held that the bankrupt's interest in his mother's estate passed to his trustee. *In re Stoner*, (E. D. Pa. 1901) 105 Fed. 752, 5 Am. Bankr. Rep. 402. And see to the same effect *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4.

From a bankrupt's adjudication until the appointment of a trustee the bankrupt is not to be regarded as civilly dead. *Plaut v. Gorbam Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

Property acquired subsequent to adjudication.—The bankrupt's creditors have no interest in, or claim to, property acquired by the bankrupt after his adjudication; therefore, the title to such property does not vest in the trustee. *In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Rennie*, (S. D. Ind. Ter.) 2 Am. Bankr. Rep. 182; *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491.

Thus a liquor license, granted to a person after he has been adjudicated a bankrupt, belongs to him personally, and not to his estate in bankruptcy; and the receiver has no right to sell such a license as an asset of the bankrupt's estate. *Whitlock's License*, (1909) 22 Am. Bankr. Rep. 262, 39 Pa. Super. Ct. 34.

And where a bankrupt, subsequent to the filing of an involuntary petition and an adjudication thereon, fell heir to a certain interest in an estate, it was held that he was entitled to the benefit of such bequest in full, so far as his general creditors were concerned. *In re Woods*, (D. C. Pa. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

The portion of the monthly salary of a public officer of a state which was earned, but not payable, at the time of his filing a petition in bankruptcy, does not pass to his trustee. *In re Doherty*, (D. C. Conn. 1904) 135 Fed. 432, 13 Am. Bankr. Rep. 549.

So, also, it has been held that since, under R. S. sec. 3477, 2 Fed. Stat. Annot. 7 *et seq.*, prohibiting the assignment of claims against the United States prior to allowance and ascertainment of the amount due, a bankrupt could not have assigned an expectancy of reward for information concerning smugglers prior to the allowance of the reward by the secretary of the treasury, which did not occur until after the bankruptcy adjudication, the reward subsequently awarded passed to the bankrupt, and not to his trustee for the benefit of creditors. *In re Ghazal*, (C. C. A. 2d Cir. 1909) 174 Fed. 809, 23 Am. Bankr. Rep. 178.

Necessity of appointment of trustee.—It has been held that an adjudication of bankruptcy divests the owner of property of the title thereto, which thereupon becomes *in cus-*

todia legis, and on the appointment of a trustee his title relates back to the date of the adjudication. *In re Frasin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289. And see to the same effect *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338. And see the cases cited *supra*, this subdivision, p. 813 *et seq.*

On the other hand it has also been held that the appointment of a trustee is essential to divest the bankrupt of the title to his property. *Rand v. Iowa Cent. R. Co.*, (1906) 16 Am. Bankr. Rep. 692, 186 N. Y. 58, 9 Ann. Cas. 542, 78 N. E. 574, *reversing* (1904) 12 Am. Bankr. Rep. 162; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 14 Ann. Cas. 886, 45 So. 384.

And it is certain that, until a trustee has been appointed, there is no legal representative of the bankrupt's estate clothed with title or authority regarding it. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

But in this connection it must be borne in mind that, the property being in *custodia legis*, it is under the authority of the bankruptcy court; and that a receiver or the marshal may, under sections 2 (3), 3e, and 69, be appointed to take possession of it when the facts warrant such action. See the annotation under the sections referred to, *supra*, pp. 472, 494, 803, and see also the preceding paragraphs of this subdivision.

It is true that, technically, the title to his property remains in the bankrupt until the trustee has been appointed and qualified. But during the period between the filing of the petition and the qualifying of the trustee, the bankrupt's title is that of a trustee, he occupying a sort of fiduciary relation to his creditors. No title can be acquired to the property through any act of his, or by operation of law, during that period. *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491. And see the cases cited throughout this subdivision to the same effect.

See also *Rand v. Sage*, (1905) 94 Minn. 344, 102 N. W. 864, wherein the court said: "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not, for any reason, act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and, if necessary, in the meantime, to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed, or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property, with power to exercise dominion over it, to transfer and encumber it, or the title passes conditionally to the court for the benefit of the creditors until a trustee is appointed

or the estate is closed. The latter is the only rational view consistent with the provisions of the Act."

III. BURDENSOME PROPERTY.

Acceptance optional with trustee—Generally.—It is always optional with the bankrupt's trustee whether he will accept, or refuse to accept, such assets as are of an onerous and unprofitable character. *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 22 Am. Bankr. Rep. 649, 120 La. 441, 45 So. 384.

Thus the trustee in bankruptcy has the option to assume or renounce leases and other executory contracts of the bankrupt, as he may deem for the best interest of the estate. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454.

If the trustee is confronted with the alternative of an immediate ejection from the premises, with the consequent depreciation of the personal estate, or the assumption of an undesirable lease and the payment of a large sum for unsecured rent, whereby an unsecured creditor will secure a preference, a court of equity should relieve him from the coercion of the situation. If time is essential for an equitable adjustment of the various rights, the court may impose such delay as is reasonably necessary upon the enforcement of any particular right, making pecuniary compensation therefore whenever that is adequate. *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537.

A trustee in bankruptcy is not bound to take property which may involve him in litigation. *Oldmixon v. Severance*, (1907) 18 Am. Bankr. Rep. 823, 117 App. Div. 921, 102 N. Y. S. 1144.

Nor is the trustee obliged to accept title to the property surrendered by the bankrupt, if to do so would not benefit the creditors, or would prejudice them. *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 22 Am. Bankr. Rep. 649, 120 La. 441, 14 Ann. Cas. 886, 45 So. 384.

Where it is doubtful whether a proceeding to set aside a voidable transfer of property would result in any benefit to the estate, such transfer will not be set aside at the instance of creditors, except upon their giving bond to indemnify the trustee for any loss which the estate may suffer. *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 4 Am. Bankr. Rep. 745.

The trustee may, at the request of the creditors and with the sanction of the court, execute a quitclaim deed for property in which the bankrupt has an equitable interest, and which is deemed to be unprofitable. *Kenyon v. Mulert*, (C. C. A. 3d Cir. 1911) 184 Fed. 825.

Encumbered property.—A trustee in bankruptcy is not required to take charge of, or sell, any portion of the estate so heavily encumbered with valid liens that nothing can be realized therefrom for the unsecured creditors. *In re Cogley*, (N. D. Ia. 1901) 107 Fed. 73, 5 Am. Bankr. Rep. 731.

The trustee has the election to refuse to take possession of mortgaged property, if its value, over and above the incumbrance, is not sufficient to justify an attempt to administer it. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

Where it appears that the entire assets of a bankrupt corporation consist of a manufacturing plant encumbered by a mortgage for more than its value; that the trustee, after diligent effort, has been unable to sell the same, either at public or private sale, for any sum near its value; and that the property is a source of expense, the court of bankruptcy should permit it to be turned over to the mortgagee, subject to the right of the trustee of general creditors to contest the validity of the mortgage, if desired, in any court having jurisdiction. *Equitable Loan, etc., Co. v. Moss*, (C. C. A. 5th Cir. 1903) 125 Fed. 609, 11 Am. Bankr. Rep. 111.

When trustee must act.—A bankrupt's trustee has a reasonable time after his appointment to determine whether he will or will not accept such assets as appear to him to be unprofitable. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

It is the duty of the trustee to elect whether he will assume an existing executory contract and continue its performance and ultimately dispose of it for the benefit of the estate, or renounce it, and leave the injured party to such legal remedies for the breach as the case affords. *Atchison, etc., R. Co. v. Hurley*, (C. C. A. 8th Cir. 1907) 153 Fed. 503, 18 Am. Bankr. Rep. 396.

Where property is encumbered the trustee should act promptly in the premises, and if he concludes not to redeem the property, he should at once notify the bankrupt of such conclusion, in order that the latter may redeem it if he wishes to do so. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27.

But the rule that where the trustee declines to take the property the bankrupt can assert title thereto has no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408, 13 Am. Bankr. Rep. 698.

IV. EXEMPT PROPERTY.

Title remains in bankrupt.—The title to exempt property, under the express provisions of the Bankruptcy Law (secs. 70a and 6) remains in the bankrupt, and does not vest in his trustee. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 (U. S. (L. ed.) 1061; *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re Marquette*, (D. C. Vt. 1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 706, 8 Am. Bankr. Rep. 60; *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761; *In re Mussey*,

(W. D. Tex. 1910) 179 Fed. 1007; *In re National Grocer Co.*, (C. C. A. 6th Cir. 1910) 181 Fed. 33; *Sullivan v. Mussey*, (C. C. A. 5th Cir. 1910) 184 Fed. 60; *Sayre First Nat. Bank v. Bartlett*, (1908) 21 Am. Bankr. Rep. 88, 35 Pa. Super. Ct. 593. And see the annotation under section 6, *supra*, p. 508.

Section 6 must be construed with section 70a, in so far as exempt property is concerned, so that both provisions may be given effect. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107.

The purpose of the Bankruptcy Act is to give creditors only such rights as would have been theirs if bankruptcy had not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process. *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

On the death of a debtor, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator. *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 60.

Even though exempt property may be temporarily in the possession of the trustee, he has no title or beneficial interest therein, and the possession, in effect, remains in the bankrupt, within the meaning of the state statute, and the trustee will be directed to surrender it to the bankrupt. *In re Durham*, (E. D. Ark. 1900) 104 Fed. 231, 4 Am. Bankr. Rep. 760.

Notes taken for rental of exempt property.—Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy. *In re Oleson*, (N. D. Ia. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22.

Waiver of exemption.—The fact that a bankrupt has given notes in which he waived his right to exemptions does not give the bankruptcy court jurisdiction to administer his exempt property, nor affect his right to have the same set apart to him. *Goodman v. Curtis*, (C. C. A. 5th Cir. 1909) 174 Fed. 644, 23 Am. Bankr. Rep. 504.

Homesteads—Generally.—Since homestead property does not pass to a bankrupt's trustee, the fact that it was mortgaged to certain creditors does not make it assets to be administered in bankruptcy. *In re Bailey*, (D. C. Utah 1910) 176 Fed. 980, 24 Am. Bankr. Rep. 201.

The homestead of a bankrupt, exempt from his general debts under the laws of the state, does not pass to his trustee, and the court of bankruptcy is without power to order its sale because a particular creditor may have the right, under such laws, to subject it to the payment of his debt. *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913, 11 Am. Bankr. Rep. 192.

In the absence of a local rule to the contrary, the mere use by an insolvent of non-exempt funds or assets in acquiring a homestead does not make it subject to the claims of his creditors in bankruptcy. *In re Letson*,

(C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506.

Land acquired by the bankrupt under the United States homestead law cannot be subjected, in the bankruptcy proceedings, to the payment of any debt contracted by him before the issuance of the patent for such land, it being exempt as to all such debts by the terms of the Homestead Act. *In re Daubner*, (D. C. Ore. 1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

Interest in homestead passing to trustee.—The interest or title of the bankrupt in the land allotted as a homestead exemption, after the termination of the time for which such property is exempted from sale, is property; hence it is the duty of the trustee to reduce to money, by sale, such property or title or reversion, and apply the proceeds to the payment of debts proved according to law. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339.

The rule that the title to exempt property does not pass to the trustee has reference to an exemption covering all the property of the bankrupt, and is not applicable to an exemption of a homestead or real estate of a specified value, less than the actual value, where the trustee is directed by the statute to determine the claim of the bankrupt to the exemption and report its estimated value to the court so that any excess value may be preserved for the benefit of creditors. *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79.

But see *In re Manning*, (D. C. S. C. 1903) 123 Fed. 180, 10 Am. Bankr. Rep. 496, wherein it was said that it is the intent of the homestead laws that a homestead in real estate in kind shall be set aside whenever practicable, and a bankrupt is entitled to retain the land assigned as his homestead, although valued in excess of the limit of exemption, on payment of the excess.

Life insurance policies.—Life insurance policies which are exempt under the law of the state must be so considered under the bankruptcy law, and therefore do not pass to the trustee. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1078, 14 Am. Bankr. Rep. 94, reversing (C. C. A. 9th Cir. 1902) 113 Fed. 141, 7 Am. Bankr. Rep. 615; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 484; *Steele v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, 5 Am. Bankr. Rep. 165, reversing (S. D. Ia. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549. And see *infra*, p. 835, under section 70a (5) *Policy of Insurance*.

Lands allotted to an Indian, within the Umatilla reservation, under the Act of March 3, 1885 (23 Stat. L. 340), is incapable of being alienated, encumbered, or sold on execution; and, therefore, such land remains exempt to the allottee and cannot pass to his trustee in bankruptcy. *In re Russié*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6.

V. RECLAMATION PROCEEDINGS.

Right to reclaim.—Whenever the trustee in bankruptcy obtains possession of the property of persons other than the bankrupt, the

owner of such property has the undoubted right to recover it from the trustee in some appropriate proceeding. *In re Garner*, (N. D. Ga. 1901) 110 Fed. 123, 6 Am. Bankr. Rep. 596; *In re Galt*, (7th Cir. 1903) 120 Fed. 64, 56 C. C. A. 470, 13 Am. Bankr. Rep. 575; *In re Tice*, (M. D. Pa. 1905) 139 Fed. 52, 15 Am. Bankr. Rep. 97; *In re Poore*, (M. D. Pa. 1905) 139 Fed. 862, 15 Am. Bankr. Rep. 174; *In re Wells*, (M. D. Pa. 1905) 140 Fed. 752, 15 Am. Bankr. Rep. 419; *In re Wood*, (M. D. Pa. 1905) 140 Fed. 964, 15 Am. Bankr. Rep. 411; *In re Heckathorn*, (W. D. Pa. 1906) 144 Fed. 499, 16 Am. Bankr. Rep. 467; *In re Bolling*, (E. D. Va. 1906) 147 Fed. 786, 17 Am. Bankr. Rep. 399; *In re Berry*, (C. C. A. 2d Cir. 1906) 149 Fed. 176, 17 Am. Bankr. Rep. 467; *Nylla v. American Trust, etc., Bank*, (C. C. A. 7th Cir. 1908) 166 Fed. 276; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857, 22 Am. Bankr. Rep. 63; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740; *In re Susquehanna Roofing Co.*, (M. D. Pa. 1909) 173 Fed. 150, 23 Am. Bankr. Rep. 5; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124; *In re Corn*, (C. C. A. 2d Cir. 1910) 179 Fed. 841; *In re Monongahela Distillery Co.*, (E. D. Mich. 1910) 186 Fed. 220; *In re Woodman*, (D. C. Mass. 1910) 186 Fed. 533; *McEwen v. Totten*, (C. C. A. 5th Cir. 1908) 21 Am. Bankr. Rep. 336. And see *infra*, p. 823, the annotation under section 70a (5), and *supra*, p. 595, under section 23b.

Claim allowed from proceeds of sale.—And if the property claimed has been sold by the trustee, and the claimant proves his right thereto, the claim will be allowed out of the proceeds of such sale. *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186.

Property taken by receiver under erroneous order.—Where property of a defendant is taken from his possession by a receiver against his consent, under an erroneous order, which he successfully resists in an appellate court, he is entitled to the return of such property without charge of any kind against it or against him by reason of the proceedings. *Beach v. Macon Grocery Co.*, (5th Cir. 1903) 125 Fed. 513, 60 C. C. A. 557, 11 Am. Bankr. Rep. 104.

A trustee in bankruptcy has no equities greater than those of the bankrupt; and he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and perhaps not even to a right which could be enforced in a court of equity as against an ordinary litigant. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery. *In re Chase*, (C. C. A. 1st Cir. 1903) 124 Fed. 753, 10 Am. Bankr. Rep. 677.

In *In re MacDonald*, (D. C. Conn. 1905) 138 Fed. 463, 14 Am. Bankr. Rep. 797, it appears that the bankrupt at the time of his bank-

ruptcy was conducting a shipyard, and had contracted with the several petitioners to build vessels for them, the contracts providing for the making of partial payments by them at certain stages in the progress of the work, and that title should vest as each payment was made. At the time of the bankruptcy one of said vessels had been practically completed, so far as the work of the bankrupt was concerned, the payments had been made, and it had been launched and delivered to the petitioner for whom it was built, who was to complete it himself. The others remained in the yard in various stages of construction, but the required payments had been made, and exceeded the value of the structures. None of such vessels were scheduled by the bankrupt, but all were taken possession of by the trustee, who declined to complete the contracts. It was held that the title to such vessels, so far as completed, was in the several petitioners, who were entitled to their possession.

Question of fact.—The question of title is, under conflicting evidence, one of fact. *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118; *In re Donnelly*, (C. C. A. 2d Cir. 1911) 187 Fed. 121.

The burden of proof rests on the claimant. *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 143 Fed. 958, 16 Am. Bankr. Rep. 198; *In re Kessler*, (S. D. N. Y. 1908) 165 Fed. 508, 21 Am. Bankr. Rep. 583; *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338; *Ellet-Kendall Shoe Co. v. Ward*, (C. C. A. 8th Cir. 1911) 187 Fed. 982; *Matter of Mundle*, (S. D. N. Y. 1905) 13 Am. Bankr. Rep. 490.

In re Mayer, (E. D. Pa. 1907) 156 Fed. 432, 19 Am. Bankr. Rep. 490, a claim to property which was in the possession of a bankrupt at the time of the filing of the petition was held not to have been sufficiently established by the unsupported testimony of the claimant, where, if it had been true, he could have produced other evidence in corroboration thereof.

Reclamation precluded by act of claimant—*Filing claim.*—A claimant who deposited money with a banking firm four days before it was adjudged a bankrupt on a voluntary petition, receiving a certificate of deposit therefor, on learning of the insolvency of the bank when it received his deposit, was bound to elect promptly whether to rescind the contract for the alleged fraud or to affirm it, and the fact that he filed a claim against the estate was held to constitute an irrevocable election, by which he was precluded from also claiming a rescission. *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 195.

So also it has been held that creditors of a bankrupt, by filing their claims for the price of goods alleged to have been wrongfully transferred by the bankrupt to defendant corporation, waived their right to dispute the passing of the title in the goods to the bankrupt prior to bankruptcy. *Lynch v. Bronson*,

(D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409.

And where a firm of brokers, prior to their bankruptcy, without authority, pledged stocks of customers in their hands to secure loans to themselves, the action of such a customer in proving his claim against the estate for the value of his stock, without reservation, with full knowledge of the facts, was held to constitute an election of remedies, which prevented him from reclaiming such stock on its subsequent return to the trustee. *In re Berry*, (C. C. A. 2d Cir. 1909) 174 Fed. 409, 23 Am. Bankr. Rep. 27.

Claimant bound by election made prior to bankruptcy.—Where a corporation provided a bond issue with which to take up preferred stock, and a holder of such stock, on being tendered bonds in the place thereof, refused the tender and demanded money, to which he was entitled under the retirement proceedings, after which the bonds so tendered were kept in the corporation safe in an envelope, with the stockholder's name indorsed thereon, for more than a year, until the corporation became bankrupt, it was held that the stockholder was bound by his election, and that he could not then demand the bonds from the trustee in exchange for his stock. *In re Reading Hosiery Co.*, (E. D. Pa. 1909) 171 Fed. 195, 22 Am. Bankr. Rep. 562.

In re Esmark, (E. D. Pa. 1911) 188 Fed. 687, it appears that a claimant, having received the bankrupt's judgment notes for money advanced, afterwards distrained for rent due him as landlord from the bankrupts, and levied on certain property as belonging to them; and it was held that he could not in bankruptcy thereafter claim title to such property as having been purchased by the bankrupts with claimant's funds, under an agreement that he should hold the title until the money was repaid, *In re Esmark*, (E. D. Pa. 1911) 188 Fed. 687.

Jurisdiction.—When a court of bankruptcy having jurisdiction in the premises, through its receiver or a trustee in bankruptcy, has taken actual possession of property scheduled by the bankrupt as assets of his estate, and holds the same for administration in bankruptcy, it is not competent for a stranger claiming to be the owner of such property to maintain a suit in a state court against the trustee for the purpose of establishing his title and restraining the officer from selling the property. His remedy is by petition in the court of bankruptcy. *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79.

So, also, it has been held that a person claiming to be the owner of property in possession of the bankrupt, and which has passed into the hands of the trustee in bankruptcy, will not be allowed to prosecute replevin in a state court without the consent of the court of bankruptcy. *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658, wherein it was said that the claimant might have brought an action in the state court against the trustee for the recovery of the value of the property, but that replevin could not be maintained because

it was an interference with the possession of the court of bankruptcy.

Where the seller of goods, which had been delivered to the buyers prior to the institution of bankruptcy proceedings against them, rescinded the sale for fraud after such proceedings were commenced, and applied to the court in which the proceedings were pending for leave to commence a replevin action for the goods in the state court against the receiver in bankruptcy, and after such petition was denied applied for an order directing the receiver to set aside and hold the goods in question for petitioners, which was also denied, it was held that such seller thereby became a party to the bankruptcy proceedings, and was bound to prosecute its claim to the goods in the court where such proceedings were pending. *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

Practice—Reference to master.—Where petitions for the reclamation of property from a trustee are presented to a court of bankruptcy, it is the prevailing practice to refer the same to a special master, instead of to the referee in bankruptcy; and such practice should not be changed, except by a general order of the Supreme Court which would be uniform in its operations. *In re Tracy*, (C. C. A. 2d Cir. 1910) 179 Fed. 366.

A referee in bankruptcy has authority to entertain and consider the claim of an intervening petitioner to property or its proceeds in the hands of a trustee, alleged to be the property of the petitioner, and not of the estate in bankruptcy. *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 602.

Trial by jury.—But a *bona fide* claimant has the right to a trial by jury in the federal

court; and he cannot be compelled to submit the final determination of his claim to adjudication in a summary proceeding, on petition, rule to show cause, and reference of the case to the master or referee in bankruptcy. *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658. And see also the annotation under section 23b, *supra*, p. 595.

Creditors have a right to be heard as to ownership of any property which was in the possession of the debtor at the time of the institution of bankruptcy proceedings. *In re Pottenger*, (E. D. Pa. 1910) 181 Fed. 640.

Forms in reclamation proceedings are given in (1902) 8 Am. Bankr. Rep. 763.

Stoppage in transitu.—Where goods, previously ordered, were shipped to a bankrupt after his bankruptcy and delivered to his receiver, who paid the freight and took possession of them, it was held that it was then too late for the seller to lay a foundation for reclaiming them from the trustee by an attempted exercise of the right of stoppage in transitu. *In re Allen*, (M. D. Pa. 1910) 178 Fed. 879.

Conflict of law.—Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the Bankruptcy Act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the state court. The other law regulates its passage to the trustee, and is interpreted by the federal court. *In re Loveland*, (C. C. A. 1st Cir. 1907) 155 Fed. 838, 19 Am. Bankr. Rep. 18.

(1) [*Documents.*] documents relating to his property; [(1898) 30 Stat. L. 565.]

All documents included.—By section 70a (1) of the Bankruptcy Act the trustee takes, by operation of law, the bankrupt's title to all documents relating to his property. *In re Madden*, (C. C. A. 2d Cir. 1901) 110 Fed. 348, 6 Am. Bankr. Rep. 614.

Section 1a (13), given *supra*, p. 465, defines a "document" to include any book, deed, or instrument in writing, and includes deeds, all other muniments of title, contracts, securities, bills receivable, notes, bankbooks, bills of exchange, account books, and all papers and books relating to the business of the bankrupt. These books and papers which come within the designation of documents are regarded by the Bankruptcy Act as personal property, the title to which, by operation of law, is vested in the trustee. They are valuable not so much as an asset that can be converted for the purpose of meeting the demands of creditors, as they are for their importance as evidence by which assets can be discovered by the trustee. *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559.

Where a bankrupt pleads his constitutional

privilege against a production of books of accounts, alleged to contain incriminating evidence, he should be required to bring such books and papers either before the court or the referee in bankruptcy for the determination of the question whether the plea is well founded in fact, and for the making of an order for the protection of the bankrupt from the discovery of such evidence, and, if possible, to enable the trustee to obtain other necessary information from such books. *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, following *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109. And see the annotation under section 7a (4) and (9), *supra*, pp. 520, 524.

But where there is no foundation in fact for the claim of privilege set up by a bankrupt on the ground that his books and papers, if produced, would tend to incriminate him, and the referee so finds, an order for the production of the books will be affirmed. *In re Hess*, (E. D. Pa. 1905) 136 Fed. 988, 14 Am. Bankr. Rep. 559. And see the annotation under section 7a (4) and (9), *supra*, pp. 520, 524.

(2) [*Patents, copyrights, and trade-marks.*] interests in patents, patent rights, copyrights, and trade-marks; [(1898) 30 Stat. L. 566.]

Title to application for patent.—Patent applications which have afforded benefit and credit to a bankrupt before bankruptcy are a species of "property" which passes to the estate in bankruptcy. *In re Cantelo Mfg. Co.*, (D. C. Me. 1911) 185 Fed. 276, 26 Am. Bankr. Rep. 57, *disapproving In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92, and *In re Dann*, (N. D. Ill. 1904) 129 Fed. 495, 12 Am. Bankr. Rep. 27.

And in *Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, it was suggested that a court of bankruptcy would compel an inventor to take out his application for a patent and assign it to his trustee.

Compare *In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92, wherein it was held that the statute does not declare that the bankrupt's interest in patentable inventions, or in pending applications for patents, shall be vested in the trustee, but only his interest in patents and patent rights; and that the words "patent rights" were intended to include rights acquired under a patent to a third party, such as a license or manufacturing right, and the word "patents" to include cases wherein the title in the letters patent, in whole or in part, is vested in the bankrupt, either by the issuance of the letters in his name or by proper assignment in writing from the patentee. And see to the same effect, *In re Dann*, (N. D. Ill. 1904) 129 Fed. 495, 12 Am. Bankr. Rep. 27, *explaining Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

(3) [*Powers.*] powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; [(1898) 30 Stat. L. 566.]

Title to powers.—The trustee is vested by operation of law with the title of the bankrupt to all "powers which he [the bankrupt] might have exercised for his own benefit." *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7, *affirming* (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623.

Liquor license not a "power."—As to whether a liquor license was included in the word "powers," as used in the statute, Putnam, C. J., said: "We prefer not to attempt to rest the case on this expression, because we doubt whether so popular a signification

Where the president and manager of a corporation had completed certain inventions with the corporation's funds, while acting as the corporation's agent and employee, and thereafter the corporation obtained credit thereon, it was held that the pending applications for patents constituted "property" which passed to the corporation's trustee in bankruptcy. *In re Cantelo Mfg. Co.*, (D. C. Me. 1911) 185 Fed. 276.

A copyright for a publication held under an absolute assignment from the author to the assignee, his successors and assigns, is property of the assignee, which passes to his trustee in bankruptcy. *In re Howley-Dresser Co.*, (S. D. N. Y. 1904) 132 Fed. 1002, 13 Am. Bankr. Rep. 94.

A contract between an author and publisher for the copyrighting, publication, and sale, by the latter, of a series of books, and the payment of a royalty thereon to the author, is a personal engagement, although the publisher may be a corporation; and where it expressly provides that it shall not be transferred without the author's consent, and that on a failure to carry out its provisions the copyrights shall revert to the author, such copyrights cannot be sold by a trustee in bankruptcy as an asset of the publisher's estate, against the objection of the author, who is entitled, on petition therefor, to have them assigned by the trustee in accordance with the contract. *In re McBride*, (S. D. N. Y. 1904) 132 Fed. 285, 12 Am. Bankr. Rep. 81.

can be given to the word, and whether, on a careful examination of the English statutes from which this was drawn, and of the decisions of the English courts in regard thereto, we might not be required to determine that it is to be construed technically, as known to the common law." *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

A husband's interest in his wife's real estate during her life is not a "power," within the meaning of section 70a (3). *Heseltine v. Prince*, (D. C. Mass. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600.

(4) [*Property transferred in fraud.*] property transferred by him in fraud of his creditors; [(1898) 30 Stat. L. 566.]

Property fraudulently transferred vests in trustee.—In accordance with section 70a (4), above set out, it has frequently been decided that the title to all property transferred by the bankrupt in fraud of his creditors vests in the bankrupt's trustee for the

benefit of such creditors. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *In re Boston*, (D. C. Neb. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3

Am. Bankr. Rep. 815; *In re* Hamilton Furniture, etc., Co., (D. C. Ind. 1902) 117 Fed. 774, 9 Am. Bankr. Rep. 65; Chesapeake Shoe Co. v. Seldner, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; Bush v. Export Storage Co., (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; Chicago State Bank v. Cox, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re* Kohler, (C. C. A. 6th Cir. 1906) 159 Fed. 871, 20 Am. Bankr. Rep. 89; Belding Hall Mfg. Co. v. Mercer, etc., Lumber Co., (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; Ludvig v. American Woolen Co., (S. D. N. Y. 1910) 176 Fed. 145, 23 Am. Bankr. Rep. 314; *In re* Wisniefsky, (D. C. N. J. 1910) 181 Fed. 896; *In re* Bendall, (N. D. Ala. 1910) 183 Fed. 816; *In re* Spann, (N. D. Ga. 1910) 183 Fed. 819; *In re* Hartman, (N. D. N. Y. 1911) 185 Fed. 196; *In re* McNamara, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566.

See also the annotation under section 60b (as to voidable preferences); section 67e (as to fraudulent conveyances within the four months period); and section 70e (as to the recovery of property transferred in fraud of creditors generally), pp. 739, 792, 844.

Property sold by the bankrupt, but retained in his possession, is subject to be taken by bona fide creditors as his property, and the good faith of the parties makes no difference. *In re* Fitzgerald, (D. C. Conn. 1911) 188 Fed. 763.

Collusion essential.—Up to the moment of bankruptcy a party may make a valid disposition of his property, where it is done for a fair consideration and with an honest motive; and even where there is a fraudulent intent, in order to affect the purchaser, collusion must be shown. *In re* Benjamin, (M. D. Pa. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351.

Bona fide transactions are, of course, unaffected. Thus in *Lovell v. Newman*, (E. D. La. 1911) 188 Fed. 534, it appears that the bankrupts, having sold a quantity of cotton through their broker to various Italian spinners, forged certain bills of lading purporting to show shipment of the entire quantity to be carried to New Orleans and thence to Genoa by the line specified in the contract, consigned to the shippers' order, with instructions to notify the broker. They then drew drafts for the value of the cotton at the price for which it had been sold, and annexed the fraudulent bills of lading, together with the insurance certificates and invoices, the whole apparently in strict conformity to the contract, discounted the drafts, and received the money. The spinners ultimately paid the drafts. More than two months after the time the cotton should have been delivered under the contract, the bankrupts did ship an identical quantity of cotton, consigned according to the forged bills, and after obtaining bills of lading for this cotton held the same in their hands, but before the cotton had cleared the port, bankruptcy intervened, and a quantity of it was claimed by the receivers from the steamship on which it had been placed. It was held that the contracts of sale being

valid, they were fulfilled and became executed when the cotton was actually delivered to the carriers, the stipulations as to time of delivery, and time and manner of payment, being incidental merely, and that the bankrupts and their trustee were estopped to deny that the cotton shipped belonged to the buyers.

A transfer between husband and wife, as a gift, and good under the law of the state, is also valid in bankruptcy, in the absence of an actual intention to defraud. *Tucker v. Curtin*, (C. C. A. 1st Cir. 1906) 148 Fed. 929, 17 Am. Bankr. Rep. 354, reversing (D. C. Mass. 1904) 131 Fed. 647, 12 Am. Bankr. Rep. 594.

Thus where a husband when free from debt paid the consideration for real estate which was conveyed to his wife, the presumption is that a voluntary settlement upon her was intended, and the burden rests upon one seeking to establish a resulting trust in him to overcome such presumption by sufficient evidence. *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439.

Statute refers to title as between bankrupt and creditors.—As between the bankrupt and his fraudulent grantee, the bankrupt has no title; and to give any effect, or even meaning, to section 70a (4) the words "title of the bankrupt" must be construed to mean title as between the bankrupt and his creditors. *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138. See also section 47e (2), *supra*, p. 682, which, as amended by the Act of 1910, vests the trustee with the right of a creditor holding an execution duly returned unsatisfied.

All fraudulent transfers which affect creditor's rights included.—Title is vested generally in the trustee in and to all property transferred by the bankrupt in fraud of his creditors at any time; and this, undoubtedly, was intended to mean any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt could be followed and seized for that purpose. *In re Kohler*, (C. C. A. 6th Cir. 1906) 159 Fed. 871, 20 Am. Bankr. Rep. 89; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566.

The statute includes all such conveyances as are fraudulent either under the common law, under the provisions of a statute, or under any recognized rule of the law of the state. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138.

Right of trustee subrogation.—Where a debtor shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, sold property which was not exempt from execution, and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, it was held that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the extent of the money so paid. *In re Boston*, (D. C.

Neb. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388.

Decree of state court available to trustee. — The trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring certain transfers and conveyances of the debtor to have been fraudulent and void; and he may claim the property affected by such fraud as assets of the estate in bankruptcy, subject to any

valid liens or charges against it. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

Capital stock is a trust fund for the benefit of creditors; and if such stock is fictitiously and fraudulently issued it may be collected by the trustee for their benefit. *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810.

(5) [*Property which might have been transferred or levied upon.*] property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: [(1898) 30 Stat. L. 566.]

I. IN GENERAL, 823.

II. INTERESTS IN REAL PROPERTY, ETC., 824.

III. PLEDGES, 826.

IV. CONDITIONAL SALES, 828.

V. TRUST FUNDS AND DEPOSITS, 830.

VI. PROPERTY FRAUDULENTLY OBTAINED, 831.

VII. SUBSCRIPTIONS FOR STOCK, 832.

VIII. MEMBERSHIP IN STOCK EXCHANGE, 832.

IX. CONTRACTUAL INTERESTS AND OBLIGATIONS, 833.

X. LICENSES, 834.

XI. EFFECT OF COMMINGLING PROPERTY, 834.

I. IN GENERAL.

Transferable and leviable property passes to trustee. — Subdivision (5), set out above, is clearly the most comprehensive clause of section 70a; and the decisions thereunder are unanimous to the effect that this clause means precisely what its language imports, namely, that the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against such bankrupt. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Butterwick*, (M. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; *In re Burnstine*, (E. D. Mich. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464, 17 Am. Bankr. Rep. 283; *In re Millbourne Mills Co.*, (E. D. Pa. 1908) 162

Fed. 988, 20 Am. Bankr. Rep. 746, *affirmed* (C. C. A. 3d Cir. 1909) 172 Fed. 177; *In re Gebbie*, (E. D. Pa. 1909) 167 Fed. 609, 21 Am. Bankr. Rep. 694; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *In re Faulkner*, (D. C. Conn. 1910) 181 Fed. 981; *Foerster v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1; *Hansen Mercantile Co. v. Wyman*, (1908) 22 Am. Bankr. Rep. 877, 105 Minn. 491, 117 N. W. 926.

The maxim "*expressio unius est exclusio alterius*" does not apply; and the trustee's right to any particular asset will not be denied merely because it does not fall literally within the statute. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Thus it has been held that clause (5), in connection with the other subdivisions of section 70a, embraces every species of property, and interests in property, of which one can be invested with ownership. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

But the word "property" is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

The interest of a bankrupt in a stock pool to advance the market in a certain stock and then sell to the public, constitutes "property" within the meaning of the Bankruptcy Act. *In re Lathrop*, (S. D. N. Y. 1910) 184 Fed. 534.

Local law governs. — Whether property is subject to seizure and sale under execution must, generally, be determined by the local law. *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Butterwick*, (W. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536.

Condition of property immaterial. — Section 70a (5) is concerned only with furnishing a definition and prescribing a test to determine what property shall pass by operation of law from the bankrupt to his trustee, so as to become a part of the estate for administration and distribution among the creditors. Its purpose is to distinguish between what

Am. Bankr. Rep. 816; *In re* Hamilton Furniture, etc., Co., (D. C. Ind. 1902) 117 Fed. 774, 9 Am. Bankr. Rep. 65; Chesapeake Shoe Co. v. Seldner, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; Bush v. Export Storage Co., (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; Chicago State Bank v. Cox, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re* Kohler, (C. C. A. 6th Cir. 1906) 159 Fed. 871, 20 Am. Bankr. Rep. 89; Belding Hall Mfg. Co. v. Mercer, etc., Lumber Co., (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; Ludvig v. American Woolen Co., (S. D. N. Y. 1910) 176 Fed. 145, 23 Am. Bankr. Rep. 314; *In re* Wisnefsky, (D. C. N. J. 1910) 181 Fed. 896; *In re* Bendall, (N. D. Ala. 1910) 183 Fed. 816; *In re* Spann, (N. D. Ga. 1910) 183 Fed. 819; *In re* Hartman, (N. D. N. Y. 1911) 185 Fed. 196; *In re* McNamara, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566.

See also the annotation under section 60b (as to voidable preferences); section 67e (as to fraudulent conveyances within the four months period); and section 70e (as to the recovery of property transferred in fraud of creditors generally), pp. 739, 792, 844.

Property sold by the bankrupt, but retained in his possession, is subject to be taken by bona fide creditors as his property, and the good faith of the parties makes no difference. *In re* Fitzgerald, (D. C. Conn. 1911) 188 Fed. 763.

Collusion essential.—Up to the moment of bankruptcy a party may make a valid disposition of his property, where it is done for a fair consideration and with an honest motive; and even where there is a fraudulent intent, in order to affect the purchaser, collusion must be shown. *In re* Benjamin, (M. D. Pa. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351.

Bona fide transactions are, of course, unaffected. Thus in *Lovell v. Newman*, (E. D. La. 1911) 188 Fed. 534, it appears that the bankrupts, having sold a quantity of cotton through their broker to various Italian spinners, forged certain bills of lading purporting to show shipment of the entire quantity to be carried to New Orleans and thence to Genoa by the line specified in the contract, consigned to the shippers' order, with instructions to notify the broker. They then drew drafts for the value of the cotton at the price for which it had been sold, and annexed the fraudulent bills of lading, together with the insurance certificates and invoices, the whole apparently in strict conformity to the contract, discounted the drafts, and received the money. The spinners ultimately paid the drafts. More than two months after the time the cotton should have been delivered under the contract, the bankrupts did ship an identical quantity of cotton, consigned according to the forged bills, and after obtaining bills of lading for this cotton held the same in their hands, but before the cotton had cleared the port, bankruptcy intervened, and a quantity of it was claimed by the receivers from the steamship on which it had been placed. It was held that the contracts of sale being

valid, they were fulfilled and became executed when the cotton was actually delivered to the carriers, the stipulations as to time of delivery, and time and manner of payment, being incidental merely, and that the bankrupts and their trustee were estopped to deny that the cotton shipped belonged to the buyers.

A transfer between husband and wife, as a gift, and good under the law of the state, is also valid in bankruptcy, in the absence of an actual intention to defraud. *Tucker v. Curtin*, (C. C. A. 1st Cir. 1906) 148 Fed. 929, 17 Am. Bankr. Rep. 354, reversing (D. C. Mass. 1904) 131 Fed. 647, 12 Am. Bankr. Rep. 594.

Thus where a husband when free from debt paid the consideration for real estate which was conveyed to his wife, the presumption is that a voluntary settlement upon her was intended, and the burden rests upon one seeking to establish a resulting trust in him to overcome such presumption by sufficient evidence. *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439.

Statute refers to title as between bankrupt and creditors.—As between the bankrupt and his fraudulent grantee, the bankrupt has no title; and to give any effect, or even meaning, to section 70a (4) the words "title of the bankrupt" must be construed to mean title as between the bankrupt and his creditors. *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138. See also section 47a (2), *supra*, p. 682, which, as amended by the Act of 1910, vests the trustee with the right of a creditor holding an execution duly returned unsatisfied.

All fraudulent transfers which affect creditor's rights included.—Title is vested generally in the trustee in and to all property transferred by the bankrupt in fraud of his creditors at any time; and this, undoubtedly, was intended to mean any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt could be followed and seized for that purpose. *In re Kohler*, (C. C. A. 6th Cir. 1906) 159 Fed. 871, 20 Am. Bankr. Rep. 89; *In re* McNamara, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566.

The statute includes all such conveyances as are fraudulent either under the common law, under the provisions of a statute, or under any recognized rule of the law of the state. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138.

Right of trustee subrogation.—Where a debtor shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, sold property which was not exempt from execution, and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, it was held that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the extent of the money so paid. *In re Boston*, (D. C.

Neb. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388.

Decree of state court available to trustee. — The trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring certain transfers and conveyances of the debtor to have been fraudulent and void; and he may claim the property affected by such fraud as assets of the estate in bankruptcy, subject to any

valid liens or charges against it. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

Capital stock is a trust fund for the benefit of creditors; and if such stock is fictitiously and fraudulently issued it may be collected by the trustee for their benefit. *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810.

(5) [*Property which might have been transferred or levied upon.*] property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: [(1898) 30 Stat. L. 566.]

I. IN GENERAL, 823.

II. INTERESTS IN REAL PROPERTY, ETC., 824.

III. PLEDGES, 826.

IV. CONDITIONAL SALES, 828.

V. TRUST FUNDS AND DEPOSITS, 830.

VI. PROPERTY FRAUDULENTLY OBTAINED, 831.

VII. SUBSCRIPTIONS FOR STOCK, 832.

VIII. MEMBERSHIP IN STOCK EXCHANGE, 832.

IX. CONTRACTUAL INTERESTS AND OBLIGATIONS, 833.

X. LICENSES, 834.

XI. EFFECT OF COMMINGLING PROPERTY, 834.

I. IN GENERAL.

Transferable and leviable property passes to trustee. — Subdivision (5), set out above, is clearly the most comprehensive clause of section 70a; and the decisions thereunder are unanimous to the effect that this clause means precisely what its language imports, namely, that the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against such bankrupt. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Butterwick*, (M. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; *In re Burnstine*, (E. D. Mich. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464, 17 Am. Bankr. Rep. 283; *In re Millbourne Mills Co.*, (E. D. Pa. 1908) 162

Fed. 988, 20 Am. Bankr. Rep. 746, *affirmed* (C. C. A. 3d Cir. 1909) 172 Fed. 177; *In re Gebbie*, (E. D. Pa. 1909) 167 Fed. 609, 21 Am. Bankr. Rep. 694; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *In re Faulkner*, (D. C. Conn. 1910) 181 Fed. 981; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1; *Hansen Mercantile Co. v. Wyman*, (1908) 22 Am. Bankr. Rep. 877, 105 Minn. 491, 117 N. W. 926.

The maxim "*expressio unius est exclusio alterius*" does not apply; and the trustee's right to any particular asset will not be denied merely because it does not fall literally within the statute. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Thus it has been held that clause (5), in connection with the other subdivisions of section 70a, embraces every species of property, and interests in property, of which one can be invested with ownership. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

But the word "property" is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

The interest of a bankrupt in a stock pool to advance the market in a certain stock and then sell to the public, constitutes "property" within the meaning of the Bankruptcy Act. *In re Lathrop*, (S. D. N. Y. 1910) 184 Fed. 534.

Local law governs. — Whether property is subject to seizure and sale under execution must, generally, be determined by the local law. *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Butterwick*, (W. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536.

Condition of property immaterial. — Section 70a (5) is concerned only with furnishing a definition and prescribing a test to determine what property shall pass by operation of law from the bankrupt to his trustee, so as to become a part of the estate for administration and distribution among the creditors. Its purpose is to distinguish between what

passes and what does not pass, as regards specific property and property rights, without regard to the condition of the property, whether in possession or in action. With reference to its condition, the property might be found in adverse possession of a third person, or to have been fraudulently transferred, or under an invalid pledge or lien, in all of which cases suit by the trustee would or might become necessary in order to bring in the property or its proceeds; but these several conditions are provided for in other sections of the act. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138.

Transfers and incumbrances ineffective as to creditors.—Where, under the state laws, a transfer or incumbrance of property is void or voidable as to creditors, for want of record or otherwise, so as to be subject to execution, the property passes to the trustee in bankruptcy under section 70a (5). *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Tweed*, (N. D. Ia. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1.

Defeasible or contingent interest.—The marketability and assignability of property are quite distinct, and the fact that an interest in property is defeasible or contingent does not prevent it from being transferable within the meaning of the bankruptcy law. *In re Wright*, (C. C. A. 2d Cir. 1907) 157 Fed. 544, 19 Am. Bankr. Rep. 454, *reversing* (W. D. N. Y. 1907) 16 Am. Bankr. Rep. 778.

The fact that transferability depends on the consent of a stranger does not defeat the claim of creditors in bankruptcy to realize what can be obtained on a transfer if made. *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

Nontransferable property does not pass.—It was clearly the intention of Congress that property should not pass to the trustee which could not be the subject of conveyance or disposition by the bankrupt at the time the bankruptcy proceedings were inaugurated. *Hesseltine v. Prince*, (D. C. Mass. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600; *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12.

Thus the interest of a legatee under a will which provided that "no income or principal shall in any case be assignable, or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof" does not pass to the legatee's trustee in bankruptcy. *Munroe v. Dewey*, (Mass. 1900) 4 Am. Bankr. Rep. 264.

A claim of a wife for alimony is not a property right, and property awarded to her as alimony after her bankruptcy does not become a part of her estate in bankruptcy. *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733.

A bankrupt's right to earn wages in the future, and dispose of the fruits of his labor,

is not "property" as that term is used in section 70a (5). *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

II. INTERESTS IN REAL PROPERTY, ETC.

Generally.—It is well settled that the trustee in bankruptcy is, on his appointment, vested, by operation of law, with all the right, title, and interest to real property which, prior to the filing of the petition in bankruptcy, the bankrupt might have transferred, or which might have been sold under judicial process issued against him. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339; *In re St. John*, (N. D. N. Y. 1900) 105 Fed. 234, 5 Am. Bankr. Rep. 190; *In re Twaddell*, (D. C. Del. 1901) 110 Fed. 145, 6 Am. Bankr. Rep. 539.

Vested remainder.—Thus it has been held that a vested remainder passes to the trustee. *In re McHarry*, (C. C. A. 7th Cir. 1901) 111 Fed. 498, 7 Am. Bankr. Rep. 83.

And it has also been held that the interest of a bankrupt in his father's estate, vested prior to bankruptcy, goes to the trustee, even though such interest has not been determined. *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268.

Life interest.—So, also, a bankrupt's life interest in real property becomes a part of his estate on his adjudication. *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114.

Interest under contract.—The trustee is also entitled to any interest which the bankrupt may have under a contract for the sale of land. *In re Clark*, (M. D. Pa. 1902) 118 Fed. 358, 9 Am. Bankr. Rep. 252.

Landlord's interests.—Upon his adjudication as a bankrupt the interests of a landlord, as such, pass to his trustee. *In re Hays, etc., Co.*, (W. D. Ky. 1902) 117 Fed. 879, 9 Am. Bankr. Rep. 144.

Rents accruing after adjudication for mortgaged property of the bankrupt which comes into the possession of the trustee, and before the mortgagee has taken such action as to entitle him to possession of the property, belong to the estate. *In re Dole*, (D. C. Vt. 1901) 110 Fed. 926, 7 Am. Bankr. Rep. 21; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576; *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114.

Tenant's interest in leasehold.—When a tenant has been declared bankrupt, his trustee, on his appointment, is vested with title to the leasehold subject to his acceptance thereof within a reasonable time. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

The tenant's trustee is not obliged to accept the lease, and if there be no acceptance the title thereto never passes; therefore the property which may be said to pass immediately to the trustee is not the lease itself, but the option of accepting it. *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

Term not affected.—Bankruptcy does not, of itself, terminate the lease. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454. And see the

annotation *infra*, p. 833, IX. *Contractual Interests and Obligations*.

And a lessee's covenant not to assign, mortgage, or pledge the lease, or underlet the property, without the lessor's consent, is not violated by the lessee's bankruptcy. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

And where an involuntary bankruptcy is tenant under a lease containing a covenant against assignment, an adjudication in bankruptcy is not a breach, and the lease passes to the trustee. *In re Bush*, (D. C. R. I. 1904) 126 Fed. 878, 11 Am. Bankr. Rep. 415.

When the trustee accepts a lease, or a contract for a lease, made by the bankrupt, he must assume every obligation and be bound by all the conditions that the contract imposes upon the bankrupt. *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538.

In the event of an acceptance, the vesting of the trustee's title relates back to the time of the adjudication. *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

And where, after the sale of a bankrupt's assets located on leased premises was confirmed, the trustee abandoned possession to the purchaser, and the landlord might have entered on that day, it was held that the trustee was not chargeable with the purchaser's occupation thereafter. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

If the trustee refuses to accept the lease the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967; *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

Trustee not trespasser.—Where a bankrupt's receiver and trustee entered under the bankrupt's lease, it was held that they were not trespassers, and could not be made so by a state statute. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

Right of trustee as against subsequent lessee.—Where, prior to the bankruptcy of a tenant, the landlord took no steps to regain possession of the premises for rent in arrear, on the appointment of the tenant's trustee it was held that the latter was entitled to possession under the tenant's lease, as against lessees of the landlord subsequent to the adjudication. *In re Adams*, (D. C. Conn. 1905) 134 Fed. 142, 14 Am. Bankr. Rep. 23.

Waiver of re-entry provisions.—The acceptance of rent from the trustee constitutes a waiver of provisions authorizing re-entry in case of the bankruptcy of the lessor; and in such case the trustee may sell the lease and convey title to the purchaser, without being subject to re-entry on the part of the landlord, so long as the purchaser complies with the other provisions of the lease. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

Lease terminated by dispossession.—Where a lease on the premises occupied by a bankrupt was terminated by a warrant of dispossession issued at least four days before a receiver in bankruptcy was appointed, and

after the receiver took possession he appeared and announced in open court that he had finished the business and disposed of the bankrupt's assets contained in the premises, and made no objection to the dissolution of an injunction restraining the landlord from interfering with his possession, it was held that the bankrupt had no lease which could be an asset of his estate in bankruptcy, nor had the receiver either wrongfully parted with or been deprived of the premises by force of the warrant to dispossess; and hence the federal court had no jurisdiction of an action by a trustee to establish the lease as an asset of the estate. *Plant v. Gorham Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

Forfeiture enforced.—Where, prior to his having been adjudged a bankrupt, a tenant was notified of the forfeiture of his lease in accordance with the terms thereof, it was held that, on petition of the lessor, the court of bankruptcy properly decreed the enforcement of the forfeiture, and directed the trustee to surrender possession of the property as the only effective remedy for the protection of the rights of the lessor. *Lindeke v. Associates Realty Co.*, (C. C. A. 8th Cir. 1906) 146 Fed. 630, 17 Am. Bankr. Rep. 215.

Encumbered property.—Property on which there is a mortgage, or other lien, passes to the trustee in bankruptcy. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

The trustee of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in a foreclosure suit by a state court of competent jurisdiction is entitled to the possession of the property not covered by the mortgage, and to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure. *Carling v. Seymour Lumber Co.*, (C. C. A. 5th Cir. 1902) 113 Fed. 483, 8 Am. Bankr. Rep. 29.

And where a corporation executed trust deeds for all of its property to secure debts not then due, such deeds not being absolute conveyances, it was held that the grantor retained an interest in the property conveyed, which passed to its trustee in bankruptcy for the benefit of unsecured creditors. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

Where a bankrupt holds the legal title to mortgaged property when the adjudication is made, it will pass into the custody of the bankruptcy court, and by operation of law the title of the bankrupt will vest in the trustee as of the date of such adjudication. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27; *In re Kellogg*, (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623.

Right of redemption.—So, also, the trustee is vested with the statutory right of redemption from a foreclosure sale, under a decree rendered after the adjudication. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27.

But bankruptcy neither enlarges nor pro-

longs the right of redemption. *In re Goldman*, (S. D. N. Y. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100.

Damages occasioned by change of grade have also been held to constitute a part of the estate in bankruptcy of the owner of the property. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

Contingent interests. — Where, under the provisions of a will, the bankrupt's interest in an estate was contingent as to whether he should ever take, and not as to the time when he or his heirs should surely take, it was held that he had no vested interest which could pass to his trustee in bankruptcy. *In re Ehle*, (D. C. Vt. 1901) 109 Fed. 625, 6 Am. Bankr. Rep. 476. See also *In re Hoadley*, (S. D. N. Y. 1900) 101 Fed. 233, 3 Am. Bankr. Rep. 780.

A contingent gift *in futuro*, which carries no present interest that is alienable or subject to execution, does not vest in the donee's trustee in bankruptcy. *In re Gardner*, (S. D. N. Y. 1901) 106 Fed. 670, 5 Am. Bankr. Rep. 432.

Dower and curtesy rights. — Where, under the state law, a husband's interest in the real estate of his wife is not property which he could convey or assign, it will not pass to his trustee in bankruptcy as assets of his estate. *Hesseltine v. Prince*, (D. C. Mass. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600.

See also to the same effect as to dower rights, which, it has been held, are not affected by section 70a (5), *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674. And see the annotation under section 8, *supra*, p. 527.

The wife of a bankrupt is not estopped to claim and recover her interest in the land, as against the general creditors of her husband, by any representations by him as to his sole ownership, made without her consent or knowledge. *In re Garner*, (N. D. Ga. 1901) 110 Fed. 123, 6 Am. Bankr. Rep. 596.

Annuity *in lieu of dower*. — But where a widow accepts an annuity *in lieu* of her dower and subsequently becomes a bankrupt, it has been held that such annuity passes to a trustee in bankruptcy, being a right which could have been assigned by her, or seized by her creditors. *In re Burtis*, (E. D. N. Y. 1911) 188 Fed. 527.

Community property. — By the civil law which is in force in New Mexico, except as changed by statute, community property acquired by either husband or wife during the marriage, whether by purchase or their individual or joint labor, is held by them as partners, being primarily a fund for the payment of community debts; and, therefore, on the bankruptcy of a husband having only a community estate, the claims of an antenuptial creditor must be postponed until those of community creditors are satisfied in full. *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641.

Property set apart as alimony. — It is not within the jurisdiction of the bankruptcy court to take property set apart as alimony and distribute it among the creditors of the wife. *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733.

Interest in growing crops. — If the bankrupt's interest in growing crops is such that he could have transferred it before filing his petition, the title to such interest vests in the trustee as of the date of the adjudication; and the bankrupt must account for such part as he has disposed of. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Luckenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455.

In Vermont the products of a wife's land which is held by her under a deed without limitation, occupied by the family, and farmed by her husband, are not her separate property, but are assets of the husband's estate in bankruptcy. *In re Rooney*, (D. C. Vt. 1901) 109 Fed. 601, 6 Am. Bankr. Rep. 478.

III. PLEDGES.

Property held by bankrupt pledgee. — As a general rule a *bona fide* pledge will be recognized in bankruptcy proceedings; and where such property comes into the possession of a trustee in bankruptcy of the pledgee, the pledgor may assert his rights thereto. *In re McCord*, (C. C. A. 2d Cir. 1909) 174 Fed. 820, 23 Am. Bankr. Rep. 164.

Property pledged by bankrupt. — Where, prior to his adjudication, the bankrupt makes a *bona fide* pledge of his property, which would be effective as against his creditors, the trustee takes title to the property so pledged subject to claims of the pledgee. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362; *In re Bartlett*, (M. D. Pa. 1909) 172 Fed. 678, 22 Am. Bankr. Rep. 891; *In re Twining*, (E. D. Pa. 1911) 185 Fed. 555. And see *supra*, p. 786, the annotation under section 67d.

An agreement of pledge, made by one who subsequently became a bankrupt, authorizing the pledgee to sell the security pledged at public or private sale, with or without notice, and to purchase the same, is valid, and a sale made in accordance therewith at public auction, but without notice, and a purchase thereat by the pledgee, cannot be impeached by the trustee in bankruptcy of the pledgor, unless fraud or bad faith is affirmatively shown. *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362.

Where certain warehouse receipts were pledged to a bank, by a corporation while insolvent, to secure a certain note then executed and any liability thereafter contracted, and there was no evidence to impugn the good faith of the bank, it was held that the bank was entitled to maintain its right to the property so pledged not only for the payment of such note, but for other notes subsequently discounted, as against the corporation's trustee in bankruptcy, although the pledge was made within four months prior to the filing of the petition in bankruptcy. *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171.

A distilling company's warehouse receipts, calling for whiskey stored in its distillery

warehouse, which is in practical effect, under the internal revenue laws, in the custody of the United States, and incapable of delivery by the distiller without payment of the tax, represent the property itself, and their transfer to a purchaser or pledgee in good faith, together with the gauger's certificates, in accordance with the usages of the business, under the law of Pennsylvania operates as a delivery of the whiskey; and, if made more than four months prior to the bankruptcy of the distiller, the sale or pledge is valid as against its trustee. *Taney v. Penn Nat. Bank*, (C. C. A. 3d Cir. 1911) 187 Fed. 689.

Pledge must be surrendered to trustee.—It has been held that a trustee in bankruptcy is vested by law with title to all the assets of the bankrupt, including securities in the hands of a creditor as collateral; and such creditor has no right to hold the securities until paid the amount of his debt, nor to sell or cancel them, or realize on them by the aid of a court or otherwise, independently of the bankruptcy proceedings, but he must surrender them to the trustee, who has sole authority to reduce them to money, and the claim of the creditor to priority of payment out of the proceeds will be adjudged and administered in the bankruptcy court, which alone has jurisdiction of the matter. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129.

Invalid pledge.—A transaction intended as a pledge of property, but which for want of delivery is ineffectual as such, does not create an equitable lien as against a trustee in bankruptcy. *Fourth St. Nat. Bank v. Milbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442. See also *Guarantee Title, etc., Co. v. Huntington First Nat. Bank*, (C. C. A. 3d Cir. 1911) 185 Fed. 373.

Stock brokerage transactions—Constitutes relation of pledgor and pledgee.—Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase. *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, 19 Am. Bankr. Rep. 717. And see to the same effect *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *Hutchinson v. LeRoy*, (C. C. A. 1st Cir. 1902) 113 Fed. 202, 8 Am. Bankr. Rep. 20; *In re Bolling*, (E. D. Va. 1906) 147 Fed. 786, 17 Am. Bankr. Rep. 399; *In re Berry*, (C. C. A. 2d Cir. 1906) 149 Fed. 176, 17 Am. Bankr. Rep. 467; *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 254, 22 Am. Bankr. Rep. 659; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124, *affirmed* (C. C. A. 2d Cir. 1910) 177 Fed. 1004, 24 Am. Bankr. Rep. 251.

A customer is entitled to any shares purchased for his account and owned by him, so long as he thereby does not become debtor to the broker or his bankrupt estate. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

Where a broker who was carrying stocks for a customer, which he had bought on a

margin, made a general assignment, and a few days afterwards the customer wrote him asking the amount of his account, which he did not know, and stating that he would remit the amount and take up the stocks; and no action was taken by the broker or assignee on such letter, the stocks having been previously pledged by the broker and sold by the pledgee, and the broker was subsequently adjudged a bankrupt, it was held that the letter constituted a demand, the failure to comply with which was a breach of the contract, and gave the customer an immediate right of action; it being shown that he was able and willing to pay the amount due from him to the broker. *In re Swift*, (D. C. Mass. 1902) 114 Fed. 947, 9 Am. Bankr. Rep. 237.

In *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124, it appears that the bankrupts, who were stockbrokers in Buffalo, received orders from the petitioner to buy certain stocks, which they executed through their New York correspondents, who purchased the stocks, paid for the same, and charged the amount to the bankrupts' general account. They subsequently had the stocks transferred and certificates therefor issued in petitioner's name, but retained the same as security for the bankrupts' account. On being advised of the purchase, the petitioner paid the bankrupts for the stocks, but they did not remit the money to the New York brokers, and the stocks had not been delivered when the bankruptcy occurred. The bankrupts' indebtedness to the New York brokers was paid from the proceeds of a seat in the stock exchange, on which they had a lien under the rules of the exchange, and the stocks were delivered to the bankrupts' trustee. It was held that on the payment for the stocks the title vested in petitioner, subject, possibly, to a lien in favor of the New York brokers for the purchase price, and, such price having been paid from other property, on which they also had a lien, she was entitled to the certificates, as between her and the trustee.

Money deposited for stock.—Where a customer, on the morning of the failure of the bankrupts, paid a certain sum to them as a margin for the purchase of stock which the bankrupts thereupon ordered, but bankruptcy intervened before its delivery, it was held that the contract was avoided, and that the customer was entitled to a return of the money. *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844.

A deposit of securities with a stock broker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge, and does not create the relation of debtor and creditor; and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee. *In re Berry*, (C. C. A. 2d Cir. 1906) 149 Fed. 176, 17 Am. Bankr. Rep. 467, *affirmed* (1908) 209

U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845.

Effect of right to use stock.—Where a stock certificate is pledged to a firm of stock brokers, with the right to them to use the stock in their business, the stock remains the property of the pledgor; and where it survives the purposes for which it was pledged, and is capable of identification, it must be returned to him. *In re McIntyre*, (C. C. A. 2d Cir. 1910) 181 Fed. 955.

Failure of customer to assert rights.—Where stockbrokers in bankruptcy had in the possession of their New York correspondents securities belonging to customers whose rights were not asserted, or were either surrendered or lost subsequent to the filing of the petition in bankruptcy, it was held that the proceeds of such securities were applicable to the claims of the general creditors, and not to the owners of other specific securities contained in such New York account. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

Effect of conversion by broker.—Where stock brokers prior to bankruptcy had converted certain corporate stock belonging to a customer, and at the time of bankruptcy had one hundred shares of the same stock in their possession, it was held that the owners of the converted stock of that character, if more than one, were entitled to the stock on hand as tenants in common, and if only one, he was entitled to have such stock delivered to him, as against the bankrupt's general creditors. *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 254, 22 Am. Bankr. Rep. 659.

Where a bankrupt sold the stock of a corporation, a part of which was owned by him and a part by others, for whom he acted as agent, and received the proceeds, which fact he concealed from the other owners, who after his bankruptcy were unable to trace the money into any particular fund or property, and who filed their claims as general creditors, it was held that the bankrupt could not avoid accounting to his trustee for the proceeds of all of the stock, on the ground that a part of it did not belong to his estate. *Cummings v. Synnott*, (C. C. A. 3d Cir. 1911) 184 Fed. 718.

Even if a contract to purchase stock was originally invalid as a gambling transaction on margins in violation of a state law, it was held that such illegality could not be asserted by the broker's trustee in bankruptcy against a claim by the purchaser, where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge and consent, and misappropriated the proceeds. *In re Dorr*, (C. C. A. 9th Cir. 1911) 186 Fed. 276.

When a broker, prior to his bankruptcy, had pledged to a bank, as collateral to a loan, securities of others in his hands, which he had no right to hypothecate, and also others which he had authority to pledge, it was held that the owners of the first class of securities had a superior equity, and should be subrogated to the right of the bankrupt

against the owners of the other class. *In re Ennis*, (C. C. A. 2d Cir. 1911) 187 Fed. 720.

Where it appears that stockbrokers, prior to their bankruptcy, had violated every obligation which they owed to a customer, and had at some time not shown converted the stocks which they pretended to carry for him, the court should not require him to make good losses for which he would have been liable, if the stocks had been kept, as a condition to his recovery of securities deposited to protect his account. *In re Ennis*, (C. C. A. 2d Cir. 1911) 187 Fed. 726.

But persons whose stock has been used by a bankrupt for his own purposes cannot establish title to specific certificates of stock, found after bankruptcy, as collateral to some loan, unless they identify those certificates as representing the shares which the bankrupt took from the claimant. *In re McIntyre*, (C. C. A. 2d Cir. 1910) 181 Fed. 960. See also *In re Brown*, (S. D. N. Y. 1910) 183 Fed. 861; *In re Brown*, (C. C. A. 2d Cir. 1911) 184 Fed. 454; *In re Brown*, (S. D. N. Y. 1910) 185 Fed. 972.

IV. CONDITIONAL SALES.

Validity of conditional sales.—Where goods have been sold on condition, and such condition is good and effective as against the bankrupt and his creditors, it will of course be effective as against the bankrupt's trustee; but where the sale is of such a character as to vest title in the bankrupt, or to make the property sold subject to execution on judicial process as the property of the bankrupt, or to be ineffective as to creditors, the property sold will vest in the trustee in bankruptcy. The validity of such sales, however, does not depend on any provision of the bankruptcy law, but is governed by the general rules of law, and such state statutes as have been enacted for the regulation thereof. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 15 Am. Bankr. Rep. 633, reversing (C. C. A. 6th Cir. 1905) 14 Am. Bankr. Rep. 52; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997, 22 Am. Bankr. Rep. 116; *In re Legg*, (D. C. Conn. 1899) 96 Fed. 326, 2 Am. Bankr. Rep. 805; *In re Leigh*, (D. C. Colo. 1899) 96 Fed. 806, affirming 2 Am. Bankr. Rep. 606; *In re Howland*, (N. D. N. Y. 1901) 109 Fed. 869, 6 Am. Bankr. Rep. 495; *In re Fraizer*, (W. D. Mo. 1902) 117 Fed. 746, 9 Am. Bankr. Rep. 21; *In re Galt*, (N. D. Ill. 1903) 120 Fed. 443, 9 Am. Bankr. Rep. 682, 56 C. C. A. 470, 13 Am. Bankr. Rep. 575; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 866, 12 Am. Bankr. Rep. 213 note; *In re Carpenter*, (N. D. N. Y. 1903) 125 Fed.

831, 11 Am. Bankr. Rep. 147; *In re Simpson Mfg. Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 307, 12 Am. Bankr. Rep. 212; *In re Tweed*, (N. D. Ia. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; *In re Butterwick*, (M. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; *In re Smith*, (N. D. Ia. 1904) 132 Fed. 301, 13 Am. Bankr. Rep. 103; *In re Martin-Vernon Music Co.*, (W. D. Mo. 1904) 132 Fed. 983, 13 Am. Bankr. Rep. 276; *In re Flanders*, (C. C. A. 7th Cir. 1905) 134 Fed. 580, 14 Am. Bankr. Rep. 27; *In re Pease Car, etc., Works*, (N. D. Ill. 1905) 134 Fed. 919, 14 Am. Bankr. Rep. 331; *In re Press-Post Printing Co.*, (S. D. Ohio 1901) 134 Fed. 998, 13 Am. Bankr. Rep. 797; *In re Miller*, (M. D. Pa. 1905) 135 Fed. 868, 14 Am. Bankr. Rep. 439; *In re Rasmussen*, (D. C. Ore. 1905) 136 Fed. 704, 13 Am. Bankr. Rep. 462; *In re Hess*, (E. D. Pa. 1905) 136 Fed. 988, 14 Am. Bankr. Rep. 647; *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653; *In re Tice*, (M. D. Pa. 1905) 139 Fed. 52, 15 Am. Bankr. Rep. 97; *In re Froehlich Rubber Refining Co.*, (E. D. Pa. 1905) 139 Fed. 201, 15 Am. Bankr. Rep. 72; *In re Poore*, (M. D. Pa. 1905) 139 Fed. 862, 15 Am. Bankr. Rep. 174; *In re Poore*, (M. D. Pa. 1905) 140 Fed. 786, 15 Am. Bankr. Rep. 407; *Southern Pine Co. v. Savannah Trust Co.*, (C. C. A. 5th Cir. 1905) 141 Fed. 802, 15 Am. Bankr. Rep. 618; *In re Rodgers*, (E. D. Pa. 1906) 143 Fed. 594, 16 Am. Bankr. Rep. 401; *In re Cavagnaro*, (D. C. N. H. 1906) 143 Fed. 668, 16 Am. Bankr. Rep. 320; *In re Columbus Buggy Co.*, (C. C. A. 8th Cir. 1906) 143 Fed. 859, 16 Am. Bankr. Rep. 759; *In re Franklin Lumber Co.*, (D. C. N. J. 1906) 147 Fed. 852, 17 Am. Bankr. Rep. 443; *In re Builders' Lumber Co.*, (E. D. N. C. 1906) 148 Fed. 244, 17 Am. Bankr. Rep. 449; *In re Gilligan*, (7th Cir. 1906) 152 Fed. 605, 81 C. C. A. 595, 23 Am. Bankr. Rep. 668; *Dunlop v. Mercer*, (C. C. A. 8th Cir. 1907) 156 Fed. 545, 19 Am. Bankr. Rep. 361; *Mishawaka Woolen Mfg. Co. v. Smith*, (W. D. Wis. 1908) 158 Fed. 885, 20 Am. Bankr. Rep. 317; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857, 22 Am. Bankr. Rep. 63; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538; *In re Bement*, (C. C. A. 7th Cir. 1909) 172 Fed. 98, 22 Am. Bankr. Rep. 616; *Crucible Steel Co. v. Holt*, (C. C. A. 6th Cir. 1909) 174 Fed. 127, 23 Am. Bankr. Rep. 302; *In re Rinker*, (M. D. Pa. 1909) 174 Fed. 490, 23 Am. Bankr. Rep. 62; *Chilberg v. Smith*, (C. C. A. 9th Cir. 1909) 174 Fed. 805, 23 Am. Bankr. Rep. 483; *John Deere Plow Co. v. Anderson*, (C. C. A. 5th Cir. 1909) 174 Fed. 815, 23 Am. Bankr. Rep. 480; *In re Priegle Paint Co.*, (N. D. Ala. 1910) 175 Fed. 586, 23 Am. Bankr. Rep. 385; *In re Penny*, (S. D. N. Y. 1909) 176 Fed. 141, 23 Am. Bankr. Rep. 115; *In re Beihl*, (E. D. Pa. 1910) 176 Fed. 593, 23 Am. Bankr. Rep. 905; *In re Bailey*, (D. C. S. C. 1910) 176 Fed. 628, 23 Am. Bankr. Rep. 876; *In re Canuet Lumber Co.*, (S. D. Ga. 1910) 178 Fed. 240; *In re*

Agnew, (S. D. Miss. 1909) 178 Fed. 478; *In re C. K. Hutchins Co.*, (W. D. N. Y. 1910) 179 Fed. 864; *In re Faulkner*, (D. C. Conn. 1910) 181 Fed. 981; *In re Forse*, (N. D. N. Y. 1910) 182 Fed. 212; *In re Allen*, (E. D. Ark. 1910) 183 Fed. 172; *In re Franklin Lumber Co.*, (E. D. Pa. 1911) 187 Fed. 281; *In re Gehris-Herbine Co.*, (E. D. Pa. 1911) 188 Fed. 502; *Ludvigh v. American Woolen Co.*, (C. C. A. 2d Cir. 1911) 188 Fed. 30; *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 21 Am. Bankr. Rep. 149; *Parlett v. Blake*, 26 Am. Bankr. Rep. 25.

Where ranges were sold to a bankrupt under a conditional contract of sale, it was held that the vendor's property therein before payment of the price, as against the bankrupt's trustee, was not impaired by the fact that the use of the ranges on the buyer's property was inconsistent with the idea of a return to the seller, nor because of the claim that the ranges became a part of the real estate, and were therefore incapable of continued ownership in the vendor. *In re Cohen*, (E. D. N. Y. 1908) 163 Fed. 444, 20 Am. Bankr. Rep. 796.

Where machines in possession of a bankrupt under contracts of conditional sale, which required monthly payments from the bankrupt, called "rental" in the contracts, were reclaimed by the vendors after the bankruptcy, it was held that they could not recover such contract rentals for the time the machines remained in the possession of the trustee during the determination of their rights; but, if the trustee used the machines without their consent, the extent of their right is, on proof, to recover the reasonable value of such use. *In re Daterson Pub. Co.*, (C. C. A. 3d Cir. 1911) 188 Fed. 64.

Recording requirements.—Under a state statute which provides that contracts for the conditional sale of chattels which are delivered to the purchaser, unless recorded, shall be void as against his judgment creditors or purchasers from him without notice, it has been held that property in possession of such a purchaser, under an unrecorded contract at the time of his bankruptcy, is property which he could have transferred, and which might have been levied upon and sold under judicial process against him, and passes to his trustee under section 70a (5). *In re Franklin Lumber Co.*, (D. C. N. J. 1906) 147 Fed. 852, 17 Am. Bankr. Rep. 443.

A reservation of title to property in a contract, which amounts, in effect, to one of conditional sale, and which is void under the laws of the state for want of registry, except as between the parties, is ineffective as against the trustee in bankruptcy of the purchaser. *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147.

Sale under trust agreement.—Where a bankrupt sells property consigned to him under a contract which requires him to hold the proceeds of such sales in trust separate from his own funds, until paid over to the owner, it has been held that the owner is entitled to recover such trust funds. *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169

Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstorsy*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740. See also *In re McGehee*, (N. D. Ga. 1909) 166 Fed. 928, 21 Am. Bankr. Rep. 656; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338. And see the following subdivision.

V. TRUST FUNDS AND DEPOSITS.

Where bankrupt is beneficiary.—The trustee, on his appointment, is vested with any interest which the bankrupt formerly owned in any trust fund or estate, and which, at the institution of the proceedings in bankruptcy, was capable of transfer, or subject to sale under judicial process. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689.

An interest in the nature of a resulting trust in realty, owned by the bankrupt, will pass to his trustee in bankruptcy for the benefit of his creditors, notwithstanding a previous levy of an execution on such interest and a sale thereunder, when by the law of the state a resulting trust is not such property as can be sold on execution. *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41.

Where bankrupt is trustee.—As to such property as was held by the bankrupt, at the time of his adjudication, in trust for another, it comes into the hands of his trustee in bankruptcy impressed with the rightful claims of the beneficiary thereof, whose interests will be fully protected upon proper proof. *In re Davis*, (D. C. Mass. 1901) 112 Fed. 129, 7 Am. Bankr. Rep. 258; *In re Mulligan*, (D. C. Mass. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8; *In re Cattus*, (C. C. A. 2d Cir. 1910) 183 Fed. 733.

Burden of proof.—A trust creditor of a bankrupt is not entitled to a preference over general creditors merely because of the character of his claim; but he must show that the trust fund, or the property into which it was converted, came into the hands of the trustee in bankruptcy, although the specific property need not be identified. *In re Brun-sing*, (N. D. Cal. 1909) 169 Fed. 668, 22 Am. Bankr. Rep. 129. And see to the same effect *In re Marsh*, (D. C. Conn. 1902) 116 Fed. 396, 8 Am. Bankr. Rep. 576; *In re Mulligan*, (D. C. Mass. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8; *In re Teter*, (N. D. W. Va. 1909) 173 Fed. 798, 23 Am. Bankr. Rep. 223, *affirmed* (4th Cir. 1910) 179 Fed. 655, 103 C. C. A. 213; *In re McIntyre*, (C. C. A. 2d Cir. 1911) 185 Fed. 96; *In re Brown*, (C. C. A. 2d Cir. 1910) 185 Fed. 766. See also *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792, 4 Am. Bankr. Rep. 700; *In re Day*, (M. D. Tenn. 1909) 176 Fed. 377, 23 Am. Bankr. Rep. 785.

The burden of showing that his property has been wrongfully mingled in the mass of property of the wrongdoer is upon the owner

who seeks to follow the same; but, when this is done, the burden shifts to the wrongdoer to show that the owner's money or property has passed out of his hands, and, in that respect, his trustee in bankruptcy stands in the same position. *Smith v. Mottley*, (C. C. A. 6th Cir. 1906) 150 Fed. 266.

Loss of identity as trust fund.—Money held by a bankrupt as guardian, which he has mingled with his own funds, thereby loses its identity as a trust fund; and the bankrupt cannot withhold property or its proceeds from his trustee on the ground that it was purchased with the money of his wards; but the wards, in such case, are merely creditors, who must share with the general creditors in the distribution of the estate. *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792, 4 Am. Bankr. Rep. 700.

A bankrupt who, prior to the filing of the petition in bankruptcy, had used in his business certain money in his hands as trustee, which he thereafter paid back to himself as trustee, must restore the same to his trustee in bankruptcy to whom the title passed. *In re Longbottom*, (E. D. Pa. 1905) 142 Fed. 291, 15 Am. Bankr. Rep. 437.

So, funds that have been dissipated, or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone and there is nothing remaining to be the subject of the trust. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

If there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

Trust agreement as to property delivered to be sold, and proceeds thereof.—Where a contract, under which certain merchandise was furnished to the bankrupt, provided that all goods on hand and the proceeds of all sales of goods received under the contract, whether consisting of notes, cash, or book accounts, should be held by the bankrupt as collateral security, in trust for the benefit of the person furnishing the merchandise, and subject to his order until all obligations due thereunder should be paid in full, it was held that such contract was not one of conditional sale, but one creating a trust for the benefit of the petitioner, and on the bankruptcy he was entitled to reclaim the goods on hand from the bankrupt's trustee. *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstorsy*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740. See also *In re McGehee*, (N. D. Ga. 1909) 166 Fed. 928, 21 Am. Bankr. Rep. 656; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

Deposits—Creating trust.—Where a claimant deposited money in the private bank of a bankrupt, at a time when the latter was

insolvent and knew himself to be so, although the claimant did not, it was held that a trust for the benefit of the claimant was impressed on the general fund with which his deposits were commingled, and followed that fund, so long as it was never exhausted but remained greater than the amount of his deposits and finally came into the hands of the trustee; and, in such case, the claimant was entitled to reclaim his deposits, even though it affirmatively appears that the general fund was kept up by the deposits of subsequent depositors who did not draw out their deposits, and have not been paid. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

In *In re Salmon*, (W. D. Mo. 1906) 145 Fed. 649, it appears that several banks entered into an agreement to the effect that they were not to compete with each other in bidding for the deposit of the county funds, that the bank receiving the deposit was to share it with the others, and that the funds so distributed were not to be drawn upon except to meet county warrants or checks. This arrangement was carried out, and the bank receiving the deposit subsequently became insolvent and the illegal contract became known. It was held that, as against the general creditors of the insolvent bank, the county had a superior claim to an allotment of the original deposit held by one of the conspiring banks, because the latter bank was in contemplation of law a principal debtor to the county therefor, and further because the money was demandable only by the insolvent bank to meet county warrants. See also *Crawford County v. Patterson*, (N. D. Ohio 1906) 149 Fed. 229.

Deposit creating debt only.—Where an alleged special deposit made with a bankrupt, a mercantile concern, amounts merely to a loan or an investment in the business, and is not secured by a mortgage or other instrument giving a lien to the depositor or creditor, it constitutes only a personal debt, which is to be settled in accordance with the claims of general creditors. *Riley v. Pope*, (S. D. Ga. 1911) 186 Fed. 857.

So, also, where it appeared that a bankrupt corporation had been a general depository for the funds of a grocer's association of which its president was treasurer, its other directors having been told by him that such deposits were authorized by the association to be repaid on demand, it was held that the corporation did not hold such funds as a special deposit in trust, but that the association was a general creditor only, and not entitled to priority. *In re Smith, etc., Co.*, (C. C. A. 7th Cir. 1909) 170 Fed. 900, 22 Am. Bankr. Rep. 350.

And where a town supervisor deposited town funds with a private banker, without any agreement that he should hold and keep the money separate from his other funds or that he should not use them in the usual course of his banking business, the relation created was held to be that of debtor and creditor only, so that on the insolvency of the banker the supervisor had no lien or preference over other creditors. *In re Nichols*, (N. D. N. Y. 1909) 160 Fed. 603, 23 Am.

Bankr. Rep. 216. And see to the same effect *In re Smart*, (N. D. Ohio 1905) 136 Fed. 974, 14 Am. Bankr. Rep. 672.

VI. PROPERTY FRAUDULENTLY OBTAINED.

Recovery by vendor.—Where property has been fraudulently obtained by the bankrupt, and the fraud is of such a nature as to warrant a rescission of the sale and the recovery of property by the vendor, the property so obtained comes into the hands of the trustee subject to such right of rescission and recovery, providing it be exercised in due time. *In re Weil*, (S. D. N. Y. 1901) 111 Fed. 897, 7 Am. Bankr. Rep. 90; *In re Davis*, (S. D. N. Y. 1901) 112 Fed. 294, 7 Am. Bankr. Rep. 276; *In re O'Connor*, (N. D. Ga. 1902) 114 Fed. 777; *In re Hildebrant*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 194; *In re Patterson*, (N. D. Tex. 1903) 125 Fed. 562, 10 Am. Bankr. Rep. 748; *In re Hess*, (E. D. Pa. 1905) 138 Fed. 954, 14 Am. Bankr. Rep. 647; *In re Levi*, (S. D. N. Y. 1906) 148 Fed. 654, 17 Am. Bankr. Rep. 430; *Lowry v. Hitch*, (1908) 110 S. W. 833, 33 Ky. L. Rep. 573, 17 L. R. A. N. S. 1032.

Thus it has been held that one from whom a bankrupt obtains goods on time, on false representation that they are to fill an order, when the bankrupt has no order, the goods being turned over to secure a bondsman of the bankrupt in another matter, and being secreted, is entitled thereto, the whole transaction being a fraud. *Bloomington v. Empire Rubber Mfg. Co.*, (E. D. N. Y. 1902) 114 Fed. 1016, 8 Am. Bankr. Rep. 74.

False representation need not be sole consideration.—It is not essential that false representations, made by a bankrupt to secure goods on credit, should have been the sole consideration of the credit, in order to entitle the seller to reclaim the goods; but it is sufficient if they were material, and the credit would probably not have been given otherwise. *In re Gany*, (S. D. N. Y. 1900) 103 Fed. 930, 4 Am. Bankr. Rep. 576.

Obtaining release of mortgage by fraud.—A bill against a trustee in bankruptcy of a corporation which alleges facts showing that the complainant was induced by the fraudulent representations of the bankrupt, through its officers having apparent authority to release a mortgage or its property, and offers to restore the consideration received therefor, states a cause of action for equitable relief by a restoration of the lien, the question of the intervening rights of creditors being one to be determined on the hearing. *Cleminshaw v. International Shirt, etc., Co.*, (N. D. N. Y. 1908) 165 Fed. 797, 21 Am. Bankr. Rep. 616.

Necessity of disaffirming sale.—A contract, under which goods were delivered on fraudulent representations, cannot be affirmed in part and disaffirmed as to the rest; the vendor cannot proceed to obtain a return of all the goods found, and procure the allowance of its claim for the balance of the account under and pursuant to the terms of the contract, at the same time. *In re Hildebrant*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 194; *Standard Varnish*

Works v. Haydock, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 286.

But one from whom a bankrupt obtains goods by means of fraudulent representations has his election to confirm the sale and assume the position of a creditor for the price, or to repudiate the sale and recover the goods. *Standard Varnish Works v. Haydock*, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 286.

Effect of ignorance of facts constituting fraud.—The proof and allowance of a claim, and the payment and acceptance of a dividend, do not bar a rescission or constitute an irrevocable election when the party proving the claim is ignorant of the facts constituting the fraud which gives him the right to rescind the contract and recover the property obtained. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

Evidence—Required proof.—To authorize the rescission of an executed sale of goods to one who subsequently became a bankrupt, on the ground that he obtained the same by false and fraudulent representations, it must be shown that he made such representations knowing them to be false, or without reasonable grounds for believing them to be true, and they must have induced the seller to consummate the sale when he otherwise would not have done so. *In re Roalswick*, (D. C. Mont. 1901) 110 Fed. 639, 6 Am. Bankr. Rep. 752.

The burden of proof rests on the party claiming the right to rescind the sale and recover the property. *In re Berg*, (D. C. Mass. 1910) 183 Fed. 885.

VII. SUBSCRIPTIONS FOR STOCK.

Trustee may recover stock subscriptions.—A trustee in bankruptcy, as the representative of a corporation's estate, is vested with the right of such corporation to recover subscriptions for its stock; and where the corporation, in the absence of bankruptcy, could have recovered the amounts due for such subscriptions, the trustee in like manner may recover them. *In re Remington Automobile, etc., Co.*, (2d Cir. 1907) 153 Fed. 345, 82 C. C. A. 421; *In re Eureka Furniture Co.*, (E. D. Pa. 1909) 170 Fed. 485, 22 Am. Bankr. Rep. 395; *In re L. M. Alleman Hardware Co.*, (3d Cir. 1910) 181 Fed. 810, 104 C. C. A. 320, reversing (M. D. Pa. 1909) 172 Fed. 611, 22 Am. Bankr. Rep. 871; *Thrall v. Union Maid Tobacco Co.*, (Ohio 1909) 22 Am. Bankr. Rep. 287.

But where the state law does not give the corporation itself a right of action against the stockholders for the recovery of their subscriptions, no such right vests in the trustee. *In re Jassoy Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 515.

Trustee not estopped by act of bondholders.—The fact that bondholders of a bankrupt corporation may be estopped, by a waiver expressed in the bonds or mortgage, to assert any personal claim against the stockholders, is no defense by the stockholders to a suit by the trustee to enforce their liability on unpaid subscriptions, where there are other

creditors who are not so estopped. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

Determination of amount due.—Where plenary suits are necessary to collect unpaid subscriptions from stockholders of a bankrupt corporation, it is not necessary that the bankruptcy court should determine the amount due from the stockholders, which may be left to the courts in which such suits are brought, and authority given by the bankruptcy court to the trustee to collect such amounts as may be due is a sufficient demand on the stockholders. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

Jurisdiction.—A District Court, as a court of bankruptcy, has jurisdiction of a suit by a trustee in bankruptcy of a corporation, against a number of defendants, to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt. *Skillin v. Magnus*, (N. D. N. Y. 1907) 162 Fed. 689, 19 Am. Bankr. Rep. 397.

So, also, it has been held that a court of bankruptcy has power to order assessments on unpaid subscriptions to the stock of a bankrupt corporation. *In re Eureka Furniture Co.*, (E. D. Pa. 1909) 170 Fed. 485, 22 Am. Bankr. Rep. 395.

Hearing confined to necessity of "call."—While the bankruptcy court has jurisdiction to make a call on the stockholders of a bankrupt corporation, the hearing before the referee to take evidence on such question should be expressly limited to the question. "Should there be a call on the shareholders of unpaid stock, and, if so, to what amount?" *In re Munger Vehicle Tire Co.*, (C. C. A. 2d Cir. 1908) 168 Fed. 910, 21 Am. Bankr. Rep. 395.

VIII. MEMBERSHIP IN STOCK EXCHANGE.

Property rights in seat on stock exchange pass to trustee.—It has been frequently decided that, under section 70a (5), the property rights of a member of a stock exchange (usually called a seat) pass to his trustee in bankruptcy subject, of course, to the lawful rules and regulations of that body. *Page v. Edmunds*, (1903) 187 U. S. 596, 23 S. Ct. 200, 47 U. S. (L. ed.) 318, 9 Am. Bankr. Rep. 277, affirming (E. D. Pa. 1900) 102 Fed. 746, 4 Am. Bankr. Rep. 467; *In re Gaylord*, (E. D. Mo. 1901) 111 Fed. 717, 7 Am. Bankr. Rep. 195; *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, 12 Am. Bankr. Rep. 88; *In re Hurlbutt*, (C. C. A. 2d Cir. 1905) 135 Fed. 504, 13 Am. Bankr. Rep. 50; *O'Dell v. Boyden*, (C. C. A. 6th Cir. 1906) 150 Fed. 731, 17 Am. Bankr. Rep. 757, 10 Ann. Cas. 239; *In re Gregory*, (C. C. A. 2d Cir. 1909) 174 Fed. 629, 23 Am. Bankr. Rep. 270, 27 L. R. A. N. S. 613; *In re Currie*, (C. C. A. 2d Cir. 1911) 185 Fed. 263; *Wrede v. Gilley*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5.

Transfer compulsory.—In *In re Hurlbutt*, (C. C. A. 2d Cir. 1905) 135 Fed. 504, 13 Am. Bankr. Rep. 50, it was held that, where a

member of a stock exchange contributed his membership to a firm which thereafter became bankrupt, the court of bankruptcy had jurisdiction to compel such member to execute a transfer thereof for the benefit of the firm's trustee in bankruptcy.

Distribution of proceeds from sale of membership.—Where, on the bankruptcy of a member of a stock exchange, his seat is sold and his transactions on the floor closed out under its rules, the proceeds of both pass to the member's trustee in bankruptcy, subject, however, to the rules of the exchange that they should be appropriated, first, to the payment of the member's indebtedness to the exchange, second, to claims arising against him out of the transactions on the floor of the exchange, and, third, loans from members, as against his general creditors. *In re Gregory*, (C. C. A. 2d Cir. 1909) 174 Fed. 629, 23 Am. Bankr. Rep. 270; *In re Currie*, (C. C. A. 2d Cir. 1911) 185 Fed. 263.

Subject to valid liens.—The title taken by the trustee to a membership in the stock exchange is, like all other property, subject to any valid lien that may exist against it. *Wrede v. Gilley*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5.

IX. CONTRACTUAL INTERESTS AND OBLIGATIONS.

Bankruptcy does not terminate contractual relations.—Under the rule that the trustee in bankruptcy takes the property of the bankrupt subject to all valid claims, liens, and equities, it has been held that contractual obligations existing at the time of the filing of the petition in bankruptcy are not terminated by the adjudication; and that, throughout the entire field of contractual obligations, the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, *affirming* (1907) 189 N. Y. 533, 82 N. E. 1126; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454; *In re Wright*, (W. D. N. Y. 1907) 151 Fed. 361, 18 Am. Bankr. Rep. 199, *affirmed* (C. C. A. 2d Cir. 1907) 157 Fed. 544; *In re Spitzel*, (E. D. N. Y. 1909) 168 Fed. 156, 21 Am. Bankr. Rep. 729; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857, 22 Am. Bankr. Rep. 63; *In re Boschelli*, (M. D. Pa. 1910) 183 Fed. 864.

Assumption of executory contracts optional with trustee.—The effect of the adjudication is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements and subject to the liabilities he has incurred. *Wat-*

son v. Merrill, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454.

If the trustees elect to assume a contract, they take it cum onere, as the bankrupt held it, subject to all of its provisions and conditions; and any valid modification of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, will be binding upon them. *Atchison, etc., R. Co. v. Hurley*, (C. C. A. 8th Cir. 1907) 153 Fed. 503, 18 Am. Bankr. Rep. 396.

Assignment of money to become due under a contract is binding on trustee.—Where a party to a contract assigned to his creditor the money to become due under the contract, and the party's receiver and trustee in bankruptcy carried out the contract, it was held that the money becoming due must be used to discharge the debt due the creditor, though on the failure of the receiver and trustee to complete the contract there would have been no money to which the assignment could apply. *In re De Long Furniture Co.*, (E. D. Pa. 1911) 188 Fed. 686.

Contract vesting title in bankrupt.—Where certain agency contracts appointed the bankrupt agent for the sale of manufacturers' furniture and carpets for a certain period, the contract providing that the bankrupt on final termination of the agreement agreed "to buy and pay for at the then current prices, and on the regular terms, such goods as may be then on hand," it was held that the contract was not executory as to the goods remaining at the termination of the contract, but, as to such goods, constituted a sale, so that the title to the goods so remaining passed to the bankrupt's trustee. *Parlett v. Blake*, (C. C. A. 8th Cir. 1911) 188 Fed. 200.

The interest of an insurance agent in a contract for renewal premiums on policies previously written has been held to be property capable of transfer which passes to his trustee in bankruptcy, subject to the terms of the contract under which such interest was earned. *In re Wright*, (C. C. A. 2d Cir. 1907) 157 Fed. 544.

Fire insurance policy.—So, also, the interest of the bankrupt in a policy of fire insurance vests in his trustee, on his appointment, by operation of law; and in case of loss the trustee may recover. *Fuller v. New York F. Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879. See also *In re Hamilton*, (W. D. Ark. 1900) 102 Fed. 683; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 14 Ann. Cas. 886, 45 So. 384.

The mere adjudication as a bankrupt of the insured in a fire insurance policy does not work a forfeiture of the policy under a clause providing in effect that the policy shall become void upon any sale or transfer of the property. *Fuller v. New York F. Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879; *Fuller v. Jameson*, (1904) 98 App. Div. 53, 90 N. Y. S. 456, *affirmed* (1906) 184 N. Y. 805, 77 N. E. 1187.

Compare Bronson v. New York F. Ins. Co., (1908) 64 W. Va. 494, 63 S. E. 283, wherein it was held that the appointment of a receiver

in bankruptcy proceedings avoided a policy providing in effect that the policy should become void if any change took place in the interest, title, or possession of the subject insured, whether by legal process or judgment, or by the voluntary act of the assured, or otherwise, or if the policy was assigned before loss.

The trustee cannot take advantage of a mistake made by the bankrupt when reducing to writing a contract made by him; and such mistake is not an asset in the hands of the trustee, nor does the bankruptcy bar the reformation of the contract because of it. *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, *affirming* (1907) 189 N. Y. 533, 82 N. E. 1126.

Where a bankrupt contractor was entitled to a mechanic's lien at the date of his adjudication in bankruptcy, such right cannot be enforced by the trustee in a court of bankruptcy, but must be enforced in the state courts, unless the adverse parties consent to be sued in the United States Circuit Court. *In re Grissler*, (C. C. A. 2d Cir. 1905) 130 Fed. 754, 13 Am. Bankr. Rep. 508.

X. LICENSES.

Liquor license.—The general rule is that a liquor license is an asset of a licensed bankrupt's estate which, upon compliance with the law of the state, may be reduced to money by his trustee in bankruptcy. *In re Brodbine*, (D. C. Mass. 1899) 93 Fed. 643, 2 Am. Bankr. Rep. 53; *In re Fisher*, (D. C. Mass. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406, *affirmed* (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 646; *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Olewine*, (M. D. Pa. 1903) 125 Fed. 840, 11 Am. Bankr. Rep. 40; *In re Baumbblatt*, (E. D. Pa. 1907) 153 Fed. 485, 19 Am. Bankr. Rep. 500; *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59; *In re May*, (D. C. Minn. 1900) 5 Am. Bankr. Rep. 1.

Even though, under the state law, the license itself cannot actually be sold, nevertheless the trustee may sell the lease of the licensed premises and the fixtures, etc., conditioned on the transfer of the license by the court. *Snyder v. Bougher*, (1906) 16 Am. Bankr. Rep. 792, 214 Pa. St. 453, 63 Atl. 893.

The bankrupt will be required to execute any instruments necessary for the purpose of effectuating the sale of a license made by his trustee. *In re Fisher*, (D. C. Mass. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406, *affirmed* (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 646; *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Emrich*, (W. D. Pa. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89; *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59.

Where the assignment of a liquor license is void under the state law, the assignee thereof can have no claim as against the assignor's trustee in bankruptcy, either for the license or the proceeds thereof. *In re*

Flaherty, (E. D. Va. 1911) 184 Fed. 902. And see to the same effect *In re McArdle*, (D. C. Mass. 1903) 126 Fed. 442, 11 Am. Bankr. Rep. 358.

But in Georgia it has been held that a liquor license duly granted to the bankrupt by the city of Brunswick is not property which passes to his trustee in bankruptcy. *Matter of Keller*, (D. C. Ga. 1906) 16 Am. Bankr. Rep. 727.

A license to occupy a stall in a city market is property of the licensee, which will pass to his trustee in bankruptcy. *In re Emrich*, (W. D. Pa. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89.

XI. EFFECT OF COMMINGLING PROPERTY.

When identity is lost.—Where the money or other property of third persons is so far commingled with that of the bankrupt as to lose its identity as a separate fund or chattel, the owner will not be entitled to a preferential claim for the value thereof as against the general creditors represented by the trustee, excepting where it is shown that the result is a net gain to the bankrupt's estate. *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792; *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 902, 11 Am. Bankr. Rep. 129; *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653; *Erie R. Co. v. Dial*, (C. C. A. 6th Cir. 1905) 140 Fed. 689, 15 Am. Bankr. Rep. 559; *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721; *Ritchie County Bank v. McFarland*, (C. C. A. 4th Cir. 1910) 183 Fed. 715; *In re Lindsley*, (W. D. Mich. 1910) 185 Fed. 684, *following Crawford County v. Strawn*, (6th Cir. 1907) 157 Fed. 49, 84 C. C. A. 553; *In re Swift*, (D. C. Mass. 1901) 5 Am. Bankr. Rep. 232; *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127.

The court will go no farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate, and which represent the proceeds of the specific property intrusted to the bankrupt. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

Thus it has been held that where cotton was by mistake delivered to factors to whom it was not consigned, and by mistake of a warehouseman it was sold, and the proceeds deposited in bank to the factors' account, and subsequently, on the bankruptcy of the factors, a balance greater than the amount of the cotton passed from the bank to the bankrupt estate, the owner of the cotton was entitled to the value thereof. *In re Woods*, (S. D. Ga. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615.

In Smith v. Au Gres Tp., (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745, it appears that a bankrupt, who was a township trustee, used the township's money with which to purchase goods for sale in his business as a merchant, and so mingled the goods that it was impossible to distinguish them from the rest of his stock, and it was held that the township was entitled at least to an

equitable lien on the proceeds of a sale of the entire stock by the bankrupt's trustee for the amount so appropriated; the general creditors of the bankrupt being entitled only to share in the residue, if any.

In re City Bank, (W. D. Mich. 1910) 186 Fed. 250, it appears that prior to its adjudication as a bankrupt, the "D" bank collected a check payable to the "C" bank, the proceeds of which were mingled with the general funds, and the latter drew on the New York correspondent of the "D" bank for the amount, which it refused to pay, though it had sufficient funds which were subsequently transmitted to the trustee; and it was held that the payee of the check was entitled to a preferential lien for the amount thereof.

When property traceable. — But if the owner can identify and trace the property claimed, or the proceeds thereof, he will be entitled to recover it from the trustee. *In re Taft*, (C. C. A. 8th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 417; *In re Coffin*, (C. C. A. 2d Cir. 1907) 152 Fed. 381, 18 Am. Bankr. Rep. 127, *reversing* (D. C. Conn. 1906) 146 Fed. 181, 16 Am. Bankr. Rep. 682; *In re Northrup*, (N. D. N. Y. 1907) 152 Fed. 763; *In re City Bank*, (W. D. Mich. 1910) 186 Fed. 250.

Officers of one corporation owning stock of another. — Where a bankrupt corporation had organized another corporation to develop oil and gas wells to furnish the bankrupt corporation with fuel to operate its business, and the officers of the bankrupt owned all

the stock of the oil company, and used it as a mere agent of the bankrupt, and not as engaged in a separate business, they were properly required to surrender the capital stock thereof to the bankrupt's receiver. *In re Muncie Pulp Co.*, (C. C. A. 2d Cir. 1905) 139 Fed. 546, 14 Am. Bankr. Rep. 70.

Expenditure of trust fund by bankrupt not presumed. — Where the bankrupt deposited the money of other persons with his own and, after filing the petition, he expended from such account, for his private purposes, the sum of \$270, it will be presumed that the amount so expended was his personal money, and he will be required to pay over such sum to his trustee. *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129. See also *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792.

Burden of proof. — The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

But if the owner succeeds in making the requisite proof, it then devolves upon the bankrupt or his trustee to distinguish between what is his and that of the *cestui que trust*. *Smith v. Au Gres Tp.*, (6th Cir. 1906) 150 Fed. 287, 80 C. C. A. 148, 9 L. R. A. N. S. 876; *Smith v. Mottley*, (6th Cir. 1906) 150 Fed. 266, 80 C. C. A. 154; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 838; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

[*Policy of insurance.*] *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and [(1898) 30 Stat. L. 566.]

Policies having surrender or other value. — The earlier decisions show considerable conflict as to what is meant by "cash surrender value," and in some cases it has been held that the phrase signified only a cash surrender value expressly stipulated for in the policy; but that view has been overruled, and it has been finally determined by the United States Supreme Court that the phrase "cash surrender value" signifies such a value as will be paid by the insurance company on the surrender of the policy, whether it be expressed in the policy or merely recognized by a rule or concession on the part of the company; therefore all policies of insurance having a surrender value within this definition, and not exempt under the law of the state, pass to the trustee in bankruptcy, subject to the right of the bankrupt to retain it, under the provisions of the statute, by paying or securing to the trustee the ascertained value thereof. *Hiscock v. Mertens*, (1907)

205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 484, *affirming* (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701; *In re Lange*, (N. D. Ia. 1899) 91 Fed. 861, 1 Am. Bankr. Rep. 189; *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Diack*, (S. D. N. Y. 1900) 100 Fed. 770, 3 Am. Bankr. Rep. 723; *In re Boardman*, (D. C. Mass. 1900) 103 Fed. 783, 4 Am. Bankr. Rep. 620; *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *In re Ellingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76; *In re Welling*, (C. C. A. 7th Cir. 1902) 113 Fed. 189, 7 Am. Bankr. Rep. 340; *Gould v. New York L. Ins. Co.*, (E. D. Ark. 1904) 182 Fed. 927, 13 Am. Bankr. Rep. 235; *In re Coleman*, (2d Cir. 1905) 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; *Clark v. Equitable L. Assur. Soc.*, (E. D. Pa. 1906) 143 Fed. 175, 16 Am. Bankr. Rep. 137; *In re Wolff*, (E. D. N. Y. 1908) 166 Fed. 984, 21 Am.

Bankr. Rep. 452; *In re Moore*, (E. D. Tenn. 1909) 173 Fed. 679, 23 Am. Bankr. Rep. 109; *In re White*, (2d Cir. 1909) 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. N. S. 451, 23 Am. Bankr. Rep. 90; *In re Hettling*, (2d Cir. 1909) 175 Fed. 65, 99 C. C. A. 87, 23 Am. Bankr. Rep. 161; *In re Orear*, (C. C. A. 8th Cir. 1910) 178 Fed. 632, 24 Am. Bankr. Rep. 343; *Burlingham v. Crouse*, (C. C. A. 2d Cir. 1910) 181 Fed. 479; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716; *Matter of Phelps*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 170.

Purpose of provision.—It was not the intent of Congress in the enactment of the insurance proviso to deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death; but it was intended to prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the Bankrupt Act. *In re Lange*, (N. D. Ia. 1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189. See also *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483.

Retention of policy by bankrupt—*Right to retain policy passes to bankrupt's representatives.*—The right of a bankrupt to retain a life insurance policy which has a cash surrender value, on payment of such value to the trustee, is not affected by his death after adjudication, but passes to his legal representatives. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239.

After the payment of the cash surrender value of a policy, or where there is no cash surrender value, the bankrupt may be entitled to hold, own, and carry such policy free from the claims of creditors. *In re Josephson*, (S. D. Ga. 1903) 121 Fed. 142, 9 Am. Bankr. Rep. 608.

Failure of bankrupt to pay value.—Where the policy passes by operation of law to the trustee, and the privilege given by the insurance proviso in section 70a (5) of the Act is not availed of by the bankrupt, the duty devolves upon the trustee, having regard to the recommendation of the creditors, the probable value of the policy, and all the circumstances of the case, to apply to the court for direction as to whether he shall retain the policy and keep it alive, or shall surrender it to the bankrupt or other person interested in it. *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76.

Actual value the test.—The test by which to determine whether a trustee shall retain a policy or shall deliver it to the beneficiary is not whether the policy has a cash surrender value, in the sense that by its terms or by practice a cash payment can be obtained from the company for its surrender, but whether or not it has an actual value which will be of benefit to the bankrupt's creditors. *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76.

It makes no difference whether the sur-

render value was stipulated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to "continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings." *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483, *affirming* (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701.

Where a bankrupt is the holder of life insurance policies which, although containing no provision for a cash payment in their surrender, possess an actual cash value which, according to the uniform practice of the company, will be paid on their surrender, the bankrupt will be permitted to retain the same on payment to his trustee of such actual value. *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701, *affirmed* (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483.

Loan and paid-up value.—Where certain insurance policies belonging to a bankrupt had no cash surrender value, but they had a collateral loan value and a paid-up insurance value, it was held that they had an inchoate value to which the bankrupt's trustee was entitled as property which, prior to the filing of the petition, the bankrupt could have transferred. *In re Coleman*, (C. C. A. 2d Cir. 1905) 136 Fed. 818, 14 Am. Bankr. Rep. 461.

Vested interest under policy passes.—The right to receive at a certain date a specified sum of money, contingent upon his surviving to that date, is a vested right of property existing in the bankrupt, which passes to the trustee. It is a property right which he could have transferred, and it falls within the comprehensive language of section 70a, which vests title in the trustee. *In re Welling*, (C. C. A. 7th Cir. 1902) 113 Fed. 189, 7 Am. Bankr. Rep. 340.

Partly paid-up life insurance policies, with the usual contingencies and provisions as to changing the beneficiaries and as to surrendering policies and receiving the benefits thereof, are assets of the insured's estate in bankruptcy to which creditors are entitled. *In re Whelpley*, (D. C. N. H. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433.

The contingent right of the insured, like the statutory right to seize and hold and sell remainder and contingent interests in real estate, is something that the trustee may hold for the benefit of the creditors; or he may waive it altogether under circumstances which justify it. *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1.

Transferable interest as beneficiary passes.—Where a bankrupt was designated as beneficiary in a policy on the life of his mother, which directed that it should be paid to the beneficiary of the insured last designated on the back of the policy, if living, and the insured died four days after the filing of the bankruptcy petition, leaving the bankrupt as designated beneficiary, it was held that his

interest in the policy was one which he could have transferred under the state law, and therefore it vested in the trustee in bankruptcy of the beneficiary. *In re Hogan*, (W. D. Wis. 1911) 186 Fed. 537.

Thus in *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702, it appears that bankruptcy proceedings having been instituted against a firm consisting of father and son, the father committed suicide prior to adjudication, leaving certain life policies, payable to his wife and children, share and share alike. He left him surviving a wife and three children, one of whom was a son also bankrupt. It was held that the son had an interest in such policies prior to his father's death which constituted property he was bound to schedule, and being transferrable by the son as a chose in action, such interest passed to the trustee in bankruptcy under section 70a (5), the policies not being within the proviso of such section relating to insurance policies having a cash surrender value payable to the bankrupt, his estate or personal representatives.

But see *In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92, wherein it was held that a trustee in bankruptcy takes no title to policies of life insurance wherein the bankrupt is named as a beneficiary when the bankrupt is not himself the contracting party with the insurance company, and would not be entitled to receive the value of the policies if surrendered at the date of the adjudication.

Policies not payable to bankrupt, or his estate or personal representatives.—Section 70a (5) does not include policies payable to the wife of kindred of the assured, but only applies to policies payable to the assured, or his estate, or his personal representatives. *Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076; *Allen v. Central Wisconsin Trust Co.*, (1910) 143 Wis. 381, 127 N. W. 1003.

Effect of right to change beneficiary.—A policy of insurance which authorizes the bankrupt to nominate or change the beneficiary at will is property which he might have "transferred," and as such passes to his trustee, although it is in terms payable to a designated beneficiary. *In re Orear*, (C. C. A. 8th Cir. 1910) 178 Fed. 632. And see to the same effect *In re Wolff*, (E. D. N. Y. 1908) 165 Fed. 984, 21 Am. Bankr. Rep. 452; *In re Hettling*, (2d Cir. 1909) 175 Fed. 65, 99 C. C. A. 87, 23 Am. Bankr. Rep. 161; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716; *In re Dolan*, (E. D. Pa. 1910) 182 Fed. 949.

Surrender value subject to valid liens.—Payment of premiums.—Where a policy of life insurance was made payable to the wife of the assured if he died during the term, or to himself if living at the expiration of the stipulated period, and was issued upon their joint application, and for several years before the bankruptcy of the husband the wife saved the policy from lapsing by paying the premiums out of her own money, it was held that the bankrupt's interest in the surrender value of the policy, upon passing to his trustee, was subject to an equitable lien or right in the wife to be reimbursed for such propor-

tion of the premiums paid by her as had gone to keep the policy alive for the benefit of the husband's interest. *In re Diack*, (S. D. N. Y. 1900) 100 Fed. 770, 3 Am. Bankr. Rep. 723.

Pledge.—A bona fide assignee of life insurance policies, pledged more than four months before the bankruptcy of the pledgor, is entitled to hold the same against the trustee in bankruptcy. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239; *In re Davison*, (N. D. N. Y. 1910) 179 Fed. 750; *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702.

Thus where a life insurance company loans to the insured, who subsequently was adjudged a bankrupt, a sum greater than the cash surrender value thereof, and takes an assignment of the policies as collateral security for the loan, the policies do not pass to the trustee, for the reason that on the day the title vested in the trustees the cash which the company had agreed to pay on surrender would, if surrender were claimed, have been entirely absorbed in releasing the lien of the company, whether the privilege of surrender were exercised by the bankrupt or by the trustees. *Burlingham v. Crouse*, (C. C. A. 2d Cir. 1910) 181 Fed. 479.

Exempt policies do not pass.—As to whether a policy of insurance, exempt under the laws of the state from levy and execution by creditors, passes to the trustee in bankruptcy, there was formerly a contrariety of opinion; but this question has also been solved by the federal Supreme Court, and it is now well settled that the provisions of section 70 are limited by those contained in section 6 of the Act; and that in accordance with section 6 a policy of insurance which is exempt under the law of the state does not pass to the trustee in bankruptcy of the insured. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483, affirming (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701; *Steele v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, 5 Am. Bankr. Rep. 165, reversing (S. D. Ia. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549; *In re Booss*, (E. D. Pa. 1907) 154 Fed. 494, 18 Am. Bankr. Rep. 658; *In re Pfaffinger*, (W. D. Ky. 1908) 164 Fed. 526, 21 Am. Bankr. Rep. 256; *In re Whelpley*, (D. C. N. H. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433; *In re Johnson*, (D. C. Minn. 1910) 176 Fed. 591, 24 Am. Bankr. Rep. 277; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716; *Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076.

Policies having no actual value.—It has been held that a policy of life insurance which, at the time of the adjudication, has no actual cash value, does not vest in the trustee in bankruptcy of the insured. *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *Gould v. New York L. Ins. Co.*, (E. D. Ark. 1904) 132 Fed. 927, 13 Am. Bankr. Rep. 233; *Morris v. Dodd*, (1900) 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129.

Thus it has been held that a policy of insurance on the life of a bankrupt, which has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy as assets of the estate. *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389.

Where a deceased bankrupt had no valuable interest in certain policies on his life, he having borrowed beyond his interest in all of them, the loans being admittedly valid, it was held that the bankrupt's executors, and not his trustee, were entitled to the proceeds of such policies in excess of the liens for loans held by the insurance company. *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702.

Effect of abandonment by trustee. — Where the trustees of a bankrupt failed to have insurance policies on his life appraised, or to provide for the payment of premiums thereon, but abandoned the same to the bankrupt as valueless to the estate, which abandonment was subsequently approved by the court, it was held that the trustee was not entitled to recover the proceeds of such policies, on the death of the bankrupt pending the proceedings, from the beneficiaries, the premiums having been kept up by them or by the bankrupt. *Meyers v. Josephson*, (C. C. A. 5th Cir. 1903) 124 Fed. 734, *affirming* (S. D. Ga. 1903) 121 Fed. 142, 9 Am. Bankr. Rep. 608.

(6) [*Rights of action.*] rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property. [(1898) 30 Stat. L. 566.]

The bankrupt's trustee is vested by operation of law with title to all the bankrupt's books, papers, contracts, securities, etc., relating to his business. *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559. And see the annotation, *supra*, p. 833, IX. *Contractual Interests and Obligations.*

A right of action for injury to "business, employment, or property" passes to the trustee in bankruptcy, even though it sounds in tort. *Cleland v. Anderson*, (1905) 75 Neb. 273, 105 N. W. 1092, 5 L. R. A. N. S. 148, *reversing* (1902) 66 Neb. 276, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. N. S. 147.

Malicious attachment of corporate property is not a personal tort, but gives rise to a cause of action for injury to property, which passes to the trustee in bankruptcy of the corporation. *Hansen Mercantile Co. v. Wyman*, (1908) 22 Am. Bankr. Rep. 877, 105 Minn. 491, 117 N. W. 926.

An action to recover damages for false and fraudulent representations, wherein the bankrupt is plaintiff and which is pending at the time of his adjudication, alleging that the bankrupt had been induced to purchase certain bonds from the defendants, who were in the same business, at prices greater than their value, by false and fraudulent representations made by the defendants regarding

Deposits to secure payment of insurance.—

There would seem to be no reason why the deposits in a life insurance company to secure a sum payable to the assured at a given date, if he should be then alive, should be treated differently from a similar contract with a savings bank or building association. *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 79.

Deferred annuity contract. — An insurance contract, entered into by the company with one who was then insolvent and was subsequently adjudged a bankrupt, by which the insurer obligated itself to pay the insured a certain sum yearly, commencing in the future and continuing during the life of the insured, is not void; and the sum paid for such insurance cannot be recovered by the trustee in bankruptcy of the insured, on the theory that such payment was a transfer in fraud of creditors, and that the insurance company, though acting *bona fide*, was not a purchaser for value, because it had not paid the purchase money or secured it in such a manner that it could not be relieved against payment. In such case, however, a bill asking that the company be compelled to pay the trustee the sum received from the bankrupt upon the surrender of the contract, will be dismissed without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may thereafter have, under the contract. *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1.

facts materially affecting the value of the bonds, and claiming damages for alleged losses to the plaintiff resulting from the purchase, is a right of action arising from injury to the bankrupt's property, and passes, as such, to his trustee under section 70a (6) of the Bankruptcy Act. *In re Gay*, (D. C. Mass. 1910) 182 Fed. 260.

Action for death of child. — Under a state law providing that an action may be brought by an administrator, but that the recovery shall pass to decedent's next of kin, it was held that a father being entitled to the entire recovery for the wrongful killing of his son, his right thereto constitutes assets belonging to his estate in bankruptcy. *In re Burnstine*, (E. D. Mich. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596.

The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal. It cannot be assigned, is not subject to levy and sale upon judicial process, and the statute does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute any part of his estate in bankruptcy. The law follows, in this respect, section 14 of the Bankruptcy Act of 1867, in the construction of which it was uniformly held that rights of action for personal torts did not vest in the assignee in

bankruptcy. *In re Haensell*, (N. D. Cal. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286; *Sibley v. Nason*, (1907) 196 Mass. 125, 12 Ann. Cas. 938, 81 N. E. 887.

Action for conspiracy. — A trustee in bankruptcy cannot maintain an action in tort for conspiracy, in assisting a bankrupt to place his property beyond the reach of his creditors, against persons who are alleged to have performed their acts of conspiracy during the pendency of the bankruptcy proceedings but before the adjudication therein, where no allegation is made that any of the defendants received any portion of the bankrupt's estate, and the sole result of the conspiracy is to turn the bankrupt's property into money in his hands for which he himself failed to account to his trustee. *Friedman v. Myers*, (1907) 19 Am. Bankr. Rep. 883, 30 Ohio Cir. Ct. Rep. 303.

Action for partition. — The bankrupt's right to partition does not arise out of contract. Partition does not involve unlawful taking, or detention of, or injury to property. *Hobbs v. Frazier*, (1908) 22 Am. Bankr. Rep. 684, 56 Fla. 796, 47 So. 929, 20 L. R. A. N. S. 105.

Right of action in creditors only. — Where a state statute which provides that "if the indebtedness of any stock corporation shall exceed the amount of its capital stock the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," as construed by the Supreme Court of the state, gives a right

of action against officers which belongs exclusively to creditors, such right of action is not an asset of the estate of the corporation in bankruptcy, and does not pass to its trustee, but may be enforced by creditors as a secondary security independently of the bankruptcy proceedings. *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538.

Money due to a bankrupt on a paving contract at the time of the filing of his bankruptcy petition, though subject to valid liens, was held to have been properly paid to the bankrupt's trustee to be administered and paid over to those entitled thereto under the direction of the bankruptcy court. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 968, 17 Am. Bankr. Rep. 22.

Damage by change of grade. — The trustee is entitled to a sum awarded as damages to real estate, resulting from a change of street grade. *In re Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207. And see the annotation *supra*, p. 000, II. *Interests in Real Property*.

After the close of bankruptcy proceedings, and discharge of the trustee, an asset of the bankrupt (right of action to recover, with penalty, usurious interest paid) which has passed to the trustee by the bankruptcy proceedings, though he had no knowledge of its existence, may be recovered by the bankrupt himself, where neither the creditors nor the trustee assert any rights in it. *Lasater v. Jackaboro First Nat. Bank*, (1903) 96 Tex. 345, 72 S. W. 1057.

b [Appraisal and sale.] All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. [(1898) 30 Stat. L. 566.]

Cross-reference: As to

Duty of trustee to collect and reduce assets, see section 47a (2), *supra*, p. 682.

I. APPRAISAL OF PROPERTY, 839.

II. SALES, 840.

I. APPRAISAL OF PROPERTY.

The referee may appoint appraisers to value the estate of the bankrupt. *In re Styer*, E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424.

And such appointment should be made by the referee in the exercise of his independent judgment and should not be submitted to a vote of the creditors, especially where there is a sharp conflict of views and interests between them. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

Qualification of appraisers. — An appraiser must be a disinterested person. *In re Frazin*, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

It has been held, however, that a person is not disqualified for appointment as an ap-

praiser of a bankrupt's property merely because some of the officers and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

The purpose of the appraisement, which is directed to be made, is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, for which in the first instance he is to be accountable. *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

In certain contingencies the amount of the appraisal determines the validity of a sale of the property appraised, and in all cases the values are of the utmost importance in determining the question of the confirmation of the sale. *In re Frazin*, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

The particularity with which such appraisement is to be made depends somewhat upon the circumstances. It should, however,

be general and not special, and should not go into the detail practiced by a merchant taking an inventory of stock; only such particularity being indulged in as is sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value. *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

II. SALES.

Sale of assets free of incumbrances.—It is well settled that either the judge or the referee may order the sale of assets free of incumbrances. *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450; *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Sanborn*, (D. C. Vt. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54; *Southern Loan, etc., Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 351; *In re Waterloo Organ Co.*, (W. D. N. Y. 1902) 118 Fed. 804, 9 Am. Bankr. Rep. 427; *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937, 9 Am. Bankr. Rep. 767; *In re Keet*, (M. D. Pa. 1903) 128 Fed. 651, 11 Am. Bankr. Rep. 117; *In re Shoe, etc., Reporter*, (C. C. A. 1st Cir. 1904) 129 Fed. 588, 12 Am. Bankr. Rep. 248; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; *In re Wylie*, (C. C. A. 3d Cir. 1907) 153 Fed. 281, 18 Am. Bankr. Rep. 503, *affirming* (1906) 17 Am. Bankr. Rep. 404; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

Lien claims transferred to proceeds.—A court of bankruptcy has power to order property of a bankrupt which has come into the possession of his trustee sold free of liens, and to transfer all claims against it to the proceeds, notwithstanding the objection of one claiming a lien thereon. *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694. See also *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573.

Legal and equitable interests protected.—In *McKay v. Hamill*, (C. C. A. 3d Cir. 1911) 185 Fed. 11, Gray, J., said: "Undoubtedly the general rule is that the property of the bankrupt is taken by the trustee in the situation in which it was held by the bankrupt, and that any disposition of said property made by the trustee must be made with reference to the superior rights of lienholders when legally ascertained. But the court of bankruptcy, in the exercise of its equitable powers, in selling and disposing of the proceeds of the bankrupt's estate, will take care of and protect the legal and equitable interests of third parties attaching thereto."

Where a bankrupt merchant's landlord was equitably entitled only to security for future

rent to accrue under the lease, it was held that an order approving a sale of the lease sufficiently protected the landlord's rights, by ordering the purchaser to execute a bond to the trustee securing the payment of such rent, especially since the rental value of the premises exceeded the rent provided in the lease, and the landlord had additional recourse against the new tenant, by proceeding against the latter's stock of goods or to dispossess. *In re Varley, etc., Clothing Co.*, (N. D. Ala. 1911) 188 Fed. 761.

Whether property is within the district or not is immaterial to affect the exclusive right of the court which made the adjudication to direct its sale, and to determine all claims thereto, on proper notice to the parties in interest, whether they reside within or without the district; the filing of the petition in bankruptcy itself being a caveat to all the world. *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404.

Levy by sheriff under execution does not prevent sale by trustee.—An adjudication in bankruptcy draws to the bankruptcy court jurisdiction to administer all the property of the bankrupt estate not in the actual custody of some other court, and the trustee is entitled to sell property to the exclusion of a sheriff, although the latter may have a valid lien thereon by virtue of the levy of an execution more than four months prior to the bankruptcy. *In re Vastbinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148.

Validity, extent, and priority of liens.—Where the bankruptcy court has acquired the lawful custody of property to which conflicting liens attach, it has jurisdiction to determine the validity, extent, and priority of such liens, though the trustee has no interest in such question. *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

But the court may order a sale of the estate of the bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien. *In re Union Trust Co.*, (1st Cir. 1903) 122 Fed. 937, 59 C. C. A. 461; *In re Loveland*, (C. C. A. 1st Cir. 1907) 155 Fed. 838, 19 Am. Bankr. Rep. 18.

Failure of lienholders to object to sale equivalent to assent.—Holders of liens on realty of a bankrupt, who with knowledge of proceedings by the trustee for the sale of the same free from liens permit such proceedings to continue without objection, and the proceeds of the property to be used in the payment of expenses of administration, by necessary implication assent to the same and cannot afterward object to such proper expenditures. *In re Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207.

Effect of pending composition proceeding.—Where the money necessary to pay taxes and other debts having priority, required to be deposited by section 12b as a condition to the enforcement of a composition, had not been deposited, though several months had

intervened since the court declared that such deposit must be made before any composition could be confirmed, it was held that the pendency of the petition for such composition was no defense to a petition for the sale of the bankrupt's assets. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

When sale free from incumbrances will be ordered—*Generally*.—The court of bankruptcy will not order the trustee to sell encumbered property of the bankrupt free of its incumbrances unless it appears that a price will probably be realized substantially greater than the amount of the liens; that there are no rights which cannot be brought before the bankruptcy court, and which would require foreclosure proceedings proper; that the court is accurately informed as to the facts; and that all parties in interest have had notice and full opportunity to be heard. *In re Pit-telkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472. And see to the same effect *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763, 9 Am. Bankr. Rep. 419; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *George Carroll, etc., Co. v. Young*, (C. C. A. 3d Cir. 1903) 119 Fed. 576, 9 Am. Bankr. Rep. 643; *In re Shoe, etc.*, Reporter, (C. C. A. 1st Cir. 1904) 129 Fed. 588, 12 Am. Bankr. Rep. 248; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 136 Fed. 697, 14 Am. Bankr. Rep. 483.

Essential that estate be benefited.—The power of the court in ordering a sale of mortgaged property should never be exercised unless the bankrupt estate will be benefited thereby or the mortgagee proves his claim on the mortgage in the bankruptcy proceedings. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

The court of bankruptcy will not order a trustee in bankruptcy to sell the bankrupt's real property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, and that the interests of creditors holding liens on such property will not be injuriously affected. *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re Shaeffer*, (E. D. Pa. 1900) 105 Fed. 352, 5 Am. Bankr. Rep. 248.

Value need not affirmatively appear.—Where a bankrupt's trustee applied to sell all the interest of the bankrupt in the estate of his father, and the referee found that there was a purchaser who was willing to give a substantial sum for the proposed transfer, and it did not plainly appear that the bankrupt had no right in his father's estate which passed to his trustee, the sale was authorized. *In re Gutterson*, (D. C. Mass. 1905) 136 Fed. 698, 14 Am. Bankr. Rep. 495.

Necessity of notice.—An order directing a sale of a bankrupt's property on which valid liens exist should be granted only on notice to lien creditors, and the record should affirmatively disclose that every creditor whose lien will be discharged by the sale has received such notice. *In re Platteville Foundry,*

etc., Co., (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Where the time fixed in an order by a referee authorizing a private sale of the property of a bankrupt at a specified upset price had expired without a sale having been made, it was held that notice to creditors and others interested was essential before the making of a new order of sale. *Allgair v. Fisher*, (C. C. A. 3d Cir. 1906) 143 Fed. 962, 16 Am. Bankr. Rep. 278.

But see *In re Hawkins*, (W. D. N. Y. 1903) 125 Fed. 633, 11 Am. Bankr. Rep. 49, wherein it was held that under general order No. 18 (2) a court of bankruptcy or a referee has discretionary power to order a private sale of a bankrupt's property, with or without notice; and that the action of a referee in directing such a sale ought not to be disturbed, unless it clearly appears that his discretion was improvidently exercised.

Lienors entitled to hearing.—If the trustee desires to sell the real estate free of liens, without redemption, he must give the lienholders their day in court, because they are entitled to be heard before the property is discharged from their liens, and the liens transferred to the fund arising from the sale thereof. *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 136 Fed. 697, 14 Am. Bankr. Rep. 483.

Lienor may be brought into court on rule to show cause.—One claiming a lien on the property of a bankrupt, which is in the possession of his trustee, may be brought into the court of bankruptcy by service of a rule to show cause for the purposes of a petition by the trustee for an order to sell the property free of liens and transferring all liens to the proceeds. A plenary suit is not absolutely required, and is not usual when the trustee is in possession of the property, and the controversy is only of a matter of procedure in administration, the substantial rights of the parties not being affected. *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

Manner of selling assets.—The power to sell is under the direction of the court; the trustee has no authority with reference to the estate, to which he has the statutory title, except such as is expressly or impliedly given by the law. *Hobbs v. Frazier*, (Fla. 1908) 22 Am. Bankr. Rep. 684. See also *In re Shea*, (C. C. A. 1st Cir. 1903) 126 Fed. 153, 11 Am. Bankr. Rep. 210.

The court will direct the method of sale and distribution so as to protect the rights and interests of all parties concerned. *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450.

Private sale.—The bankruptcy court, under the broad powers given by the statute, may order the sale of either real or personal property at private sale. *In re Edes*, (D. C. Me. 1905) 135 Fed. 595, 14 Am. Bankr. Rep. 382.

A bankrupt is not entitled to object to a private sale of his interest in the estate, before appraisal, for the first time before the judge; but should raise such objections

on an application to the referee for a modification of the original judgment. *In re Gutterson*, (D. C. Mass. 1906) 136 Fed. 698, 14 Am. Bankr. Rep. 495.

Sale by auctioneer.—The statute authorizes the appointment of an auctioneer by the court to sell property of a bankrupt's estate, in advance of any particular occasion therefor. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481.

The court may appoint commissioners to make the sale; there being no requirement that such sales shall be made by the trustee. *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

Attorney cannot sell assets.—The general employment of an attorney at law, as counsel and attorney by the receiver of a bankrupt, does not authorize the attorney to make a sale of the bankrupt's assets, nor to take the proceeds thereof. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714.

Joinder of all trustees in petition for sale.—Where the creditors of a bankrupt appointed two trustees at their first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified and joined in the petition for sale, the fact that the petition was presented by two trustees only in the first instance was no objection thereto, since, if title to the bankrupt's estate was not vested in the two trustees on their appointment and qualification, it became vested in the three on the appointment and qualification of the third. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

Liens must be paid.—When a sale of the property free of liens has been ordered, the proceeds must be applied to their satisfaction, undiminished by anything except the costs of sale, and the expenses, if any, which have been undertaken for their benefit. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 875; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re Goldsmith*, (E. D. N. Y. 1909) 168 Fed. 779, 21 Am. Bankr. Rep. 845; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

Right to interest.—When the proceeds of the sale are sufficient to warrant it the lienor is entitled to the interest legally due on his debt. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *modifying* (S. D. Ia. 1906) 16 Am. Bankr. Rep. 583, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 1; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

Lienor not liable for expenses of estate.—A court of bankruptcy has no power to take the proceeds of mortgaged property of the bankrupt, which belongs to the lien creditor, to pay the expenses of the general estate, or the expense of conducting the bankrupt's business through a receiver or the trustee, without the consent of the lien creditor, express or implied. *In re Clark Coal, etc., Co.*,

(W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101.

Sale of assets free of dower rights.—Where a bankrupt's wife, by letter to his trustees, agreed to extinguish her dower interest in her husband's real estate for a specified price, it was held that she thereby consented to a sale of the real estate free from her dower interest, which the court thereupon had power to order. *In re Acretelli*, (S. D. N. Y. 1909) 173 Fed. 121, 21 Am. Bankr. Rep. 537. See also *Savage v. Savage*, (C. C. A. 4th Cir. 1905) 141 Fed. 346, 15 Am. Bankr. Rep. 599.

Sale subject to incumbrances.—An order by the bankruptcy court directing a sale of the bankrupt's property without mentioning liens will be construed as authorizing only a sale subject to existing liens. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Where the property of a bankrupt has been sold subject to incumbrances, the purchaser takes title subject to existing municipal claims and taxes. *In re Gerry*, (E. D. Pa. 1902) 112 Fed. 957, 7 Am. Bankr. Rep. 459.

Sale ordered to preserve value of estate.—The court of bankruptcy will, on a proper showing, order the sale of property when such a course is necessary for the preservation of its value as an asset of the estate. *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Edes*, (D. C. Me. 1905) 135 Fed. 595, 14 Am. Bankr. Rep. 382; *In re Harriß*, (S. D. Ala. 1907) 155 Fed. 875, 19 Am. Bankr. Rep. 635.

Effect of sale as to adverse claimant.—Unless there is some special direction in an order for the sale of real estate of a bankrupt, the trustee sells only the interest of the bankrupt therein; and one claiming an interest adverse to the bankrupt, and who is a stranger to the proceedings, is not affected by the sale, and has no interest in the proceeds; nor has the court of bankruptcy, after the property has been sold and conveyed, jurisdiction to adjudicate the rights of such claimant therein. *In re Muhlhauser*, (C. C. A. 6th Cir. 1903) 121 Fed. 669, 10 Am. Bankr. Rep. 236.

Setting sale aside—Subsequent offer.—A sale will not be set aside except for gross inadequacy of price, or circumstances impeaching its fairness. A subsequent offer of a better price than that realized cannot, alone, authorize a resale. *In re Ethier*, (E. D. Wis. 1902) 118 Fed. 107, 9 Am. Bankr. Rep. 160; *In re Belden*, (N. D. N. Y. 1903) 120 Fed. 524, 9 Am. Bankr. Rep. 679; *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

Inadequacy of price.—While a sale may be set aside on the sole ground of inadequacy, it must be such as to be unconscionable. *In re Shapiro*, (M. D. Pa. 1907) 154 Fed. 673, 19 Am. Bankr. Rep. 125.

Agreement to raise bid.—An auction sale of property by a trustee in bankruptcy is not invalid because of a private arrangement between the attorney for the purchaser and

the auctioneer, that the bid of any other person should be raised a certain amount each time until a sign to stop was given. *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719, 19 Am. Bankr. Rep. 638.

Bidding prevented.—A sale will be set aside on petition of a creditor who was prevented from bidding by the action of the trustee, on his giving security to make a substantially higher bid for the property at a resale. *In re Shea*, (D. C. Mass. 1903) 122 Fed. 742, 10 Am. Bankr. Rep. 481.

Trustee's misconduct.—A court of bankruptcy has general authority to set aside a sale of a bankrupt's property, made under an order of a referee, on the ground of misconduct of the trustee in making such sale, without proof of fraud on the part of the purchaser, and although the order of the referee did not require the sale to be made subject to the approval of the court. *In re Shea*, (D. C. Mass. 1903) 122 Fed. 742, 10 Am. Bankr. Rep. 481.

Purchase by appraiser.—The principles of equity and considerations of public policy for-

bid a purchase, at the sale of a trustee in bankruptcy, by one of the appraisers of the property; and, in such case, the sale will be set aside with leave to the District Court to restore the parties so far as practicable to their original situation. *In re Frazin*, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

Purchase by trustee.—So, where the property has been purchased by the trustee, the sale must be set aside. *In re Hawley*, (N. D. Ia. 1902) 117 Fed. 364, 9 Am. Bankr. Rep. 61.

On the setting aside of a private sale, the purchaser thereat, when not in fault, will be protected to the extent of the price paid, and the improvements made, by him. *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404.

Review of order setting aside sale.—An order of a District Court in bankruptcy, setting aside a sale of property and directing a resale, is not reviewable on a petition to superintend and revise, until after the resale has been made and confirmed. *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

c [Trustee to convey title.] The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee. [(1898) 30 Stat. L. 566.]

Court may summarily enforce contract of sale.—Whenever the receiver of a bankrupt, by direction of the court appointing him, makes a sale of assets in his possession, the parties concerned are bound to recognize him as an officer of the court; and hence such court not only has power to enforce in a summary manner the completion of the contract of sale, but the parties involved are deemed to have consented to such proceeding. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714; *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

Purchaser has right to be heard.—Under a contract made with a receiver in bankruptcy for the purchase of property of the estate, including a stock of goods, by which the purchaser agreed to take "all salable merchandise in good condition at the lowest market purchase price," it was held that he could not be required to accept the inventory and prices made by the appraisers appointed by the court, without having an opportunity to be heard as to the condition and market price of the goods. *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

Bankrupt corporation cannot interfere with purchaser of its business, good will, and name.—In *S. F. Myers Co. v. Tuttle*, (S. D. N. Y. 1911) 188 Fed. 532, it appears that the S. F. Myers Company, doing a mail order jewelry business, became bankrupt, and its assets, including its good will and corporate name, were purchased by T. Thereafter the sons of Myers formed a corporation called the "S. F. Myers' Sons Company" and undertook to carry on a similar business at the same place occupied by the bankrupt corporation. This was enjoined, at the suit of T., and the new corporation was ordered either to change its name, so as not to produce confusion, or change its place of business; it also being enjoined from interfering with the business carried on by T. under the name of the old corporation. And it was held that the old corporation, having obtained a discharge in bankruptcy, but having no assets, was not entitled to enjoin T. from continuing to use the name of the old corporation; but that such corporation could be restrained from interfering with the business of T. which he was carrying on under such name.

d [Composition set aside — vesting title in trustee.] Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. [(1898) 30 Stat. L. 566.]

Cross-references: As to

Revocation of discharge, see section 15, *supra*, p. 568.

Setting aside composition, see section 13, *supra*, p. 546.

A secret agreement between a debtor and a single creditor, joining in a composition, by which such creditor is to receive an advantage over the others, cannot be enforced so long as it remains executory; and if fully ex-

ecuted at the time of or prior to the composition, the excess may be recovered back on the theory that it was paid under compulsion; but such transactions render the composition only voidable at the instance of other creditors joining therein. They have no lien

or other right which entitles them to recover the excess paid or secured to the preferred creditor. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

e [Avoiding certain transfers — recovery of property.] The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. [(1898) 30 Stat. L. 566.]

Cross-references: As to

Jurisdiction as to adverse claimants, see section 23 a and b, *supra*, pp. 594, 595.

Recovery of voidable preferences, see section 60b, *supra*, p. 739.

Recovery of property fraudulently transferred within four months of bankruptcy, see section 67e, *supra*, p. 792.

Power conferred on trustee. — Under section 70e, the trustee may assert any right which the creditor might have asserted on the facts as they were at the time of the filing of the petition in bankruptcy; and the trustee may impeach or set aside any fraudulent act or transaction of the bankrupt, and recover property or its proceeds, just as creditors might have done if bankruptcy had not occurred, and the rights and remedies of the creditors had not been vested in the trustees. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 797; *Burns v. O'Gorman Co.*, (C. C. R. I. 1906) 150 Fed. 226, 17 Am. Bankr. Rep. 815; *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541; *In re Gerstman*, (C. C. A. 2d Cir. 1907) 157 Fed. 549, 19 Am. Bankr. Rep. 145; *In re Siegel*, (E. D. N. Y. 1908) 164 Fed. 559, 21 Am. Bankr. Rep. 154; *In re Bement*, (C. C. A. 7th Cir. 1909) 172 Fed. 98, reversing (W. D. Wis. 1908) 158 Fed. 885, 20 Am. Bankr. Rep. 317; *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; *Gorham v. Buzzell*, (D. C. Me. 1910) 178 Fed. 596; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *Greenhall v. Carnegie Trust Co.*, (S. D. N. Y. 1910) 180 Fed. 812; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990; *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127; *In re Adams*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 94; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Skillen v. Endelman*, (1902) 11 Am. Bankr. Rep. 766, 39 Misc.

261, 79 N. Y. S. 413; *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 48 Fla. 215, 37 So. 213; *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575; *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App. Div. 851, 107 N. Y. S. 473; *Ryker v. Gwynne*, (N. Y. 1908) 21 Am. Bankr. Rep. 95; *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229; *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10; *Phillips v. Kleinman*, (Pa. 1909) 23 Am. Bankr. Rep. 266; *Hood v. Blair State Bank*, (1902) 3 Neb. (unofficial) Rep. 432, 91 N. W. 701; *Sheldon v. Parker*, (1902) 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Shreck v. Hanlon*, (1905) 74 Neb. 264, 104 N. W. 193; *Mueller v. Bruss*, (1901) 112 Wis. 406, 88 N. W. 229.

Fraud, actual or constructive, is a necessary element in order to give the trustee in bankruptcy a right of action under section 70e. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *In re Calvi*, (N. D. N. Y. 1911) 185 Fed. 642.

Not limited to transfers within four months period. — The right of the creditors of a bankrupt to pursue and reclaim property transferred fraudulently by an insolvent debtor as a voluntary gift is not limited to transfers made within four months of the institution of the bankruptcy proceedings. *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727.

The trustee may resist the establishment of a lien upon the bankrupt's property, in his hands, under a chattel mortgage which was void as to creditors at the time of the adjudication in bankruptcy. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

May seize property conveyed to corporation for personal benefit. — Where it is shown that a bankrupt, while insolvent, organized a corporation to which he conveyed his property, and which he conducted solely for his own benefit, for the evident purpose of placing such property beyond the reach of his creditors, his trustee may properly be ordered to seize such property as assets of the estate. *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233.

May enforce equitable rights.—A trustee in bankruptcy represents all persons interested in the estate; and he may enforce, in the court of bankruptcy, the equitable rights existing in favor of certain of the creditors only. *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151.

May sue as stockholder.—Where, between the passing of a bankruptcy adjudication and the appointment of a trustee, the assets of a corporation, in which the bankrupt was a large stockholder, were sold at the instance of the majority stockholders, in such a manner and for such a consideration as to prejudice the bankrupt's estate, and to apply the bankrupt's interest to an indebtedness owing to a single creditor, it was held that such sale was subject to vacation by the trustee, after his appointment, suing as a stockholder for an alleged abuse by the majority. *Greenhall v. Carnegie Trust Co.*, (S. D. N. Y. 1910) 180 Fed. 812.

Usury recoverable.—A trustee may maintain an action to recover usurious interest paid by the bankrupt. *Reed v. American-German Nat. Bank*, (W. D. Ky. 1907) 155 Fed. 233, 19 Am. Bankr. Rep. 140.

Effect of discharge.—The discharge of a debtor in bankruptcy in no way precludes the trustee from recovering property of the bankrupt's estate which has been fraudulently transferred. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

A receiver has no power to sue for the purpose of setting aside a fraudulent transfer. *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

Trustee vested with rights of creditor.—Since the enactment of the amendment of 1910, trustees as to all property in the custody or coming into the custody of the bankruptcy court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2), *supra*, p. 682.

Since the amendment of 1910 decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling. *In re Gehris-Herbine Co.*, (E. D. Pa. 1911) 188 Fed. 502.

And even prior to the amendment of 1910 it was held that when, under section 70e, the trustee seeks to set aside a fraudulent or voidable transfer of the bankrupt antedating the four months period, he does so in the creditors' right, to which he is subrogated, and which is vested in him exclusively. *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

A creditor of one discharged in bankruptcy cannot maintain a suit to set aside an alleged fraudulent transfer of the property of the bankrupt, although such transfer may have been made more than four months prior to the filing of the petition in bankruptcy. The right to sue for such property, and sub-

ject it to the payment of the bankrupt's debts, is vested alone in the trustee, and the failure of the trustee to bring such suit within the time prescribed by law does not transfer the right to do so to the creditor. *In re Adams*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 94; *Ruhl-Koblegard Co. v. Gillespie*, (1907) 22 Am. Bankr. Rep. 643, 61 W. Va. 584, 11 Ann. Cas. 929, 56 S. E. 898.

But prior to the appointment of a trustee it would seem clear that the general creditors, by bill or other appropriate proceedings, may take steps to set aside fraudulent transfers of property; and under section 11 the suit so pending might then be continued by the trustee after his appointment. See *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550. And see the annotation under section 64b (2), *supra*, p. 771.

Trustee cannot recover when creditor could not do so.—A trustee in bankruptcy cannot set aside a transfer in the interest of creditors, when the creditor himself would have no standing to do so. *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962.

Bona fide transactions are excepted from the operation of the statute, as, indeed, they would have been without being expressly excepted; therefore the power conferred on the trustee, under section 70e, does not warrant interference with, or the disturbance of, the rights of *bona fide* purchasers for value. *In re Rudnick*, (D. C. Wash. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Gorham v. Buzzell*, (D. C. Me. 1910) 178 Fed. 596.

Cannot enjoin disposition of property.—The statute does not vest a court of bankruptcy with jurisdiction to take property alleged to belong to the bankrupt out of the possession of a third party, unless by his consent, either permanently, by a plenary suit, or temporarily and by summary process, pending adjudication on a petition filed; and, lacking such jurisdiction, it is without power to enjoin the third party from disposing of such property. *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251. But see the annotation under section 11a, *supra*, p. 531.

Burden of showing bona fides.—In proceedings by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt, the burden is on the defendants to show that they are *bona fide* purchasers for value, such a defense being an affirmative one. *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297.

Valid liens protected.—Under the rule heretofore stated (see annotation *supra*, p. 811, under section 70a generally) the title of the trustee to the property of the bankrupt is subject to all valid liens, and to all legal and equitable claims existing against it; and this rule also applies where recovery is sought under section 70e. *Philadelphia Fourth St. Bank v. Yardley*, (1897) 165 U. S. 634, 17 S. Ct. 439, 41 U. S. (L. ed.) 855. And see to the same effect *Duplan Silk Co. v. Spencer*, (C. C. A. 3d Cir. 1902) 115 Fed. 689, 8 Am. Bankr.

Rep. 367; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 793; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *Aldine Trust Co. v. Smith*, (C. C. A. 3d Cir. 1910) 182 Fed. 449.

Thus, if under the state law it is not unlawful for an insolvent debtor to prefer a creditor by a transfer of property, if made in good faith and for an adequate consideration, the trustee of a bankrupt cannot set aside such a transfer under section 70e. *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217.

So, also, where a bankrupt treats certain property as having been sold by him, and assigns the proceeds thereof as collateral security for a loan, neither he nor his trustee will be heard to assert the contrary. *Philadelphia Fourth St. Bank v. Yardley*, (1897) 165 U. S. 634, 17 S. Ct. 439, 41 U. S. (L. ed.) 855; *Aldine Trust Co. v. Smith*, (C. C. A. 3d Cir. 1910) 182 Fed. 449.

Reducing claim to judgment.—The title of the bankrupt having vested in the trustee under the general provisions of section 70a, it is not necessary that the trustee should

reduce his claim to judgment prior to proceeding for the recovery of property under the provisions of section 70e. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; *Zartman v. Waterloo First Nat. Bank*, (1905) 109 App. Div. 406, 96 N. Y. S. 633, *affirmed* (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127; *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 5 Ann. Cas. 801, 48 Fla. 215, 37 So. 213; *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229; *Crary v. Kurtz*, (1906) 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; *Sheldon v. Parker*, (1902) 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Hood v. Blair State Bank*, (1902) 3 Neb. (unofficial) Rep. 432, 91 N. W. 701; *Shreck v. Hanlon*, (1905) 74 Neb. 264, 104 N. W. 193; *Mueller v. Bruss*, (1901) 112 Wis. 406, 88 N. W. 229.

But the trustee does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer. *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650.

[*Jurisdiction.*] For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(*Inserted 1903*) 32 Stat. L. 800.]

Jurisdiction of bankruptcy court.—Under the statute, as enacted originally, the jurisdiction of the bankruptcy court over actions for the recovery of property under section 70e was not provided for, and it was held that such jurisdiction depended on the consent of the adverse party. Apparently for the purpose of correcting this and other defects, section 23b was amended in 1903; but the amendment failed to expressly specify section 70e, and for that reason there was a conflict of authority as to whether actions instituted under section 70e could be prosecuted in the bankruptcy court without the consent of the defendant; this subject, however, was finally set at rest by the amendment of section 23b by the Act of June 25, 1910, which provides that in such cases the consent of the defendant is not necessary in order to confer jurisdiction on the court of bankruptcy. See sec. 23b and annotation thereunder, *supra*, p. 595. See also *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 797; *Palmer v. Roginsky*, (S. D. N. Y. 1910) 175 Fed. 883; *Sheppard v. Lincoln*, (S. D. N. Y. 1910) 184 Fed. 182 (decided prior to the amendment of 1910, but reported since then).

Jurisdiction of state courts.—In actions under section 70e jurisdiction may be exercised by the state courts. *Mueller v. Bruss*, (1901) 8 Am. Bankr. Rep. 442, 112 Wis. 406, 88 N. W. 229; *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575. And see *supra*, p. 595, the annotation under section 23b.

Where a trustee in bankruptcy is entitled to assets of the bankrupt which are in the

possession of a receiver appointed by a state court of competent jurisdiction, comity requires, as a general rule, that the trustee should first make application to the state court, instead of to the bankruptcy court, for an order for the possession of such assets. *Carling v. Seymour Lumber Co.*, (C. C. A. 5th Cir. 1902) 113 Fed. 483, 8 Am. Bankr. Rep. 29.

Referee.—Prior to the amendment of section 23b by the Act of June 25, 1910, it was held that a referee had no jurisdiction of an action under section 70e to recover property, for the reason that in such case the property is not in the possession of the court. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10, *disapproving In re Shultz*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 690. And see *supra*, p. 595, the annotation under section 23b.

Ancillary jurisdiction.—The District Court of a district other than that in which the bankruptcy proceedings are pending may entertain a suit to set aside a fraudulent transfer made by the bankrupt to parties residing in such other district. *Lawrence v. Lowrie*, (M. D. Pa. 1904) 133 Fed. 995, 13 Am. Bankr. Rep. 297. And see section 2 (20) and the annotation thereunder, *supra*, p. 480.

Prior to enactment of the amendment of 1910 it was held that when a trustee in bankruptcy seeks to enforce rights or to recover property in a district other than that of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, state or federal, and is confined to the

same remedies, subject to the exceptions made by the bankruptcy law. *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541.

Remedies available. — The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims, that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App. Div. 851, 107 N. Y. S. 473. See also *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541. And see the annotation under section 235, *supra*, p. 595.

And in such action the presumption is that the trustee has complied with all the requirements of the bankruptcy law, and is qualified to act. *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575.

The plaintiff, as the trustee in bankruptcy of a mortgagor, has the same rights as a creditor armed with an attachment or an execution. *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127. And see section 47a (2), *supra*, p. 682.

It has also been held that the bankruptcy law, instead of vesting in the trustee the remedies of the creditors against the property, such as judgment, execution, and creditor's bills, vests in him at once the title to the property — makes him the owner of it. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382.

When plenary suit necessary. — Where a third person is in possession of goods alleged to belong to the bankrupt, and such property

is held under claim and color of title, the claimant is entitled to retain them until dispossessed in a plenary suit. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990. And see *supra*, p. 595, the annotation under section 235.

Trover and conversion. — A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy; and in the declaration he may join a count upon the bankrupt's title and a count upon the trustee's title, being vested by section 70a (6) with the bankrupt's right of action. *Burns v. O'Gorman Co.*, (C. C. R. I. 1906) 150 Fed. 226, 17 Am. Bankr. Rep. 815.

Bill in equity. — A trustee in bankruptcy occupies a relation similar to that of a judgment creditor of the bankrupt, and may file a bill in equity to set aside a fraudulent conveyance of real estate by the bankrupt, although neither the trustee nor any creditor has reduced any claim against the bankrupt to judgment. *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 48 Fla. 215, 37 So. 213.

Fraudulent transferee as party. — A fraudulent transferee, who has transferred to another fraudulent transferee all the property rights which she received under her transfer, is not a necessary party to the trustee's action. *Skillen v. Endelman*, (1902) 11 Am. Bankr. Rep. 766, 39 Misc. 261, 79 N. Y. S. 413.

Necessity of showing insufficiency of assets. — In actions under section 70e the pleading and proof should show that the property of the bankrupt is not sufficient to pay his creditors in full; but a defect in this respect may be amended. *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229.

f [Revestment of title on confirmation of composition.] Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. [(1898) 30 Stat. L. 566.]

Revesting of title. — On the confirmation of a composition the title to all the property passes from the trustee and reverts in the bankrupt free from the claims of his creditors. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178. See also *Stone v. Jenkins*, (1900) 4 Am. Bankr. Rep. 568, 176 Mass. 544, 57 N. E. 1002. And see section 12e and the annotation thereunder, *supra*, p. 545.

Adverse claimant may assert rights against bankrupt. — On the confirmation of a composition the title to property in the custody of the court, and claimed adversely, is to be determined as between the bankrupt and the claimant; in such case the bankrupt does not stand in the shoes of his former creditors. *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638.

SEC. 71. [BANKRUPTCY RECORDS.] — That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided*, That said bankruptcy indexes and dockets shall at

all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. [(Inserted 1903) 32 Stat. L. 800.]

Cross-reference: As to

Duty of clerks generally, see the several subdivisions of section 51, *supra*, p. 694.

SEC. 72. [COMPENSATION OF OFFICERS RESTRICTED.] — That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act. [(Inserted 1903) 32 Stat. L. 800; (amended 1910) 36 Stat. L. 842.]

Cross-references: As to

Compensation of referees generally, see the several subdivisions of section 40, *supra*, p. 666.

Compensation of trustees, receivers, and marshals, see the several subdivisions of section 48, *supra*, p. 689.

Bar to extra allowances. — Section 72 is an absolute bar to any extra allowance, however onerous or valuable the service rendered may have been. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. See also *In re Epstein*, (W. D. Ark. 1901) 109 Fed. 878, 6 Am. Bankr. Rep. 191; *In re Screws*, (S. D. Ga. 1906) 147 Fed. 989, 17 Am. Bankr. Rep. 269. And see the annotation under sections 40 and 48, *supra*, pp. 666, 689.

Thus it has been held that the court has no power to allow special compensation to a referee for services rendered on a reference

to him of a contested application for discharge as authorized by general order in bankruptcy No. 12. *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241.

Referee as special master. — It has been held that there is no authority for converting a referee in bankruptcy into a special master, nor for allowing him compensation as such. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866. See also *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241.

But in some districts it has been the practice to allow compensation for services, in the nature of master's services, outside of the duties of the referee. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510; *Matter of Hart*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 137.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

a [Force and effect.] This Act shall go into full force and effect upon its passage: [(1898) 30 Stat. L. 566.]

Provided, however, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. [(1898) 30 Stat. L. 566.]

Time of taking effect. — The Bankruptcy Act took effect, as to involuntary proceedings, from the date of its approval, July 1, 1898. *Blake v. Francis-Valentine Co.*, (N. D. Cal. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; *In re Bruss-Ritter Co.*, (E. D. Wis. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58.

And from the first moment of that day. *Leidigh Carriage Co. v. Stengal*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 383.

From the date of the taking effect of the Bankruptcy Act, though by its terms no proceedings thereunder for involuntary bankruptcy could be commenced for four months thereafter, the relations of debtor and creditor and those between creditors were governed by its provisions; and an act of bankruptcy committed by a debtor after that date entitles every creditor to the rights given by

the Act, and to invoke the aid of the court in preserving such rights until they are enforceable. *Blake v. Francis-Valentine Co.*, (N. D. Cal. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372. And see to the same effect *E. C. Westcott Co. v. Berry*, (N. H. 1899) 4 Am. Bankr. Rep. 264; *Kosches v. Libowitz*, (Tex. 1900) 4 Am. Bankr. Rep. 265 note, 56 S. W. 613.

Not retroactive. — It is apparent that it was the intention of Congress that the law should not be retroactive, so that a person could be forced into the bankruptcy courts for any act done by him prior to July 1, 1898. It was only intended to act in the future, and to take cognizance of such acts of bankruptcy as were committed after its passage. *Grunsfeld v. Brownell*, (1904) 11 Am. Bankr. Rep. 599, 12 N. M. 192, 76 Pac. 310.

[*The amendment of Feb. 5, 1903 provides:*] That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight. [*32 Stat. L. 801.*]

Not retroactive.—The amendatory Act of Feb. 5, 1903, by its express terms does not apply to nor affect any proceeding instituted before it took effect, and in such proceedings all of the provisions of the original Act are to be enforced the same as though not amended. *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584.

As to suit brought by trustee.—The provision contained in the Act of 1903, that it "shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions" of the original

Act, applies to the administration of bankruptcy cases proper, and not to a suit brought by a trustee. Such a suit is not a bankruptcy case within the meaning of the provision in the amended Act. The general rule is that the right to any particular remedy is not a vested right, and that a statute creating new remedies, or conferring jurisdiction upon courts which previously did not have it, is not confined to rights of action arising thereafter, but may be availed of to enforce any existing rights of action. *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992, 10 Am. Bankr. Rep. 343.

[*The amendment of June 25, 1910, provides:*] That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. [*36 Stat. L. 842.*]

Not retroactive.—The amendment of 1910 is not retroactive. *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

b [*Cases pending under state laws.*] Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it. [(1898) *30 Stat. L. 566.*]

Suspension of state insolvency laws.—The enactment by Congress of a national Bankruptcy Act suspends the operation of state insolvency laws from the time of such enactment, subject only to such limitations as may be prescribed in the Bankruptcy Act. *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475; *In re Bruss-Ritter Co.*, (E. D. Wis. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58; *In re Curtis*, (S. D. Ill. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440; *In re Smith*, (D. C. Ind. 1899) 92 Fed. 135, 2 Am. Bankr. Rep. 9; *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808; *In re Macon Sash, etc., Co.*, (S. D. Ga. 1901) 112 Fed. 323; *Carling v. Seymour Lumber Co.*, (C. C. A. 5th Cir. 1902) 113 Fed. 483; *In re Storek Lumber Co.*, (D. C. Md. 1902) 114 Fed. 360; *In re Rogers*, (S. D. Ga. 1902) 116 Fed. 435; *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395; *Smith v. Mottley*, (C. C. A. 6th Cir. 1906) 150 Fed. 266; *Parmenter Mfg. Co. v. Hamilton*, (Mass. 1898) 1 Am. Bankr. Rep. 39; *E. C. Weacott Co. v. Berry*, (N. H. 1899) 4 Am. Bankr. Rep. 264; *Littlefield v. Gray*,

(Me. 1902) 8 Am. Bankr. Rep. 409; *Grunsfeld v. Brownell*, (1904) 11 Am. Bankr. Rep. 599, 12 N. M. 192, 76 Pac. 310.

The bankruptcy law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object of the provisions of the Bankruptcy Act, that part of the state law must yield to the provisions of the latter. *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

The Bankruptcy Act on its passage at once suspended and superseded all state insolvency laws, as to cases coming within its purview, whether the insolvent be a person, partnership, or corporation; and proceedings instituted thereafter under any such insolvency law by or against an insolvent subject to adjudication as a bankrupt, either voluntary or involuntary, are void. *In re F. A. Hall Co.*, (D. C. Conn. 1903) 121 Fed. 992, 10 Am. Bankr. Rep. 88.

Proceedings in state courts under state insolvent laws are, as against proceedings under the Bankruptcy Act, *coram non judice*. Such proceedings have no validity, no more than have proceedings in a state court when once a cause has been properly removed therefrom into a federal court. *In re Standard*

Fuller's Earth Co., (S. D. Ala. 1911) 186 Fed. 578.

The postponement of the right to file petitions in involuntary cases until four months after the passage of the Bankruptcy Act does not authorize state courts, in the interval, to take jurisdiction of proceedings begun under state insolvency laws, being a mere regulation of procedure, and not a denial or impairment of the rights of suitors; and, therefore, a District Court of the United States, sitting in bankruptcy, has jurisdiction to entertain a petition in involuntary proceedings against a corporation amenable to the law, and to appoint a temporary receiver of its effects, notwithstanding the fact that proceedings had been begun against the same corporation in a state court, under a statute of the state, after the passage of the national bankruptcy law, but before the date when involuntary petitions under it could be filed. *In re Bruss-Ritter Co.*, (E. D. Wis. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58.

Extent of suspension.—State insolvency laws are suspended by the Bankrupt Act only so far as the two are in conflict, and in so far as the bankruptcy law covers and supplies what is undertaken to be disposed of by the state law. *Johnson v. Crawford*, (M. D. Pa. 1907) 154 Fed. 761.

And in *Singer v. National Bedstead Mfg. Co.*, (N. J. 1903) 11 Am. Bankr. Rep. 276, it was said, *per Stevenson, V. C.*: "It is perfectly plain that state systems of voluntary and involuntary bankruptcy may remain today in full operation upon large numbers of insolvent natural persons and corporations who cannot be brought within the operations of the national Bankrupt Act under any possible state of facts. It is also, it seems to me, equally plain that a state system of involuntary insolvency also remains in full operation upon persons and corporations, who are, as possible bankrupts, within the operation of the national Bankruptcy Act, so far as the state system deals with cases of which the bankruptcy courts, under the federal Act, can obtain no jurisdiction. . . . The intention of the Act is to supply the law of certain cases, and to supply a special court to enforce that law. All other cases of bankruptcy or insolvency are left to be dealt with as the state legislature may see fit."

The bankruptcy law does not attempt to supervise insolvency proceedings under state laws, undertaken and carried out more than four months prior to the institution of bankruptcy proceedings; nor to inquire into the assignments and transfers of the bankrupt's property not made within such period. *In re Boner*, (N. D. W. Va. 1909) 169 Fed. 727, 22 Am. Bankr. Rep. 151.

Dissolution or winding-up proceedings.—The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to

be wound up under state statutes. *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113.

The Bankruptcy Act so far controls the matter of the dissolution of an insolvent corporation as to prevent its legal extinction by superseding all state laws in conflict with its provisions to an extent necessary to enable the creditors of insolvent corporations to have the assets of their insolvent debtor administered in accordance with its terms. *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

But it has been held that the creditors of a corporation may proceed with their ordinary remedies under state laws until bankruptcy proceedings have been instituted. *State v. King County*, (Wash. 1899) 2 Am. Bankr. Rep. 92.

Assignments for the benefit of creditors.—As assignments for the benefit of creditors are, under section 3a (4), in themselves, acts of bankruptcy on the part of the assignor, proceedings under such assignments are superseded by his bankruptcy. See section 3a (4), and the annotation thereunder, *supra*, p. 488.

But it has been held that state statutes which merely regulate the administration of the trust created by an assignment for the benefit of creditors are not suspended; and proceedings under such statutes, or under a common-law deed of assignment, are not void or voidable by reason of the existence merely of a bankruptcy law, or unless proceedings in bankruptcy are subsequently instituted against the assignor. *In re Sievers*, (E. D. Mo. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117. See also *In re Scholtz*, (S. D. Ia. 1901) 106 Fed. 834, 5 Am. Bankr. Rep. 782.

Supplementary proceedings.—The action of a receiver under a statute, like that of New York, permitting the examination of judgment debtors supplementary to an execution, is a substitute for a receivership in a creditor's bill (*Olney v. Tanner*, 10 Fed. 101), and is not a proceeding commenced under a state insolvency law. *In re Meyers*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 347.

Laws authorizing imprisonment for debt.—A state law which authorizes the arrest and imprisonment of a judgment debtor, on a showing that he is about to remove or has concealed property with intent to defraud his creditors, is not an insolvency law of the state, although it provides that the debtor may be released on his giving a bond that he will apply within thirty days for the benefit of such law and comply with its requirements, but merely provides a remedy in aid of execution, and its operation is not suspended by the national Bankruptcy Act. *Ex p. Crawford*, (C. C. A. 3d Cir. 1907) 154 Fed. 769.

BIGAMY, POLYGAMY, AND UNLAWFUL INTERCOURSE.

Vol. I, p. 708, sec. 3.

Indictment.—In an indictment for adultery under this section, against a married man, it is not essential to allege that the woman with whom the offense is charged to have been committed was either married or unmarried. *U. S. v. Meyers*, (1908) 14 N. M. 522, 99 Pac. 336.

A single man committing the act with a married woman may be found guilty though the indictment charges that he is a married man. *U. S. v. Cook*, (1909) 15 N. M. 124, 103 Pac. 305.

Vol. I, p. 709, sec. 4.

Indians.—This section is not in force on Indian reservations where both parties to the alleged act are Indians. *Ex p. Hart*, (1907) 157 Fed. 130.

BRIBERY.

Vol. I, p. 712, sec. 1781.

Agreement to give and receive bribe.—An agreement between a member of Congress and another, the one to receive a bribe for aiding to procure an office and the other to pay the same, constitutes a substantive offense under this section by each of the parties thereto, and cannot be made the basis of an indictment under R. S. sec. 5440, 2 Fed. Stat. Annot. 247, for a conspiracy to commit an offense against the United States. *U. S. v. Dietrich*, (1904) 126 Fed. 664.

"Member of Congress" defined.—A person elected to the office of senator of the United States is not, until he has been accepted by the Senate as a member and has assumed the duties of the office, a "member of Congress" within the meaning of this section, making it a criminal offense for a "member of Congress or any officer or agent of the government" to receive or agree to receive a bribe for procuring or aiding to procure for another any contract, office, or place from the government. *U. S. v. Dietrich*, (1904) 126 Fed. 676.

A clerk in one of the departments is subject to indictment under this section as an "officer and agent" or an "officer and clerk" of the United States. *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187.

Indictment.—Two persons cannot be severally charged in the same indictment under this section and in a single count, the one with agreeing to receive a bribe as a member of Congress and the other with agreeing to give such bribe, which constitute distinct and separate offenses. *U. S. v. Dietrich*, (1904) 126 Fed. 664.

Limitation of prosecution.—In *U. S. v. Driggs*, (1903) 125 Fed. 520, it was held that delivery to a member of Congress of a non-negotiable note made by a government contractor, promising to pay a certain sum as the proceeds of the contract were received, executed pursuant to an agreement to pay such member for his services in procuring the contract, did not constitute the giving or receiving of "property" or a "valuable consideration," within the meaning of this statute, such note being made unlawful and invalid by the statute itself; and that indictments under the statute, based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, although the note was delivered more than three years prior to the finding of the indictments.

Vol. I, p. 713, sec. 5451.

Elements of offense.—The tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States,

to such officer, with intent thereby to affect his official action, does not constitute the crime of bribery, under this section, since a

check made and delivered for such illegal purpose is void, and not within any of the classes of instruments enumerated in the statute. *U. S. v. Green*, (1905) 136 Fed. 618.

Person acting in "official function."—A person employed by the United States as an assistant statistician in the department of agriculture, in performance of the duties with which he is charged by the rules of the department, acts for the United States in an "official function," within the meaning of this section. *U. S. v. Haas*, (1908) 163 Fed. 908.

"Lawful duty."—The words "lawful duty," as used in this section, are not limited to a duty imposed by law or statute, but include duty lawfully imposed in any manner. *U. S. v. Haas*, (1908) 163 Fed. 908; *Haas v. Henkel*, (1909) 166 Fed. 621, *affirmed* (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569.

Designation of offense.—The offense denounced by this section is properly described in a complaint as bribery of an officer of the United States, being so designated in the marginal note to the section, which was a part of the Revised Statutes when the same were enacted. *U. S. v. Green*, (1905) 136 Fed. 618, *affirmed* 199 U. S. 601, 26 S. Ct. 748, 50 U. S. (L. ed.) 328.

Indictment.—An indictment which charged the defendant with bribing an officer, etc., by tendering to him "a certain obligation for the payment of money, to wit, the personal check of him, the said [defendant], drawn upon the Knickerbocker Trust Company of New York city, N. Y., in favor of the said [officer] for the sum of three hundred and twenty-five dollars, with intent," etc., but which did not set out the check, nor give its date or contents, nor allege that the trust company named was in existence or engaged in the banking business, was held to be insufficient to charge the offense stated, because it did not show the check to have been an

obligation for the payment of money, nor so identify it as to protect the defendant in case of a subsequent indictment for the same offense. *U. S. v. Green*, (1905) 136 Fed. 618, *affirmed* 199 U. S. 601, 26 S. Ct. 748, 50 U. S. (L. ed.) 328.

Venue.—The crime of bribing a public officer, when begun by mailing a letter containing the money in one federal district, and completed by the receipt of the letter in another district, is triable in the latter district. *Benson v. Henkel*, (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919.

Evidence.—In a proceeding for the removal of a defendant to another federal district for trial on an indictment charging him with bribing an officer of the postal department to use his official position to promote the sale to the government of articles in which defendant was interested as agent, evidence that defendant and such officer were personally acquainted, that the sales were made by defendant, who in soliciting the same talked with such officer and his superiors who in fact made the purchases, and that after receiving his commissions on the sales he paid a similar amount to such officer without any explanation of the reason for such payments or evidence showing that they had any connection with the sales, was held to be insufficient, aside from the indictment itself, to show the commission of the crime charged, or to establish probable cause to believe the defendant guilty. *U. S. v. Green*, (1905) 136 Fed. 618, *affirmed* 199 U. S. 601, 26 S. Ct. 748, 50 U. S. (L. ed.) 328.

In *Vernon v. U. S.*, (C. C. A. 1906) 146 Fed. 121. in a prosecution for alleged bribery of a government officer in violation of this section, the evidence was held to be insufficient to warrant a finding that the defendant made any promise or offer, or gave any money or other valuable thing, to such officer in order to effect his official action.

Vol. I, p. 715, sec. 5501.

Indian agent.—R. S. sec. 2058, 3 Fed. Stat. Annot. 349, provides that each Indian agent within his agency shall manage and superintend the intercourse with the Indians, and execute and perform all regulations and duties not inconsistent with the law that may be prescribed by the President, secretary of the interior, or commissioner or superintendent of Indian affairs. Act Feb. 28, 1891, 26 Stat. L. 795, ch. 383, sec. 3, 3 Fed. Stat. Annot. 500, provides that where purchased lands occupied by Indians are not needed for farming or agricultural purposes, or desired for individual allotments, they may be leased, by authority of the council, on such terms and conditions "as the agent in charge of the reservation may recommend," subject to the approval of the secretary of the interior. It was held that an Indian agent, in the execution and completion of leases of such land, was charged with such official trust that his

receiving a bribe to influence his official action thereon rendered him subject to punishment under this section. *Sharp v. U. S.*, (C. C. A. 1905) 138 Fed. 878.

Indictment.—Where an indictment against a United States Indian agent for bribery alleged that he, having charge of the execution and completion of certain leases for certain tracts of land in a specified Indian reservation, feloniously and corruptly accepted and received the sum of \$1,500 from one A. for the purpose of influencing his action on the completion of such leases—the subject-matter of the leases being mere matter of inducement, and the gravamen of the offense the acceptance of and the asking of the bribe—the indictment was not defective for failure to describe the leases with sufficient certainty. *Sharp v. U. S.*, (C. C. A. 1905) 138 Fed. 878.

CENSUS.

Vol. I, p. 737, sec. 5.

Preference not absolute.—The preference given honorably discharged soldiers of the United States by this section in the matter of employment in the permanent census office is not absolute and regardless of qualifications. Such preference is to be given if the person is equally qualified; but the appointing power still retains and must exercise its discretion and judgment in determining the fitness for the required work of the persons to be selected and retained. To this end the director of the census may fix a reasonable standard of fitness, and guard it by reasonable regulations intended and calculated to secure an efficient permanent force. Such regulations may relate to age, experi-

ence, rating, proposed time of service, etc. The preference given by the statute is one with respect to the place sought or held; but if a person of the preferred class fails to secure the place he seeks, or to retain the one he has, there is no obligation on the appointing power to create a vacancy by dismissing an efficient employee to give him another chance. (1902) 24 Op. Atty.-Gen. 64.

The words "all employees of the census office," as used in this section, cannot be held to apply to special agents or other field employees who may be temporarily assigned to service in the census office. (1902) 24 Op. Atty.-Gen. 78.

Vol. I, p. 742, sec. 8.

Special agents.—The director of the census is authorized, by this section, to employ special agents temporarily in the census office at Washington upon special work not clerical in its nature. (1902) 24 Op. Atty.-Gen. 78.

Oath of special agents.—The special agents of the census office appointed to col-

lect the statistics referred to in sections 7, 8, and 9 of the Act of March 6, 1902, 32 Stat. L. 52, 1 Fed. Stat. Annot. 737, are required, under section 18 of the Act of March 3, 1899, 30 Stat. L. 1019, 1 Fed. Stat. Annot. 746, to take an oath or affirmation before entering upon the discharge of their duties. (1904) 25 Op. Atty.-Gen. 228.

Vol. I, p. 747, sec. 21.

False returns after expiration of time allowed for making enumeration.—This Act authorized a supervisor, acting on advice that names had been erroneously omitted by an enumerator from his schedules, to return such schedules for correction after the expiration of the thirty days prescribed for mak-

ing the enumeration; and, in making such corrections or any additions to his schedules after their return, the enumerator acted in his official capacity, and subject to the penalties prescribed by section 21 of the Act for making false returns. *Ching v. U. S.*, (C. C. A. 1902) 118 Fed. 538.

1909 Supp., p. 716, sec. 7.

First proviso.—The residence and domicile restrictions contained in the first proviso of section 7 apply to all appointments to "positions in the government service" for which applicants are required by law, or by order of the President made pursuant thereto, to be examined before appointment. These restrictions are not confined to examinations for appointments in the departments at Washington. (1909) 27 Op. Atty.-Gen. 546; (1909) 27 Op. Atty.-Gen. 567.

The proviso deals only with applicants for examination for admission to the classified service, and does not relate to positions which are expressly excepted from the necessity of an examination as a condition to appointment. (1909) 27 Op. Atty.-Gen. 567.

The words "for at least one year previous," as used in this proviso, mean for at least one

year next preceding. (1909) 27 Op. Atty.-Gen. 546.

A citizen and resident of West Virginia, who had been employed since 1903 as field assistant in the United States Geological Survey, was held not to be disqualified by the provisions of this section for appointment to work as "classification assistant" to the land classification board of the Geological Survey, if, during all that period, his home was in West Virginia where his parents and other members of his family resided, which place he had always maintained as his home, to which he intended to return when the exigencies of public service would permit, and from which he never intended to remove. (1909) 27 Op. Atty.-Gen. 564.

The temporary absence from the United

States of an applicant for examination into the civil service of the United States, for two years, on account of illness in her family, was held not to affect such person's *bona fide* residence and domicile, in a particular state, if, as matter of fact, she went abroad with the intention of remaining temporarily and of returning to her state, and did not abandon such intention during her absence, but at all times meant to return, and finally did return to her home in that state. (1909) 27 Op. Atty.-Gen. 566.

Questions of "actual *bona fide* residence" and of "domicile" are mixed questions of law and fact, to be determined in each instance by the civil service commission upon the facts presented. (1909) 27 Op. Atty.-Gen. 566.

The provision in this section with regard to an applicant's, being "actually domiciled" in the state or territory where the examination is taken means that he must not only show that he resides in the state or territory where he applies for examination, but that for at least one year previous to his examination he has been actually domiciled there; that is, he shall, for that period, have had his permanent home within such state or territory, a home adopted at least one year previous to his examination, with the intention of making it his permanent abode, which intention shall not have been departed from during the period stated. A requirement that the applicant should have been bodily present within the state during the period of one year before the execution is not justified by the statute. There must, however, have been actual presence at some time within the state

in order to establish a residence, which presence must have been accompanied by an intention to continue indefinitely to reside and have one's home at that place. (1909) 27 Op. Atty.-Gen. 546.

The second and third provisos, which relate to consumptive applicants and to the appointment of more than one member of a family, are not of general application and refer only to permanent and temporary employees of the census office. (1909) 27 Op. Atty.-Gen. 546; (1909) 27 Op. Atty.-Gen. 567.

The fourth proviso, regarding the employment of temporary employees in the census office, seems to supersede paragraphs 1 and 2 of rule VII of the civil service rules, but it is undoubtedly governed by the preceding (third) proviso, "that in no instance shall more than one person be appointed from the same family." (1909) 27 Op. Atty.-Gen. 546.

"Appointed," in the third and fourth provisos, embraces both employment after examination in conformity with the law of apportionment, and appointment for temporary employment without regard to apportionment. (1909) 27 Op. Atty.-Gen. 546.

Exemptions.—Section 1754, Rev. Stat., 1 Fed. Stat. Annot. 828, and section 7 of the Civil Service Act of Jan. 16, 1883, 22 Stat. L. 403, 1 Fed. Stat. Annot. 814, do not exempt honorably discharged soldiers and sailors from examination into the civil service, nor do they interfere with the rule of apportionment established by section 2 of the latter Act and re-enacted in section 7 of the Census Service Act of 1909. (1909) 27 Op. Atty.-Gen. 546.

CHINESE EXCLUSION.

Vol. I, p. 755, sec. 1.

Error in date of Act.—The correct date of this Act is April 29, 1902, instead of April 22, 1902.

Only treaties with China referred to.—Only such obligations as arose out of the treaties with China were referred to by the language used in the Act of April 29, 1902: (1904) 25 Op. Atty.-Gen. 137.

Affected only by existing treaties.—This Act must be construed with reference to treaty obligations existing between the United States and China at the time it was passed, and with reference to treaty obligations which may exist at a future time. So construed, only such laws as were in conflict with treaty obligations at the time of its

passage were not re-enacted or extended. (1904) 25 Op. Atty.-Gen. 137.

Effect of this section.—Act of May 5, 1902, [probably Act of April 29, 1902], expressly continuing in force all laws prohibiting and regulating the coming into the country of Chinese persons, did not create a new law nor repeal any of the laws then in existence, but continued in force, without interruption, the Chinese Exclusion Act of May 6, 1882, 22 Stat. L. 58, ch. 126, as amended by Act July 5, 1884, 23 Stat. L. 117, ch. 220, 1 Fed. Stat. Annot. 774, and extended for ten years by Act of May 5, 1892, 27 Stat. L. 25, ch. 60, 1 Fed. Stat. Annot. 762. *Sims v. U. S.*, (1903) 121 Fed. 515, 58 C. C. A. 92.

Vol. I, p. 756, sec. 2.

Construction of section.—This section does not repeal by implication the provisions of the various previous Acts in relation to the exclusion of Chinese, vesting in the collector of customs and his deputies the power to enforce the provisions of those laws, but is to be regarded as additional legislation on the subject and in harmony therewith. The agents to be appointed by the Secretary of the Treasury are not to supersede the collectors in the performance of their duties regarding the admission of Chinese, but con-

stitute an additional force to act in co-operation with them in securing an effective enforcement of the law. (1903) 24 Op. Atty.-Gen. 561.

Departmental rules.—Rules of the Department of Commerce and Labor respecting the exclusion of Chinese persons have the force and effect of law when not inconsistent with it or with the Constitution or the treaty with China. *Ex p. Chow Chok*, (1908) 161 Fed. 627, *affirmed* (C. C. A. 1908) 163 Fed. 1021.

Vol. I, p. 757, art. II.

Exception applies to condition on returning.—The exception in this article of the treaty that it "shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement," has reference to the condition of the laborer at the time of his return, and it is competent for the appropriate department of the government to adopt a regulation requiring an inquiry into the matter by the immigration officers on the laborer's return, notwithstanding his possession of a collector's certificate, obtained when he left the country, as provided for by the treaty. *In re Ong Lung*, (1903) 125 Fed. 814.

Applicable only to Chinese laborers.—A Chinese person possessing a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the Act of May 5, 1892, 27 Stat. L. 25, 1 Fed. Stat. Annot. 764, is not entitled thereby to the "return certificate" provided for in article

II. of the treaty with China of Dec. 8, 1894, 28 Stat. L. 1210, as that article applies only to registered Chinese laborers. (1902) 24 Op. Atty.-Gen. 132.

Debts "pending settlement."—An open book account of over \$1,000 of a registered Chinese laborer seeking to return to this country, with a Chinese debtor, the existence of which account has been established, is one "pending settlement" under article II. (1903) 24 Op. Atty.-Gen. 637. See also under vol. I, p. 770, sec. 6.

Treasury deportation regulations.—Circular No. 52, Bureau of Immigration, Treasury Department, issued May 10, 1902, providing that duly registered Chinese laborers seeking admission to the United States after temporary absence under article II. of the treaty of 1894 between the United States and China must prove that some one of the conditions mentioned in that article exists at the time of application for readmission, is warranted both by the treaty with China and by the existing laws of the United States. (1902) 24 Op. Atty.-Gen. 91.

Vol. I, p. 759, sec. 1.

"District."—Under Act Cong. May 28, 1896, ch. 252, secs. 7, 9, 29 Stat. L. 180, 181, the territory of Arizona, though divided for the administration of law and for the holding of District Courts with powers of the District and Circuit Courts of the United States into five judicial districts, with boundaries as established by the justices, is one "district" within Act Cong. March 3, 1901, ch. 845, 31 Stat. L. 1093, authorizing the district attorney of the district in which any Chinese per-

son may be arrested for being found unlawfully within the United States to designate the commissioner within such district before whom such person shall be taken for hearing, and the district attorney of the territory may designate a commissioner within the first judicial district of the territory as the commissioner before whom a Chinese person arrested in the second judicial district shall be taken for hearing. *Lee Kim Fong v. U. S.*, (Ariz. 1910) 108 Pac. 237.

Vol. I, p. 759, sec. 3.

Complaint by officer of another district.—The official titles used in this section in describing the persons entitled to make the complaint were made *descriptio personæ*, and hence, where a complaint was made by a

Chinese inspector, it was immaterial that it was filed with a United States commissioner outside the inspector's official district. *Toy Tong v. U. S.*, (1906) 146 Fed. 343, 76 C. C. A. 621.

Vol. I, p. 760, sec. 2. ["Laborer" defined.]

Laborers.—This section does not restrict the meaning of the word "laborers," as used in the prior Acts, so as to enlarge the privileged classes. *U. S. v. Yee Gee You*, (1907) 152 Fed. 157, 81 C. C. A. 409.

A Chinese person owning a \$500 interest in

a general merchandise store, but operating a fruit farm as a tenant and selling the fruit grown thereof by his own labor, was held to be a "laborer," and not entitled to enter or remain in the United States. *Lew Quen Wo v. U. S.*, (C. C. A. 1911) 184 Fed. 685.

["Merchant" defined.]

Minor son of Chinese merchant.—The minor son of a Chinese merchant lawfully domiciled in the United States, who immigrated and entered the United States while a minor without trick, deception, or fraud, under a certificate issued by the registrar-general at Hongkong and viséd by the acting United States consul-general at the same place, and who during the remainder of his minority labored and studied in the United States, was held to be entitled to remain after attaining his majority, though he had since worked as a laborer. *U. S. v. Foo Duck*, (C. C. A. 1909) 172 Fed. 856, *affirming* (1908) 103 Fed. 440.

But in *U. S. v. Joe Dick*, (1905) 134 Fed. 988, it was held that a Chinese minor lawfully entering the United States as the son of a Chinese merchant domiciled in this country lost such status on the return of his father to China to remain permanently, leaving the son, who was still a minor, in this country, and that his status thereafter was determined by his own occupation.

Adopted children of merchant.—A Chinese merchant domiciled in the United States has the right to bring into this country with his wife minor children legally adopted by him in China, where it is shown that the adoption was *bona fide*, and that the children have lived as members of his family and have been supported by him for several years. *Ex p. Fong Yim*, (1905) 134 Fed. 938.

Chinese who may and may not enter.—To the same effect as the original note. *U. S. v. Crouch*, (1911) 185 Fed. 907.

Chinese merchant.—Where a Chinese person arrested as unlawfully within the United States at the time of his arrest was working as a servant in a boarding house, and since coming to the United States had worked as a cook and deliveryman in a store in which he had no interest, it was held that he was not a "merchant" and, not having procured a certificate of residence as required by section 6, a deportation order issued against him was not error. *Mar Sing v. U. S.*, (C. C. A. 1905) 137 Fed. 875.

Partnership.—The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business in order to constitute them "merchants" within the meaning of this section. *Tom Hong v. U. S.*, (1904) 193 U. S. 517, 24 S. Ct. 517, 48 U. S. (L. ed.) 772.

Evidence.—In proceedings for the deportation of a Chinese person the evidence was held to be insufficient to establish that he was a Chinese merchant when he came to the United States, and that he engaged in that line of business for some time thereafter. *U. S. v. Ngum Lun May*, (1907) 153 Fed. 209.

Salesman.—Under the treaty of Nov. 17, 1880, 22 Stat. L. 826, 7 Fed. Stat. Annot. 490, and the treaty of March 26, 1894, 28 Stat. L. 1210, 7 Fed. Stat. Annot. 484, providing that Chinese persons entitled to come into the United States when provided with the certificate prescribed by Act Cong. July 5, 1884, ch. 220, 23 Stat. L. 115, are Chinese subjects, being officials, teachers, students, merchants,

or travelers for curiosity or pleasure, and under this section, defining the term "merchant," as used in the Exclusion Acts, a person described in his certificate as a "salesman" is not a merchant who is entitled to remain in the United States. *U. S. v. Gin Hing*, (1904) 8 Ariz. 416, 76 Pac. 639.

Waiver.—Where a Chinese person was entitled to re-enter the country by virtue of his being a merchant at L, the fact that, on

his attempting to enter a second time after being deported, he put forward the unfounded claim that he was entitled to enter as a merchant at B., did not constitute a waiver of his rights based on the facts that he had been a merchant at L. *Ex p. Ow Guen*, (1906) 148 Fed. 926.

Merchant afterwards becoming laborer.—See under this title, vol. I, p. 774, sec. 1.

[Deportation, how executed.]

Bail pending appeal.—The provision in this section that an order of deportation of a Chinese person shall be executed by the United States marshal with all convenient dispatch, and pending the execution of such order such persons shall not be admitted to bail, does not prevent the district judge from granting bail in his discretion, pending appeal to him from an order of deportation of a commissioner; the commissioner's order not being necessarily final, though such discretion should be sparingly exercised, in view of the object of the Chinese Exclusion Law, which was to prevent competition of Chinese labor with American labor. *In re Ah Tai*, (1903) 125 Fed. 795; *Chin Wah v. Colwell*, (C. C. A. 1911) 187 Fed. 593, *affirming* (1910) 182 Fed. 256; *U. S. v. Wong Lee Foo*, (Ariz. 1910) 108 Pac. 488, *followed in* *Jung Goon Jow v. U. S.*, (Ariz. 1910) 108 Pac. 490.

Deportation, how executed.—Under commerce and labor rule 9, providing that every Chinese person refused admission to the United States, being actually or constructively on the vessel or other conveyance by which he was brought to a port of entry, must be returned to the country from which he came, at the expense of the transportation agency owning such vessel or conveyance, it was held that where the petitioning Chinese persons were apprehended in an attempt unlawfully to enter the country over the Canadian boundary, and were ordered to be dealt with according to law, an inspector had no right to take them to Hoboken, to deport them direct to China, but should have returned them to Canada. *Lui Lum v. U. S.*, (1909) 166 Fed. 106, 92 C. C. A. 90.

Vol. I, p. 762, sec. 1.

Effect of Act of April 29, 1902.—No repeal of the provisions of this Act was effected by the Act of April 29, 1902, 32 Stat. L. 176, ch. 641, sec. 1, 1 Fed. Stat. Annot. 755, continuing all laws then in force so far as not inconsistent with treaty obligations, on the theory that the former section was inconsistent with the treaty with China of Dec. 4, 1894, art. 4; 1 Fed. Stat. Annot. 757, giving the Chinese the rights of citizens of the most favored nation, since the treaty itself in art. 5, 1 Fed. Stat. Annot. 767, expressly refers to the Act of 1892, as amended by the Act of Nov. 3, 1893, 1 Fed. Stat. Annot. 760, and states that the Chinese government will not

object to the enforcement of those Acts. *Ah How v. U. S.*, (1904) 193 U. S. 68, 24 S. Ct. 357, 48 U. S. (L. ed.) 619.

Review on appeal.—A person of Chinese descent, arrested for being unlawfully in the United States, has the burden of proof to establish his claim that he was born in this country; and a finding against such claim by the commissioner, affirmed by the District Court on additional testimony, will not be set aside by an appellate court, unless clearly against the weight of evidence. *Yee King v. U. S.*, (1910) 179 Fed. 368, 102 C. C. A. 646; *Kum Sue v. U. S.*, (1910) 179 Fed. 370, 102 C. C. A. 648.

Vol. I, p. 763, sec. 2.

Nature of proceeding.—A proceeding to expel or exclude aliens under the federal law is civil, and not criminal, in its nature. *U. S. v. Lee Huen*, (1902) 118 Fed. 442; *U. S. v. Moy You*, (1903) 126 Fed. 226.

Complaint.—No formal complaint or pleadings are required in the proceedings under this Act for the determination of the right of Chinese laborers to remain in the United States. *Ah How v. U. S.*, (1904) 193 U. S. 65, 24 S. Ct. 357, 48 U. S. (L. ed.) 619; *In re Jem Yuen*, (1910) 188 Fed. 351.

Where the complaint in deportation proceedings against a Chinese person duly alleged that he was a Chinese manual laborer within the United States without a certificate of residence, it was not material to the right

of the government to deport him that he came into the United States at a time when it was impossible to obtain a certificate of residence. *Lew Quen Wo v. U. S.*, (C. C. A. 1911) 184 Fed. 685.

Deportation of slave girl.—The fact that the deportation of a Chinese slave girl illegally brought into this country for purposes of prostitution by her master, from whom she subsequently escaped, would result in remanding her to slavery and degradation, affords no ground upon which the courts can refuse to enforce the statute. *U. S. v. Ah Sou*, (C. C. A. 1905) 138 Fed. 775, *reversing* (1904) 132 Fed. 878.

Laundry proprietor.—In *U. S. v. Kol Lee*, (1904) 132 Fed. 136, it appeared that the de-

fendant was a Chinese person of reputable character, who had resided in this country for nineteen years, and was the proprietor of two laundries, which he conducted. If he labored himself, it was only incidentally. He testified that he entered the country on proper papers, which he had lost, and that he applied to a lawyer to obtain a duplicate certificate, and did obtain a paper which he supposed to be one, and which he produced, but it was in fact worthless. It was held that the evidence was not sufficient to show that he was a laborer, and that his evident good faith, and the fact that he had remained in the country so long without being molested, raised a presumption that he was entitled to remain.

"Unlawfully in the United States."—A Chinese alien and subject of the Chinese empire, not of the exempt classes, who knowingly crosses the Canadian border into the United States, but not at or near any established port of entry, with the purpose of entering and remaining in the United States, who is apprehended after he has crossed the boundary, and taken before a commissioner of immigration at the nearest port of entry and given a hearing as an applicant for entry, and after such hearing is refused admission and ordered returned to Canada, but who cannot be returned because of the demand of the Canadian authorities for a head tax, which he refuses to pay, is found and is unlawfully in the United States, and subject to arrest and deportation under the Chinese Exclusion Laws. *U. S. v. Yuen Pak Sune*, (1910) 183 Fed. 260.

Conclusiveness of findings of immigration officers.—The decision of the proper custom or immigration officer adverse to the claim of a person of the Chinese race to nativity in the United States, and denying him entry, is conclusive in subsequent proceedings for his deportation for being unlawfully in this country. *U. S. v. Lue Yee*, (1903) 124 Fed. 303. See also *Leung Jun v. U. S.*, (1909) 171 Fed. 413, 96 C. C. A. 369, *reversing* (1908) 160 Fed. 251; *In re Jem Yuen*, (1910) 188 Fed. 350.

Where an immigration commissioner's de-

termination rejecting the evidence of citizenship in a proceeding for the deportation of a Chinese alien, on the ground that he did not believe the testimony that the defendant was only twenty-nine years of age, was affirmed by the district judge, and there was nothing in the record to show that the commissioner's conclusion as to defendant's age was incorrect, it was held that the ruling was correct. *Ark Foo v. U. S.*, (1904) 128 Fed. 697, 63 C. C. A. 249.

Bail pending appeal.—After a final order of deportation has been entered by a District Court or judge against a Chinese person, he is not entitled to be admitted to bail pending an appeal as a matter of right, but admission to bail rests in the discretion of the court, which should be carefully exercised with regard to the special circumstances of the case. Where it does not appear that defendant had any justification for entering the country, but that he entered and remained in plain violation and defiance of the law, bail will not be allowed. *U. S. v. Fah Chung*, (1904) 132 Fed. 109.

Effect of marriage to Chinese laborer.—Where a Chinese slave girl was brought to the United States, and her entry secured by fraud in violation of the exclusion laws, her subsequent marriage in this country to a Chinese inhabitant registered as a Chinese laborer, and not entitled to have a wife in this country, is not a defense to proceedings for her deportation; and especially where the marriage was at her solicitation, for her protection, and was not followed by cohabitation, nor apparently regarded by the parties as more than a formality. *U. S. v. Ah Son*, (C. C. A. 1905) 138 Fed. 775, *reversing* (1904) 132 Fed. 878.

In *Wong Heung v. Elliott*, (1910) 179 Fed. 110, 102 C. C. A. 408, the evidence was considered and held to sustain a finding that the marriage of a Chinese woman, after a judgment of deportation against her, and while at large on bail pending an appeal, to a native-born citizen of the United States, was not in good faith, but a mere sham, pretense, and form, for the purpose of evading the judgment of deportation.

Vol. I, p. 763, sec. 3.

Validity of section.—This section, in so far as it places on a Chinese person without a certificate the burden of proof of his right to remain in the United States, is valid. *Low Foon Yin v. U. S. Immigration Com'r*, (C. C. A. 1906) 145 Fed. 791.

Evidence.—Immigration officers in deportation proceedings are not bound by the rules of criminal procedure or by the rules of evidence applied in court, nor is it enough for review of their decision on habeas corpus that there was no sworn testimony taken or no record of the testimony or of the decision. *In re Jem Yuen*, (1910) 188 Fed. 350.

Of citizenship.—Where, in a proceeding for the exclusion of certain Chinese aliens, the only evidence of citizenship offered was certain unsatisfactory testimony of one witness that he was an uncle of defendants, and that

they were both born in San Francisco, and defendants refused to be sworn in their own behalf, it was held that a finding against the alien's right to remain was not erroneous. *U. S. v. Moy You*, (1903) 126 Fed. 226.

A person of Chinese descent, claiming to have been born in the United States and never to have been out of this country, where he and other unimpeached witnesses testify to such fact without contradiction, and his good character and truthfulness are testified to by white persons of standing who have known him for years, cannot be ordered deported solely on testimony tending to show that he made false statements to an inspector, which is denied. *U. S. v. Jhu Why*, (1910) 175 Fed. 630.

In *Pang Sho Yin v. U. S.*, (1907) 154 Fed. 660, 83 C. C. A. 484, the evidence was consid-

ered and held to be sufficient to entitle a Chinese person, arrested for being unlawfully within the United States, to his discharge on the ground that he was by birth a citizen of the United States; there being direct testimony of apparently credible witnesses to such fact, and no evidence to the contrary, except a statement made by defendant to the inspectors who arrested him, which, although somewhat inconsistent with such claim, was not irreconcilable therewith.

In *Chew Hing v. U. S.*, (1904) 133 Fed. 227, 86 C. C. A. 281, the judgment of a District Court affirming an order of a commissioner for the deportation of a Chinese person against his claim that he was born in the United States, which was supported by the testimony of himself and two other Chinese witnesses, but was contradicted by a prior admission of defendant, was held reversible for error.

In proceedings for the deportation of a Chinese person charged with being unlawfully in this country, which were resisted on the ground that defendant was a native-born citizen of the United States, where his testimony was consistent and explicit, giving his place of birth, residence at different times, place of attending school, and the occupation and places of business of his father and uncle, and was corroborated by the testimony of his uncle and cousin, and wholly uncontradicted, it was held that his deportation was not warranted by a finding that he had not established his right to remain in the United States "by affirmative proof to the satisfaction of the commissioner." *Moy Suey v. U. S.*, (1906) 147 Fed. 697, 78 C. C. A. 85.

Of nationality.—An affidavit made by a United States Chinese inspector charging defendant with being a Chinese laborer unlawfully within the United States without a certificate of registration, on which a warrant was issued for defendant's arrest, was not evidence at the hearing to prove that defendant was a Chinese person. *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

In proceedings for the deportation of an alleged Chinese person, the fact that he was a native of China, coupled with his personal appearance, indicating by his dress, physiognomy, and queue that he was a Chinaman, was held to be sufficient to justify a finding to that effect in the absence of evidence to the contrary. *Low Foon Yin v. U. S. Immigration Com'r*, (C. C. A. 1906) 145 Fed. 791.

Sufficiency.—In the following cases it was held that the evidence did not show that the defendant was entitled to remain in the United States. *U. S. v. Sing Lee*, (1903) 125 Fed. 627; *Ark Foo v. U. S.*, (1904) 128 Fed. 697, 63 C. C. A. 249; *U. S. v. Wong Du Bow*, (1904) 133 Fed. 326; *Lee Joe Yen v. U. S.*, (1906) 148 Fed. 682, 78 C. C. A. 427, *affirming* (1905) 136 Fed. 701; *U. S. v. Lam Jung Sing*, (1907) 151 Fed. 715; *Ho Ngen Jung v. U. S.*, (1907) 153 Fed. 232; *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211; *Eng Choy v. U. S.*, (C. C. A. 1910) 175 Fed. 566; *U. S. v. Chu King Foon*, (1910) 179 Fed. 996; *U. S. v. Too Toy*, (1911) 185 Fed. 838.

In the following cases the evidence was held to show that the defendant had a right to remain in the United States. *U. S. v. Chu Hung*, (1910) 179 Fed. 564; *U. S. v. Wong Ock Hong*, (1910) 179 Fed. 1004; *U. S. v. Chin Len*, (1911) 187 Fed. 544.

Certificate of identification.—On a trial of a Chinaman charged with being unlawfully in the United States, it was held to be proper to allow in evidence a certificate granted him on his return from China, where he had been temporarily, which stated that it was issued under section 6, Act of July 5, 1884, ch. 220, 23 Stat. L. 116, 1 Fed. Stat. Annot. 778, though it did not state that he was entitled by the above Act to come into the United States; he being a former resident merchant therein. *U. S. v. Quong Chee*, (Ariz. 1907) 89 Pac. 525.

Other evidence than certificate.—Where the right of a Chinese person to remain in the country is challenged after he has been lapped as a merchant by the customs officers on his return from a visit to China, and he produces a certificate, which states that it was issued under section 6, Act of July 5, 1884, ch. 220, 23 Stat. L. 116, 1 Fed. Stat. Annot. 778, entitling defendant, a Chinese person other than a laborer, to come into the United States, which certificate is not controverted by the government, such certificate is not by law the only evidence admissible, and he may show by two white witnesses that he has been a merchant in the United States. *U. S. v. Quong Chee*, (Ariz. 1907) 89 Pac. 525.

Defendant remaining mute.—On proof that a defendant, arrested for deportation as a Chinese laborer unlawfully in the United States, is a Chinese person and a laborer, the burden rests on him to show his right to remain in the United States, and he gains no rights by standing mute, but, on the contrary, such conduct justifies his being held strictly to his technical rights. *U. S. v. Chin Ken*, (1910) 183 Fed. 332.

Long continued residence here.—In proceedings for the deportation of a Chinaman, it was held that the fact that he had been permitted to live in the United States for nineteen years without molestation was insufficient to raise a presumption that his arrival antedated the date on which the Exclusion Act went into effect, he never having registered as a laborer or merchant as required by law. *U. S. v. Ah Chung*, (C. C. A. 1904) 130 Fed. 885.

A passport issued to a Chinese person by the secretary of state is not evidence of the citizenship of such person in the United States. *Edsell v. D. Charlie Mark*, (C. C. A. 1910) 179 Fed. 292.

Presumptions.—In Chinese deportation proceedings there is a natural presumption that a person of Mongolian race coming to the United States from China is an alien, to overcome which, and secure recognition of rights, privileges, and immunities pertaining to United States citizenship, convincing evidence is essential. *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211.

Burden and measure of proof.—The provision of section 3, which places the burden on a Chinese person or person of Chinese descent arrested thereunder to "establish by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his lawful right to remain in the United States," requires him to produce credible evidence sufficient to satisfy the judgment of a reasonable man, considering the same fairly and impartially. A commissioner may not, arbitrarily, capriciously, or against reasonable, unimpeached, and credible evidence, which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied; but, on the other hand, he is not bound to be satisfied by the testimony of a single witness as to facts which, if the testimony is true, must necessarily be known to other obtainable witnesses who are not produced. *U. S. v. Lee Huen*, (1902) 118 Fed. 442.

This section applies to, and imposes the burden of proof on, a defendant who is of the Chinese race, although he claims to be a citizen of the United States by birth. *U. S. v. Sing Lee*, (1903) 125 Fed. 627; *Lee Yuen Sue v. U. S.*, (1906) 146 Fed. 670, 77 C. C. A. 96; *U. S. v. Hoy Way*, (1907) 156 Fed. 247; *U. S. v. Too Toy*, (1911) 185 Fed. 838, refusing to follow *Moy Suey v. U. S.*, (1906) 147 Fed. 697, 78 C. C. A. 85. Compare *Gee Cue Beng v. U. S.*, (C. C. A. 1911) 184 Fed. 383.

In a proceeding to deport a Chinaman as a Chinese laborer unlawfully in the United States, he has the burden of proving that he is a merchant, privileged to remain in the United States. *U. S. v. Yee Gee You*, (1907) 152 Fed. 157, 81 C. C. A. 409.

In *Lee Yue v. U. S.*, (1904) 133 Fed. 45, 66 C. C. A. 178, and *Tsui Yui v. U. S.*, (1904) 133 Fed. 1022, 66 C. C. A. 681, the judgment of a District Court affirming an order of a commissioner directing the deportation of a Chinese person was held to be sustained by the evidence, under the rule established by the Exclusion Acts, which casts upon the defendant in such cases the burden of proving his right to remain in this country.

Examination of accused.—Where the evidence in Chinese deportation proceedings left the question as to defendant's alleged citizenship in doubt, it was held to be proper for the judge to cause defendant, accompanied by his counsel, to be brought before him, and to further examine defendant concerning the evidence. *Lee Yuen Sue v. U. S.*, (1906) 146 Fed. 670, 77 C. C. A. 96.

The written statement by a United States commissioner that a Chinaman was brought before him charged with being unlawfully within the United States, and was adjudged to have the right to remain in the United States by reason of being a citizen thereof, is not evidence of such adjudication. *Ah How v. U. S.*, (1904) 193 U. S. 65, 24 S. Ct. 357, 48 U. S. (L. ed.) 619.

Credibility of Chinese witnesses.—The fact that accused was in the United States and engaged in business as a merchant at the time of the passage of this Act, providing for the registration of Chinese laborers, may be

established by Chinese witnesses. *U. S. v. Louie Juen*, (1904) 128 Fed. 522.

But the commissioner in a Chinese deportation proceeding need not necessarily believe a Chinese witness, when he sees him and has opportunity to judge of his credibility. *U. S. v. Chu King Foon*, (1910) 179 Fed. 995. See also *Wong Chun v. U. S.*, (1909) 170 Fed. 182, 95 C. C. A. 198.

The mere fact that a witness for the defendant in a proceeding for deportation is himself a Chinese person does not render him an interested witness, within the rule which permits interest to be considered as a discrediting circumstance. *U. S. v. Lee Huen*, (1902) 118 Fed. 442.

Failure of defendant to testify.—Proceedings for the exclusion or deportation of Chinese aliens under the Exclusion Act are not criminal in character, and if the defendants therein fail to give testimony in their own behalf to explain doubtful matters peculiarly within their own knowledge or to contradict testimony given against them, such fact may be considered, where the testimony is contradictory. *U. S. v. Lee Huen*, (1902) 118 Fed. 442.

Where a witness to the citizenship of an alleged Chinese alien was not impeached or discredited, but was clear and straightforward, and no criticism was made with regard to the same by the commissioner, and the alleged alien was not requested to be sworn in his own behalf, it was held that his failure to offer himself as a witness was not a sufficient reason for ordering him deported. *Ark Foo v. U. S.*, (1904) 128 Fed. 698, 63 C. C. A. 249.

Where, in deportation proceedings under the Chinese Exclusion Act, a commissioner found that defendants had produced a witness who testified that defendants were born in the state of California, and that such witness was not contradicted, impeached, or discredited in any manner whatsoever, it was held to be error for the court to order their deportation solely on the ground that their right to remain in the United States was discredited by their refusal to take the stand and testify on the demand of the United States attorney. *U. S. v. Leung Shue*, (1903) 126 Fed. 423.

Identification.—Where, in deportation proceedings against a Chinese person, he presented a commissioner's judgment dismissing former similar proceedings on the ground that the person described therein was a citizen of the United States, claiming that such determination was *res judicata*, the burden was on him to establish that he was the identical person named and described in such judgment. *Ex p. Long Lock*, (1909) 173 Fed. 208.

Certificate of commissioner.—*Ex p. Lung Foot*, (1909) 174 Fed. 70.

Review.—A resident of the United States claiming to be a native-born citizen, although of the Chinese race, may not be deported or banished until the right of the government to deport or banish has been judicially determined in accordance with the usual and ordinary rules of evidence. *Moy Suey v. U. S.*, (1906) 147 Fed. 697, 78 C. C. A. 85.

Review.—Orders for the deportation of Chinese laborers, made on the sole ground that they had failed to show that they were *bona fide* merchants within the meaning of the Chinese Exclusion Act at the time registration was required, will be reversed by the federal Supreme Court, where that court is satisfied from an examination of the record that the testimony did establish that fact. *Tom Hong v. U. S.*, (1904) 193 U. S. 517, 24 S. Ct. 517, 48 U. S. (L. ed.) 772.

In *Ex p. Jong Jim Hong*, (1907) 157 Fed. 447, it was held that whether a Chinese person, claiming the right to enter the United States on the ground that he is a citizen by birth, has such right, is a question of fact, on which the decision of the immigration officer, affirmed on appeal to the secretary of commerce and labor, if fairly made, is conclusive, and can only be reviewed by a court

on a writ of habeas corpus for abuse of discretion.

Under this section the judgment of a District Court ordering deportation of a Chinese person will be affirmed on appeal, unless the case clearly shows that an incorrect conclusion has been reached. *Mar Sing v. U. S.*, (C. C. A. 1905) 137 Fed. 875.

Where an appeal was taken to the secretary of commerce and labor from a deportation order, the fact that a "memorandum for the acting secretary," signed by the commissioner-general, was added to the record before it was acted on, and contained remarks on the evidence and a recommendation that the decision be affirmed, was held to be immaterial, and not to indicate that the officer whose duty it was to determine the appeal did not do so himself. *In re Jem Yuen*, (1910) 188 Fed. 350.

Vol. I, p. 764, sec. 5.

Bail.—It has been held that the words "in the first instance," in this section, do not render the prohibition against bail any less applicable after the court has made its decision than before, and hence that where a

Chinese person had been ordered deported and writ of habeas corpus dismissed, the alien was not entitled to bail pending appeal. *In re Jem Yuen*, (1910) 188 Fed. 350.

Vol. I, p. 764, sec. 6.

Constitutional rights.—The constitutional and statutory provisions guaranteeing trial by jury, prohibiting unlawful seizure and search, cruel and inhuman punishment, and the deprivation of life, liberty, or property without due process of law, and regulating the admission to bail in criminal cases, have no application to Chinese exclusion proceedings. *In re Chin Wah*, (1910) 182 Fed. 256.

Merchant afterwards becoming laborer.—Where at the time of the passage of this section providing for the registration of Chinese laborers, a Chinese person thereafter charged to be unlawfully in the United States was in the United States and engaged in business as a merchant, and was therefore not entitled to registration as a laborer under such Act, he was not subject to deportation, though he subsequently became a laborer. *U. S. v. Louie Juen*, (1904) 128 Fed. 522; *U. S. v. Leo Won Tong*, (1904) 132 Fed. 190; *U. S. v. Seid Bow*, (1905) 139 Fed. 56; *U. S. v. Quong Chee*, (Ariz. 1907) 89 Pac. 525.

In *Ow Yang Dean v. U. S.*, (C. C. A. 1906) 145 Fed. 801, it appeared that defendant, in 1890, became a member of two Chinese mercantile firms in California, his name appearing on the partnership books as a partner, and so continued up to the time of the commencement of deportation proceedings. From 1890 to 1900 he engaged in no manual labor, but devoted his entire time to his mercantile interests, until he purchased an interest in a shrimp company in March, 1900, after which from March till August he devoted a portion of his time to keeping books for that concern, but did manual labor, such as picking shrimps, and delivering them to customers.

The shrimp business was absorbed by another company in which he was interested until May, 1902, when he sold the interest in the purchasing company and returned to China, he having devoted his entire time after the sale and before his return to the mercantile business of the firms of which he was a member. It was held that by engaging in manual labor while in the shrimp business he did not lose his right to remain in the United States.

Right of unregistered laborer to become merchant.—This section did not prohibit an unregistered laborer from remaining in the United States until proceeded against, and hence, prior to the taking of such proceedings, he was entitled to become a merchant and to the immunities accorded to merchants. *Ex p. Ow Guen*, (1906) 148 Fed. 926.

Investigation.—Where, on the return of a Chinese person to the United States, his claim that he was a merchant at L. was not investigated by the immigration officers, but he was deported because of his former status as an unregistered laborer, such decision was not conclusive against his right again to enter the United States by virtue of his being a merchant in L., established by two credible witnesses other than Chinese, as provided by the Chinese Exclusion Act of May 5, 1892, ch. 60, sec. 6. *Ex p. Ow Guen*, (1906) 148 Fed. 926.

Effect of laborer's minority.—The fact that a Chinese laborer was a minor nineteen or twenty years old at the time of the passage of the registration acts did not exempt him from the duty of registering thereunder. *U. S. v. Joe Dick*, (1905) 134 Fed. 988.

Minor children of Chinese merchants.—The fact that a Chinese person, who, as shown by the uncontradicted evidence, entered the United States in 1898, when a minor fourteen or fifteen years old, his father being at the time a merchant engaged in business in San Francisco, did not have a certificate under this section, does not raise any presumption that his entry was unlawful, no such certificates being then required under the decisions of the Supreme Court to entitle the wives and children of Chinese merchants residing in this country to entry. *U. S. v. Chin Sing*, (1907) 158 Fed. 590.

Sickness as excuse.—A United States commissioner is not, as a matter of law, bound to be satisfied by the testimony of a Chinese laborer that he was disabled by sickness from obtaining the certificate of residence required by this section in order to entitle him to remain in the United States. *Ah How v. U. S.*, (1904) 193 U. S. 65, 24 S. Ct. 357, 48 U. S. (L. ed.) 619.

Marriage of Chinese woman to American citizen.—The provision in this section requiring all Chinese laborers then lawfully in the United States to procure certificates of residence within six months, under penalty of deportation, cannot be construed to authorize the deportation of a Chinese woman who lawfully entered the country before the enactment of any exclusion laws, and remained, but who failed to obtain the required certificate, where she was thereafter, and prior to her arrest, lawfully married to a citizen of the United States. Assuming that she was subject to deportation previous to her marriage, she then, having lawfully entered the country, took the status of her husband as to the right of domicile in the United States, and, if deported under a strict construction of the Act, would have the right immediately to return and remain as the lawful wife of an American citizen. *Tsoi Sim v. U. S.*, (1902) 116 Fed. 920, 54 C. C. A. 154.

Nature of proceedings.—A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence required by this section is not a criminal proceeding, and hence it is competent for the government to swear such Chinese person as a witness against himself. *Low Foon Yin v. U. S. Immigration Com'r*, (C. C. A. 1906) 145 Fed. 791. See also *In re Chin Wah*, (1910) 182 Fed. 256.

Jurisdiction of United States commissioner.—A United States commissioner has jurisdiction to hear and determine a charge against a Chinese person of being unlawfully within the country without a certificate of residence, though section 6 providing for the issuance of such certificates declares that no one obtaining a certificate within a specified time shall be adjudged unlawfully within the country, and shall be arrested and taken before a United States "judge," etc. *Low Foon Yin v. U. S. Immigration Com'r*, (C. C. A. 1906) 145 Fed. 791.

Referred to commissioner as referee.—In deportation proceedings in which the defendant was arrested and brought before a United States district judge, it was held that the

case could not be referred to a United States commissioner and judgment of deportation rendered upon the evidence in his report, the defendant being entitled to a judgment upon a hearing of the witnesses before the district judge personally. *Jung Goon Jow v. U. S.*, (Ariz. 1910) 108 Pac. 490.

Proof of nationality.—Where a person named Louie Lee was arrested on complaint of a United States Chinese inspector in deportation proceedings, and on appearing in court was attired in the ordinary street apparel of an American gentleman, with his hair worn as an American and with nothing to indicate that he was a Chinese except his color and features, which were more or less common to all Mongolians, his name not being distinctively Chinese, it was held that his appearance was insufficient to establish that he was a Chinese person within the Exclusion Acts. *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

Identification.—Where, in deportation proceedings against an alleged immoral alien Chinese woman, she was described in the complaint and warrant as "Sally Doe," and it appeared from her own testimony that she was a Chinese person without a certificate of residence required by law and was not entitled to be or remain in the United States, it was held that she was thereby specifically identified by her status, by the place where she was found, and by her own testimony, and hence it was not material that she was not identified as the person named in the complaint and warrant. *Wong Chun v. U. S.*, (1909) 170 Fed. 182, 95 C. C. A. 198.

Evidence.—Under this section the only permissible evidence of a Chinese laborer's right to be in the United States is the certificate of residence mentioned in such legislation, or, in lieu thereof, testimony showing that by reason of accident, sickness, or other unavoidable cause he was unable to procure such certificate, and the testimony of at least one white person that he was a resident of the United States prior to the registration period. *U. S. v. Yee Gee You*, (1907) 152 Fed. 157, 81 C. C. A. 409.

Burden of proof.—The burden is on the United States, under this section, in proceedings to deport a Chinese person as unlawfully within the United States, to show by affirmative proof that defendant was a Chinese person. *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

Evidence to excuse failure to obtain certificate.—In *Yee Yuen v. U. S.*, (1904) 135 Fed. 222, 66 C. C. A. 276, the evidence was considered and held to be insufficient to establish clearly that a Chinese laborer who testified that he was a resident of the United States on May 5, 1892, and who failed to procure a certificate of residence, was unable to do so, "by reason of accident, sickness, or other unavoidable cause," as required by this section.

Sufficiency of findings.—Where a judgment for the deportation of a Chinese person recited that it appeared to the court that the accused was a Chinese laborer and a subject to the emperor of China; that he was not

registered as required by this section, and that he did not belong to one of the classes of Chinese excepted by said Acts from such registration, and was unlawfully within the United States, it was held to be unobjectionable for failure to state sufficient facts to sustain it. *Lee Won Jeong v. U. S.*, (C. C. A. 1906) 145 Fed. 512.

Collateral attack.—Where a Chinese person was duly registered under this section as a native-born citizen, such registration was not subject to collateral attack in a proceeding to enforce a judgment of deportation rendered against him before the registration law took effect. *In re Tom Hon*, (1906) 149 Fed. 842.

Effect of discharge by commissioner.—A United States commissioner exercises special authority in Chinese cases, and where a Chinese person charged with being unlawfully

in the United States has had a hearing regular in form before a commissioner, who had adjudged that such person is entitled to be and remain within the United States and has ordered his discharge, the decision is determinative of the issue, and such person cannot be again apprehended and proceeded against upon a complaint filed in the District Court of the same district upon substantially the same facts. *U. S. v. Yeung Chu Keng*, (1905) 140 Fed. 748.

Bail.—Where an alleged Chinese alien, domiciled in the United States, is arrested in deportation proceedings, he is not entitled to bail as of right, but only in the discretion of the court, to be exercised with reference to the facts of the particular case. *In re Chin Wah*, (1910) 182 Fed. 256, *affirmed* (C. C. A. 1911) 187 Fed. 592.

Vol. I, p. 769, sec. 2.

What constitutes "entry."—An "entry" or "entrance" of a Chinese person into the United States, within the Chinese Exclusion Acts, means more than the mere act of crossing the border, and consists in his going at large or becoming domiciled in the country. *Ex p. Chow Chok*, (1908) 161 Fed. 627, *affirmed* (C. C. A. 1908) 163 Fed. 1021.

Chinese seamen.—Under the regulations of the department of commerce and labor, authorizing Chinese seamen to enter the United States on shore leave, on giving bond to depart within thirty days, a Chinese seaman belongs to the excluded class, and may not enter the United States except by giving the required bond. *U. S. v. Crouch*, (1911) 185 Fed. 907. See also *U. S. v. Ah Fook*, (C. C. A. 1910) 183 Fed. 33.

Chinese person other than laborer previously domiciled in the United States.—

Neither the Chinese treaty of 1880, nor subsequent legislation relating to Chinese exclusion, has any relation to Chinese persons, not of the laboring class, who were at the time of the adoption of that treaty domiciled in the United States, and who have since continued to reside therein; and such a person who temporarily leaves the country, with the intention of returning, cannot be excluded on his return because he is not included in one of the classes expressly excepted from the operation of the Exclusion Acts, who alone are permitted to enter the United States by rules 1 and 2 of the regulations adopted by the department of commerce and labor, such rules being applicable only to persons seeking to enter for the first time. *Ex p. Ng Quong Ming*, (1905) 135 Fed. 378.

Merchant afterwards becoming laborer.—See under p. 774, sec. 1.

Vol. I, p. 769, sec. 3.

Detention pending decision on application to enter.—The detention of a Chinese person in a place provided within the United States pending final determination of his application to enter is legal. *Ex p. Jong Jim Hong*, (1907) 157 Fed. 447.

The landing of a crew, temporarily, for the purpose of transfer, would not violate the treaty with China and the laws of the United States in relation to the exclusion of Chinese. (1902) 24 Op. Atty.-Gen. 111; (1902) 24 Op. Atty.-Gen. 553.

Vol. I, p. 770, sec. 6.

Debts "unascertained and unsettled."—An open book account of over \$1,000 of a registered Chinese laborer seeking to return to this country, with a Chinese debtor, the existence of which account has been established, is one "pending settlement" under article II. of the treaty with China of Dec. 8, 1894, 28 Stat. L. 1210, 1 Fed. Stat. Annot. 756, and is one "unascertained and unsettled" within the meaning of this section. (1903) 24 Op. Atty.-Gen. 637.

"Pending settlement."—The term "pending settlement" may mean more than "pending payment;" it may include ascertainment. The word "settlement" in legal use embraces both ideas—the idea of discharging an obligation by payment, and the idea of arriving at its amount by ascertainment and adjustment. (1903) 24 Op. Atty.-Gen. 637.

Vol. I, p. 770, sec. 7. [*Identification of Chinese permitted to leave and return.*]

Effect of Act of April 29, 1902.—The re-enactment of this section by Act of April 29, 1902, ch. 641, sec. 1, 32 Stat. L. 176, 1 Fed. Stat. Annot. 755, did not have the effect of re-enacting that part of the section which was inconsistent with the treaty with China of 1894. (1902) 24 Op. Atty.-Gen. 544.

Right depends on facts existing at return.—The facts which entitle such Chinese la-

borer to return to this country must exist not only at the time of his departure but also at the time of his return, and this notwithstanding the fact that he has obtained a return certificate. (1902) 24 Op. Atty.-Gen. 91.

Not affected by Immigration Act of Feb. 20, 1907.—*Wong You v. U. S.*, (C. C. A. 1910) 181 Fed. 313, *reversing* (1910) 176 Fed. 933.

[*Limit of time for returning.*]

Effect of treaty of 1894.—To the same effect as the original note. (1902) 24 Op. Atty.-Gen. 544.

[*To land only at certain ports.*]

Surrender of certificate.—Where a Chinese laborer holding a United States labor certificate departed from the United States at a point other than the places of departure prescribed, without applying to the collector of customs for permission to leave, etc., and thereafter re-entered the United States at a

nondesignated point, in the absence of evidence as to his intention in departing it was held that he had forfeited his right to remain in the United States, and was subject to deportation. *U. S. v. Tuck Lee*, (1903) 120 Fed. 989.

Vol. I, p. 772, sec. 9.

Seaman.—A Chinese seaman, a member of the crew of a vessel calling temporarily at the port of New York, is not a "laborer" or "other Chinese person" within this section. *U. S. v. Jamieson*, (1911) 185 Fed. 165.

Knowledge.—An indictment charging the master of a vessel with a violation of section 9 must aver that defendant "knowingly" permitted such Chinese person to be landed. *U. S. v. Walker*, (1907) 156 Fed. 987; *U. S. v. Rout*, (1909) 170 Fed. 201.

Intent.—An indictment charging the master of a vessel with bringing a Chinese laborer into the United States, failing to allege that his act was with the specific intent to leave such person in the United States contrary to law, was held to be insufficient. *U. S. v. Jamieson*, (1911) 185 Fed. 165.

Indictment.—An indictment under section 9 must negative the exceptions stated in sec-

tion 10 of the Act. *U. S. v. Wood*, (1909) 168 Fed. 438.

An indictment charging the master of a vessel with having permitted a Chinese laborer to land in the United States from his vessel in violation of section 9 was held sufficiently to negative the exceptions contained in section 10 of the Act, where it averred that the said Chinese person was not landed by reason of "any necessity." *U. S. v. Graham*, (1908) 164 Fed. 654.

Evidence to show landing.—In a prosecution for attempting to land certain Chinese laborers not entitled to enter the United States, the evidence was held to show a landing, an attempt to land, or the permitting of the landing of the Chinese by the defendant, and to sustain a conviction. *Gerald v. U. S.*, (1908) 159 Fed. 421, 86 C. C. A. 401.

Vol. I, p. 773, sec. 13.

This section is constitutional.—*U. S. v. Jock Coe*, (1904) 196 U. S. 635, 25 S. Ct. 794, 49 U. S. (L. ed.) 629, *reversing* (1903) 128 Fed. 199; *U. S. v. Foong King*, (1904) 132 Fed. 107.

The effect of the Act of April 29, 1902, was to continue this section in force. *Hong Wing v. U. S.*, (1906) 142 Fed. 128, 73 C. C. A. 346.

Not affected by Immigration Act of Feb. 20, 1907.—*Wong You v. U. S.*, (C. C. A. 1910) 181 Fed. 313, *reversing* (1910) 176 Fed. 933.

Natives of Hong Kong.—The fact that a Chinese person emigrates to the United States from Hong Kong, or even that he is a native of that colony, does not prevent his being subject to the provisions of this section. *U. S. v. Foong King*, (1904) 132 Fed. 107.

"Unlawfully in the United States."—In *Ex p. Chou Chok*, (1908) 161 Fed. 627, *affirmed* (C. C. A. 1908) 163 Fed. 1021, it was held that Chinese persons were not "found unlawfully in the United States," so as to entitle them to a hearing as to their right to remain, where, when they crossed the border into the United States at a point remote from the designated port of entry, they were within sight of inspectors, who, intending to prevent their unlawful entry, followed them closely until they had proceeded about one-fourth of a mile across the border, and until it was apparent that they intended to enter unlawfully, and, taking them into custody, conducted them immediately to the nearest port of entry for investigation of their right to

enter; the term "found unlawfully in the United States" referring to those Chinese persons who have entered, gone at large, and mixed with and become a part of the population. Hence, such persons having been given opportunity to show their right to enter, and having remained mute, the inspector in charge had jurisdiction to exclude them.

Nature of proceedings.—A proceeding for the deportation of a Chinese person under the exclusion acts is civil, and not criminal, in its nature, and the constitutional provisions which safeguard the rights of persons accused of crime do not apply therein. Admissions or statements of a defendant, voluntarily made to the officers by whom he is arrested in answer to questions put by them either before or after his arrest, are admissible in evidence against him, and the government has the right to call and examine him as a witness. *U. S. v. Hung Chang*, (1904) 134 Fed. 19, 67 C. C. A. 93, *reversing* (1903) 126 Fed. 400.

As the proceedings brought under the Chinese Exclusion Act for the deportation of a Chinese person are civil, and not criminal, a defendant claiming to be a native of the United States may avail himself of the right given by R. S. sec. 863, 3 Fed. Stat. Annot. 8, to take and use depositions *de bene esse*. *In re Lam Jung Sing*, (1907) 150 Fed. 608.

Jurisdiction of United States commissioners.—The powers and functions of United States commissioners in Chinese deportation proceedings are confined to the issuance of warrants for the apprehension of Chinese persons accused of being unlawfully within the United States, to the decision of questions whether such persons are unlawfully in the United States, and to making orders directing those not privileged to remain to be deported, and discharging from arrest those who prove a present right to remain in the United States; such decisions being subject to review on appeal to the District Court of the proper district. *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211.

Issues and proof.—In a proceeding for the deportation of a person under this section, as affected by Act May 5, 1892, c. 60, sec. 3, 27 Stat. L. 25, 1 Fed. Stat. Annot. 763, two questions are put in issue by defendant's plea of not guilty: First, whether or not he is a Chinese person or person of Chinese descent; and, second, if so, whether he is entitled to be and remain in the United States—the burden of proof on the latter issue being on the defendant. Upon either issue proof to the satisfaction of the commissioner or the court is all that is required, and upon the issue as to race, the appearance of defendant, his color, manner of wearing his hair, his dress and language, may properly be taken into consideration by the commissioner or court; and inspectors and interpreters employed by the government in the enforcement of the exclusion laws, who state their ability from practical experience to identify persons of the Chinese race from such characteristics, are competent to testify upon such issue, although they may have no theoretical knowledge of the science of ethnology. *U. S. v.*

Hung Chang, (1904) 134 Fed. 19, 67 C. C. A. 93, *reversing* (1903) 126 Fed. 400.

No formal complaint or pleadings required.—*U. S. v. Fah Chung*, (1904) 132 Fed. 109.

Compulsion to testify.—A Chinese person against whom deportation proceedings are pending may be called as a witness by the United States and compelled to answer questions relevant to the pending issue. *Tom Wah v. U. S.*, (C. C. A. 1908) 163 Fed. 1008, *affirming* (1908) 160 Fed. 207.

Trial by jury.—Congress not having authorized trial by jury in proceedings for the deportation of a Chinese person, provided for by this Act, the right to a jury trial does not exist. *U. S. v. Ngum Lun May*, (1907) 153 Fed. 209.

Collateral attack.—A decision of a United States commissioner confirming a Chinese person's asserted right to live in the United States and enjoy the privileges of a native-born citizen is not a final adjudication by a court of competent jurisdiction, free from collateral attack in a subsequent proceeding; such commissioners not being courts of the United States, ordained and established by Congress, in which the judicial power of the government can be vested. *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211.

Motion to dismiss for lack of proof of citizenship.—Where the government rested in Chinese deportation proceedings without introducing any evidence that defendant was a Chinese person, whereupon defendant moved to dismiss the proceedings and for his discharge, it was held that he was entitled to have the motion determined on the record as it stood when the motion was made, and hence the government's application for permission then to introduce evidence to prove the fact was denied. *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

Sufficiency of record.—The deportation of a Chinaman lawfully admitted to the United States upon a student's certificate, complying with the treaty with China of Dec. 8, 1894, 28 Stat. L. 1210, art. 3, 1 Fed. Stat. Annot. 757, cannot be ordered by a federal District Court upon the transcript of the proceedings before the commissioner, which presents merely such student's certificate and a statement that witnesses were examined, without any findings or the giving of any testimony, although additional separate findings of the commissioner were afterwards filed, where this was done without the order of the court, and there was no consent to a hearing upon such additional findings. *Liu Hop Fong v. U. S.*, (1908) 209 U. S. 453, 28 S. Ct. 576, 52 U. S. (L. ed.) 888.

Certification of judgment.—Failure of the commissioner in Chinese deportation proceedings to certify the judgment to the District Court on appeal is not a jurisdictional defect; the court being authorized to direct certification and require transmission of the judgment. *U. S. v. Wong Oek Hong*, (1910) 179 Fed. 1004.

Findings of fact.—On appeal in a habeas corpus case for the discharge of a Chinese person held for deportation, it was held that the findings of the lower court were not con-

clusive, and that all questions of fact on the evidence were open to consideration by the appellate court, but that such findings should not be set aside unless the evidence in the record was such as to convince the court that they were erroneous. *Wong Heung v. Elliott*, (C. C. A. 1910) 179 Fed. 110. See also *Yee Yet v. U. S.*, (C. C. A. 1910) 175 Fed. 565.

Bail.—A Chinese person arrested in this country for deportation under the Exclusion Acts may be admitted to bail by a District Court or judge pending his hearing before the commissioner. *In re Lum Poy*, (1904) 128 Fed. 974.

Bail pending appeal.—A proceeding for the deportation of a Chinese alien under the Exclusion Acts is not criminal in its nature so as to entitle such alien to bail, as a person accused of crime, pending appeal from a commissioner's order of deportation. *In re Ah Tai*, (1903) 125 Fed. 795; *U. S. v. Wong Lee Foo*, (Ariz. 1910) 108 Pac. 488.

But the district judge to whom an appeal is taken from a commissioner's order directing deportation has inherent power to admit the alien to bail pending the appeal. *In re Ah Tai*, (1903) 125 Fed. 795.

New trial.—In proceedings for the exclusion of an alleged Chinese alien, an application for a new trial after judgment of deportation has been entered on trial before a United States commissioner should be addressed to the commissioner. *U. S. v. Ng Young*, (1903) 126 Fed. 425.

Where a Chinese alien was ordered deported after trial, at which he produced a witness who testified that defendant was born in the United States, and at the time of the trial he knew of another witness who would have testified to the same fact, it was held that the defendant was not entitled to a new trial to produce such witness. *U. S. v. Ng Young*, (1903) 126 Fed. 425.

Appeal of motion for new trial.—Where a motion for a new trial in Chinese deportation proceedings is denied by the commissioner before whom the proceedings were had an appeal may be taken to the United States District Court from the order denying the motion. *U. S. v. Ng Young*, (1903) 126 Fed. 425.

Hearing de novo.—A hearing *de novo* before the district judge is contemplated by the provision of section 13, giving a Chinese person convicted before a United States commissioner of being unlawfully within the United States the right to appeal to the judge of the federal District Court for the district. *Liu Hop Fong v. U. S.*, (1908) 209 U. S. 453, 28 S. Ct. 576, 52 U. S. (L. ed.) 888; *U. S. v. Wong Ock Hong*, (1910) 179 Fed. 1004; *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

Appeal and review.—A Chinese person, ordered deported by a commissioner, may appeal to the district judge as a matter of right under the statute, and, in the absence of a rule of court requiring it, an order of the judge allowing the appeal is unnecessary; the service of notice of appeal on the commissioner and the district attorney, and the filing of such notice with the clerk, being sufficient. An order of the judge, however,

is necessary to stay the execution of the commissioner's order pending the appeal. *U. S. v. Loy Too*, (1908) 147 Fed. 750, *affirmed* (C. C. A. 1907) 152 Fed. 1022.

Under section 6 of the Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. L. 828, ch. 517, 4 Fed. Stat. Annot. 409), which gives such courts the power to review by appeal or writ of error final decisions in the District Court, an appeal lies to such court from a judgment of a District Court rendered on an appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13, which authorizes an appeal from a conviction before a commissioner to "the judge of the District Court for the district." *Tsai Yui v. U. S.*, (C. C. A. 1904) 129 Fed. 585, *affirmed* (1904) 133 Fed. 1022, 66 C. C. A. 681. See also *Gee Cue Beng v. U. S.*, (C. C. A. 1911) 184 Fed. 383.

An appeal is the proper proceeding for review by the Circuit Court of Appeals of a judgment of a District Court rendered on appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13. *U. S. v. Hung Chang*, (1904) 134 Fed. 19, 67 C. C. A. 93, *reversing* (1903) 126 Fed. 400; *Leo Lung On v. U. S.*, (1908) 159 Fed. 125, 86 C. C. A. 513.

The appeal to "the judge of the District Court for the district," authorized by this section, where a Chinese person has been convicted before a United States commissioner of being unlawfully in the United States, is, in effect, an appeal to the District Court, and not to the district judge as an individual; and the commissioner's transcript and the papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court. *In re U. S.*, (1904) 194 U. S. 194, 24 S. Ct. 629, 48 U. S. (L. ed.) 931.

The right of appeal is not given to the government, but only to the defendant upon conviction. *U. S. v. Mar Ying Yuen*, (1903) 123 Fed. 159.

It is the settled general rule that the finding of a commissioner who sees and hears Chinese witnesses sworn in behalf of Chinese persons of the prohibited class seeking entry to the United States, and who reaches the deliberate conclusion that they are not entitled to credit, will not be reversed by an appellate court. *Hong Yon v. U. S.*, (C. C. A. 1908) 164 Fed. 330.

Time for appeal.—Unless the appeal is taken within the ten days limited in this section the court acquires no jurisdiction to hear and determine the cause. *U. S. v. Yuen Yee Sum*, (1907) 153 Fed. 494.

Notice of appeal.—Where a notice of appeal in Chinese deportation proceedings, though entitled in the District Court, was nevertheless left with the commissioner and transmitted with the papers in the case, the fact that the notice was entitled in the District Court, and not before the commissioner, was not a jurisdictional defect. *U. S. v. Wong Ock Hong*, (1910) 179 Fed. 1004.

Effect of appeal.—An appeal from an order of deportation suspends execution until after determination of the appeal. *U. S. v. Louie Lee*, (1911) 184 Fed. 651.

Vol. I, p. 774, sec. 1.

Merchant afterwards becoming laborer.—A Chinaman who has lawfully entered the United States as a merchant, and has lawfully practiced his calling here for some time thereafter, but who is not a merchant at the time of his arrest, is not subject to deportation under existing statutes. *In re Yew Bing Hi*, (1904) 128 Fed. 319.

Effect of subsequent statutes.—On May 5, 1892, before this Act had expired, the laws relating to the exclusion of Chinese were reenacted for a further period of ten years. R. S. sec. 13 (Act Feb. 25, 1871, ch. 71, 16 Stat. L. 432, 7 Fed. Stat. Annot. 136) declares that the repeal of any statute shall not release or extinguish any penalty incurred

thereunder, unless the repealing Act shall expressly so provide, but such statute shall be treated as remaining in force to sustain any action or prosecution for the enforcement of such penalty. It has been held that where an offense against the Exclusion Act was alleged to have been committed on Feb. 15, 1902, an indictment therefor not brought until after the expiration of the time limited by the Act of May 5, 1892, 27 Stat. L. 25, ch. 60, 1 Fed. Stat. Annot. 767, was not demurrable, since the Exclusion Act was continued in force as to such offense by section 13. *Sims v. U. S.*, (1903) 121 Fed. 515, 58 C. C. A. 92.

Vol. I, p. 775, sec. 2.

Repeal by implication.—This and the following sections were repealed by implication by sections 9 and 10 of Act of Sept. 13, 1888, ch. 1015, 25 Stat. L. 478, 1 Fed. Stat. Annot. 772. *U. S. v. Wood*, (1909) 168 Fed. 438,

followed in *U. S. v. Durie*, (1909) 170 Fed. 624.

For a case under this section, see *U. S. v. Seabury*, (1904) 133 Fed. 983.

Vol. I, p. 775, sec. 3.

Repeal by implication.—See note to preceding section.

Vol. I, p. 778, sec. 6.

Requisites of certificate.—The provisions of this section requiring Chinese persons to procure certificates stating certain facts to entitle them to come to the United States must be strictly complied with in order that the certificate may be of value to the person holding the same in establishing his right to enter or remain within the United States. *U. S. v. Gin Hing*, (1904) 8 Ariz. 416, 76 Pac. 639.

A merchant's certificate issued to a Chinese person under this section, but which does not conform to the requirements of said section by stating the estimated value of his business carried on in China, nor fully establish his status as a merchant, does not entitle him to enter the United States, nor to remain after his entry has been permitted. *Cheung Pang v. U. S.*, (1904) 133 Fed. 392, 66 C. C. A. 454.

Merchant becoming laborer on arrival.—A Chinese person who entered the United States upon a certificate granted by the Chinese au-

thorities in accordance with the provisions of this section, showing him to belong to one of the classes entitled to enter under the Act, is subject to deportation under the subsequent Exclusion Acts, where it is shown that from the time of his entry several years before his arrest, he has been a manual laborer. *Chain Chio Fong v. U. S.*, (1904) 133 Fed. 154, 66 C. C. A. 220.

Merchant afterwards becoming laborer.—See *Cheung Him Nin v. U. S.*, (1904) 133 Fed. 391, 66 C. C. A. 453.

Seamen.—The provision in this section for the exclusion of Chinese laborers "about to come to the United States," means to "come with the intention of remaining at least for some period of time," and therefore did not include a seaman landing at a port in the United States for temporary purposes while his vessel was in port. *U. S. v. Jamieson*, (1911) 185 Fed. 165.

Vol. I, p. 782, sec. 10.

The word "vessel," as used in this section, is broad enough to include the vessel's tackle, apparel, furniture, and appurtenances. *The Frolic*, (1906) 148 Fed. 921.

A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, although not in general a necessary part of her equipment, is to be regarded as appurtenant to the ship, and as included in the term "ship" or "vessel." *The Frolic*, (1906) 148 Fed. 921.

Leased property.—A chronometer, which is one of the appurtenances of a vessel seized under this section, is not exempt from forfeiture because of the fact that it is not the property of the owners of the vessel, but was leased to them by the owner to be used as a necessary part of the vessel's equipment. *The Frolic*, (1906) 148 Fed. 921.

Vessel purchased on conditional sale.—An agreement by the owner to sell a schooner, to be paid for in instalments, under which he

put the purchaser in possession and appointed him master, with the right to use the vessel and receive her earnings, although retaining title until full payment of the purchase price, was held to be sufficient to authorize the purchaser to appoint another master and to ren-

der her subject to condemnation and sale, under section 10, for the knowing and wilful violation of the provisions of such Act by the new master so appointed. *The Frolic*, (1906) 148 Fed. 918.

Vol. I, p. 782, sec. 11.

"Knowingly."—The word "knowingly," as used in this section, refers to knowledge of the fact of landing and not knowledge that the Chinese landed were not legally entitled to enter the United States. *Sims v. U. S.*, (1903) 121 Fed. 515, 58 C. C. A. 92.

Indictment.—Under this section prohibiting any person from aiding or abetting the landing of any Chinese person brought into the United States from any vessel, an indictment charging defendants with "aiding and abetting," and immediately thereafter charging them with "landing" Chinese, was not objectionable for repugnancy, since, as defendants were liable as principals for aiding and abetting the commission of the offense, the further charge of "landing the Chinese" was surplusage, and not repugnant to the other charge. *Sims v. U. S.*, (1903) 121 Fed. 515, 58 C. C. A. 92.

An indictment charging that defendants did unlawfully and knowingly land, and aid and abet in landing, in the United States, from a certain foreign steamship specified, then lying at the port of T., three certain male Chinese laborers, named, each of whom was not lawfully entitled to enter the United States, who had previously been brought on such

steamship from the empire of China, was not demurrable for failure to set out the facts constituting the alleged unlawful landing. *Sims v. U. S.*, (1903) 121 Fed. 515, 58 C. C. A. 92.

An indictment charging "John Doe, a Chinese person whose true name is to the grand jurors aforesaid unknown," with the offense of aiding the illegal landing of a Chinese person in the United States, showed on its face that the name "John Doe" was fictitious only, and that the grand jurors were unable to identify the person whom they were indicting, and was therefore void for insufficiency of description. *U. S. v. Doe*, (1904) 127 Fed. 982.

Deportation decree as evidence.—A deportation decree rendered by the United States commissioner in proceedings instituted before him to determine the status of a Chinese person alleged to have been illegally brought into the United States is relevant and competent evidence of the status of such person, and is sufficient to justify a grand jury in finding an indictment against defendant for wilfully bringing such person into the United States in violation of this Act. *U. S. v. Hills*, (1903) 124 Fed. 831.

Vol. I, p. 782, sec. 12.

Jurisdiction.—Since no formal complaint or pleadings are required in Chinese deportation proceedings, it has been held that where certain Chinese persons proceeded against were before the commissioner and before the District Court on appeal, objections to the validity of the process of arrest were not available to oust the court of jurisdiction. *Toy Tong v. U. S.*, (1906) 146 Fed. 343, 76 C. C. A. 621.

Trial by jury.—Proceedings for the deportation of Chinese persons are not "causes," within R. S. sec. 566, 4 Fed. Stat. Annot. 236,

declaring that the trial of issues of fact in the United States District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury. *Toy Tong v. U. S.*, (1906) 146 Fed. 343, 76 C. C. A. 621.

Review.—Proceedings to enforce the Chinese Exclusion Acts, being administrative rather than judicial, the decision of a Chinese inspector refusing permission to a Chinese person to land is not reviewable by the courts. *Toy Tong v. U. S.*, (1906) 146 Fed. 343, 76 C. C. A. 621.

Vol. X, p. 54, sec. 5.

Construction of statute.—The purpose and effect of Act April 29, 1902, ch. 641, 32 Stat. L. 176, 1 Fed. Stat. Annot. 755, as amended by this section, was to continue all such laws in force after the expiration of the then existing treaty with China of Dec. 8, 1894, in-

cluding sections 5-11, 13, and 14 of Act Sept. 13, 1888, ch. 1015, 25 Stat. L. 477, 479, 1 Fed. Stat. Annot. 770-774, which are therein expressly enumerated. *Hong Wing v. U. S.*, (1906) 142 Fed. 128, 73 C. C. A. 346.

CITIZENSHIP.

Vol. I, p. 786, sec. 1993.

Children born abroad.—Under this section a child born in a foreign country, but whose father was at the time of the child's birth a

citizen of the United States, is a citizen thereof. *Buckley v. McDonald*, (1906) 33 Mont. 483, 84 Pac. 1114.

Vol. I, p. 786, sec. 1994.

Conflict between immigration and naturalization laws.—This section is not intended to annul or override the immigration laws, so as to authorize the admission into this country of the wife of a naturalized alien not otherwise entitled to enter. Thus it has been held that the clause "who might herself be lawfully naturalized," as used in this section, limits the section to a woman lawfully within the country, her own capacity, independent of her marital status, being essential to attainment of citizenship, so that where the wife of a naturalized alien was not entitled to enter the country under the immigration regulations because afflicted with a contagious disease, she would not become a citizen entitled to enter by the naturalization of her husband. *In re Rustigian*, (1908) 165 Fed. 980.

But in *In re Nicola*, (C. C. A. 1911) 184 Fed. 322, *affirming* (1909) 173 Fed. 626, it was held that the wife of a citizen of the United States, who at the time of her marriage, although then an alien, might have been lawfully naturalized without regard to where the marriage took place, could not thereafter be excluded from entry into the United States under the immigration laws, although she might be subject to exclusion if an alien.

So it has been held that an alien female who lawfully enters this country for a lawful purpose and marries an American citizen becomes herself an American citizen and is not subject to deportation. *Sprung v. Morton*, (1909) 182 Fed. 330. See also *Hopkins v. Fachant*, (C. C. A. 1904) 130 Fed. 839.

1909 Supp., p. 69, sec. 3.

The wife becomes incompetent.—The case cited in the original note was reversed in so far as it allowed an amendment to the petition, the appellate court holding that the

petition was absolutely void, and therefore not amendable. *U. S. v. Martorana*, (C. C. A. 1909) 171 Fed. 397.

1909 Supp., p. 69, sec. 5.

Effect of immigration laws.—Where a minor child, whose father was a naturalized citizen, had never resided in the United States, and on applying to enter was found by a board of special inquiry to be an idiot, and within excluded classes, he was not en-

titled to enter because of the citizenship of his father, as such right to enter could not begin until the child had begun to permanently reside within the United States. *U. S. v. Rodgers*, (1910) 182 Fed. 274, *affirmed* (C. C. A. 1911) 185 Fed. 334.

CIVIL RIGHTS.

Vol. I, p. 791, sec. 1977.

Applicability to individuals.—Congress was not empowered by U. S. Const., 13th Amendment, to make it an offense against the United States, cognizable in the federal courts, for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, but the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error

in proper cases. *Hodges v. U. S.*, (1906) 203 U. S. 1, 27 S. Ct. 6, 51 U. S. (L. ed.) 65.

State taxation laws.—This section does not affect the validity of a state statute requiring insurance companies, except county mutuals, not organized for pecuniary profit, and certain others, to pay a tax of one per cent. of their gross receipts after deducting amounts for losses, etc. *Iowa Mutual Tornado Ins. Assoc. v. Gilbertson*, (1906) 129 Ia. 658, 106 N. W. 153.

Vol. I, p. 792, sec. 1978.

Constitutionality.—Congress has the power, under the 13th Constitutional Amendment, to protect citizens of the United States in the enjoyment of those rights which are funda-

mental and belong to every citizen, if the deprivation of such rights is solely because of race or color, and this section is within that power. *U. S. v. Morris*, (1903) 125 Fed. 322.

Vol. I, p. 795, sec. 1979.

Jurisdiction.—The scope of the equitable jurisdiction of the federal courts was not extended by this section beyond what was an appropriate subject-matter for equitable relief according to existing standards. *Giles v. Harris*, (1903) 189 U. S. 475, 23 S. Ct. 640, 47 U. S. (L. ed.) 909. See also *Moyer v. Peabody*, (1909) 212 U. S. 78, 29 S. Ct. 235, 53 U. S. (L. ed.) 410.

An action against election officers to recover damages for the wrongful rejection of the plaintiff's vote for a member of Congress is one arising under the Constitution of the United States, and is within the jurisdiction of a federal court, where the damages are laid at more than \$2,000. *Brickhouse v. Brooks*, (1908) 165 Fed. 534.

Where, in a suit by a private person against state judges of general jurisdiction, the statement of plaintiff's claim did not show diverse citizenship, or that the action involved a federal question, a mere allegation that defendants were liable under this section was held to be insufficient to establish federal jurisdiction, in the absence of an allegation of facts showing a substantial dispute as to the effect or construction of the Constitution, or of some law of the United States on the determination of which the recovery depended. *U. S. v. Bell*, (C. C. A. 1905) 135 Fed. 336.

Disfranchisement.—Where the registers of election of the city of Annapolis refused to register the plaintiffs, who were negroes, and who were otherwise qualified voters, because they did not fulfil the qualifications of voters prescribed by Acts Md. 1908, ch. 525, which Act was unconstitutional in so far as it effected negro disfranchisement, it was held that the plaintiffs were entitled to recover damages against defendants under this section; nor were complainants required to allege that defendants in refusing to register plaintiffs acted wilfully or maliciously. *Anderson v. Myers*, (1910) 182 Fed. 223.

Amount in controversy.—In an action under this section to recover damages for de-

priving plaintiff of rights secured to him by the Constitution and laws of the United States under color of a state statute or law, the plaintiff is not required to allege that the defendants acted maliciously, and a failure to do so does not authorize the court to determine as matter of law that only nominal damages are recoverable, and that therefore the action is not within the jurisdiction of a federal court. *Brickhouse v. Brooks*, (1908) 165 Fed. 534.

Rights protected.—The rights, privileges, and immunities referred to in this section are those secured by the Constitution and the laws of the United States, and do not include the right of an individual to life, liberty, or property, which are primary rights within the protection of the state of which the individual is an inhabitant. *Browner v. Irvin*, (1909) 169 Fed. 964. See also *Wadleigh v. Newhall*, (1905) 136 Fed. 941.

Right to custody of children.—The California statute (Code Civ. Pro. Cal., sec. 1747), which authorizes proceedings for the appointment of guardians for the persons and estates of minor children having no guardians by will or deed is a lawful exercise of the state's power; and proceedings based thereon, by which parents are deprived of the custody of their children, do not give them a right of action against the persons instituting the proceedings, under this section, for depriving them of rights, privileges, or immunities secured to them by the Constitution or laws of the United States. *Wadleigh v. Newhall*, (1905) 136 Fed. 941.

Persons protected.—Persons of African descent have the same rights as, but no greater than, other citizens in the state where they make their home; the rights and privileges protected from infringement by this section, and the infringement of which creates a cause of action for damages, being common to all citizens. *Browner v. Irvin*, (1909) 169 Fed. 964.

Vol. I, p. 799, sec. 1986.

Commissioner's fees.—A commissioner of a federal Circuit Court is not entitled to compensation for services rendered in connection with complaints in civil-right cases in which there has been no arrest and examination, since the fee of ten dollars allowed him by

this section "for his services in each case, inclusive of all services incident to the arrest and examination," when earned, covers all services, and, unless earned, he gets no other fee. *Allen v. U. S.*, (1907) 204 U. S. 581, 27 S. Ct. 324, 51 U. S. (L. ed.) 634.

Vol. I, p. 801, sec. 1990.

Constitutionality.—This section is a valid exercise of power granted to Congress by Const. U. S., Amend. 13, forbidding slavery or involuntary servitude except as punishment

for crime, and declaring that Congress shall have power to enforce this by legislation. *U. S. v. McClellan*, (1904) 127 Fed. 971.

Peonage defined.—Peonage is a term de-

scriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. *Bailey v. Alabama*, (1911) 219 U. S. 219, 31 S. Ct. 146, 55 U. S. (L. ed.) 191; *U. S. v. McClellan*, (1904) 127 Fed. 971; *Peonage Cases*, (1905) 136 Fed. 707; *U. S. v. Clement*, (1909) 171 Fed. 974.

Elements of offense.—The fact that persons were induced to work for another in payment of debts through fear of prosecution if they refused does not render the master guilty of peonage, unless such fear was caused by threats of prosecution made by him at the time. *U. S. v. Clement*, (1909) 171 Fed. 974.

Imprisonment for violation of contract to labor or to lease lands.—An Alabama statute (Act March 1, 1901, Acts 1900–1901, p. 1208, sec. 1) makes it a penal offense where any person who has contracted in writing to labor for or serve another for any given time, or who has by written contract leased or rented land from another for any specified time, or who has contracted in writing with the party furnishing lands, or the lands and teams to cultivate it, either to furnish the labor or labor and teams to cultivate the lands, shall afterwards, without the consent of the other party and without sufficient excuse, to be adjudged by the court, “leave such other party or abandon said contract, or leave or abandon the leased premises or land, and take employment of a similar nature from another person without first giving him notice of the prior contract.” Another statute subjects the new employer to heavy penalties if he employs such person, with knowledge of the prior contract, without the consent of the former employer. It was held that this Act was void as in violation of the Thirteenth Amendment, prohibiting involuntary servitude except as a punishment for crime, and that its enforcement established a system of peonage within the meaning of R. S. sec. 1990, enacted to carry such amendment into effect. *Peonage Cases*, (1903) 123 Fed. 671.

The South Carolina statute (Crim. Code, sec. 357), declaring a laborer under contract to labor on farm lands, who shall receive advances and thereafter wilfully and

without just cause fail to perform the reasonable service required by the contract, guilty of a misdemeanor, is a violation of Const. U. S., Amend. 13, prohibiting slavery or involuntary servitude except as a punishment for crime, and of this section, enacted pursuant thereto, abolishing peonage. *Ex p. Hollman*, (1907) 79 S. C. 9, 60 S. E. 19.

But in *Young v. State*, (1908) 4 Ga. App. 827, 62 S. E. 558, it was held that a state statute which makes criminal the procurement of money upon a fraudulent contract to perform service, and the fraudulent abandonment of the contract after having so procured the money, is not a violation of the federal statutes prohibiting involuntary service or labor.

Breach of labor contract as prima facie evidence of fraud.—So far as the refusal without just cause to perform the labor called for in a written contract of employment under which the employee has obtained money which was not refunded, or property which was not paid for, is made *prima facie* evidence of an intent to defraud by a state statute, and therefore punishable as a criminal offense, such legislation offends against the prohibition of the Thirteenth Amendment to the Federal Constitution against involuntary servitude except as punishment for crime, and against the provisions forbidding peonage, found in this section, enacted to secure the enforcement of such amendment—especially where, under the local practice, the accused may not, for the purpose of rebutting the statutory presumption, testify as to his uncommunicated motives, purposes, or intentions. *Bailey v. Alabama*, (1911) 219 U. S. 219, 31 S. Ct. 145, 55 U. S. (L. ed.) 191.

Jurisdiction.—A federal court may entertain a prosecution for violation of this section denouncing peonage, though prosecution of the same acts under the name of kidnapping and false imprisonment might be had in the state courts. *U. S. v. McClellan*, (1904) 127 Fed. 971.

Intimidation.—Inducing a person to labor in payment of debts by threats of prosecution may constitute intimidation and amount to peonage, if by reason of the different character of the parties such threats overcame the will of the servant and the service is involuntary. *U. S. v. Clement*, (1909) 171 Fed. 974.

Vol. I, p. 802, sec. 1022.

Crimes punishable by fine or imprisonment not in state prison or penitentiary.—Offenses against the United States punishable by a fine or by imprisonment not in a state prison or penitentiary are not infamous, within the meaning of the Fifth Constitutional Amendment, and any such offense may be prosecuted by information. *U. S. v. Camden Iron Works*, (1907) 150 Fed. 214, *reversed* on other grounds (C. C. A. 1908) 158 Fed. 561.

Violation of pure food law.—In *U. S. v. J. Lindsay Wells Co.*, (1910) 186 Fed. 248, it was held in a prosecution for violation of the Food and Drugs Act of June 30, 1906, ch. 3915, sec. 2, 34 Stat. L. 768, 1909 Supp. Fed. Stat. Annot. 137, that as the imprisonment for violation of the Act could not be more than one year, and therefore could not be in the penitentiary, the crime was not infamous and the prosecution could be begun by information of the district attorney.

Vol. I, p. 802, sec. 5508.

Constitutionality.—Congress was not empowered by U. S. Const., 13th Amendment, to make it an offense against the United States, cognizable in the federal courts, for private individuals to compel negro citizens, by intimidation and force, to desist from performing their contracts of employment, but the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases. *Hodges v. U. S.*, (1906) 203 U. S. 1, 27 S. Ct. 6, 51 U. S. (L. ed.) 65.

Persons protected.—This section was not intended for the sole protection of the civil rights of citizens of African descent, depending entirely on the Federal Constitution and laws passed in accordance therewith, but protects all citizens in the civil rights guaranteed and secured to them by the Constitution and laws of the United States. *Felix v. U. S.*, (C. C. A. 1911) 186 Fed. 685.

Conspiracy to impose involuntary servitude.—If two or more persons conspire to falsely accuse another of crime and carry him before a magistrate in order that he may be convicted and put to hard labor, having at the time the purpose or design to hire such person or to enable some other person to hire him, they are guilty under this section, if such accused person is a citizen of the United States, of a conspiracy to deprive him of the free exercise or enjoyment of a right or privilege secured to him by the Constitution of the United States. *Peonage Cases*, (1903) 123 Fed. 671; *Smith v. U. S.*, (C. C. A. 1907) 157 Fed. 721.

Conspiracy to prevent negroes from leasing land.—A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land, because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States, within the meaning of this section. *U. S. v. Morris*, (1903) 125 Fed. 322.

Right to organize.—The right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement or advancement, or for any other lawful purpose, is a fundamental right of a citizen in all free governments; but it is not a right, privilege, or immunity granted or secured to citizens of the United States, by its Constitution or laws, and is left solely to the protection of the states. *U. S. v. Moore*, (1904) 129 Fed. 630.

Right to vote for member of House of Representatives.—The right or privilege to vote at an election for a member of the House of Representatives of the United States is a right or privilege secured by the Constitution of the United States, and such right is therefore within the meaning of section 5508. *Felix v. U. S.*, (C. C. A. 1911) 186 Fed. 685.

Right to vote at state election.—This section is not appropriate legislation for the enforcement of the Fifteenth Constitutional Amendment, both because it relates to the

acts of individuals, and not of a state, and because it is broader in its terms than the legislation authorized by the amendment; and it will not sustain an indictment for conspiring to prevent a citizen from voting at a purely state or municipal election on account of his race or color, whether the defendants are charged as individuals, or as officers of the state. *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. 250.

Right to personal liberty.—Where an indictment charged that defendants conspired to injure, oppress, threaten, and intimidate B., a citizen of the United States, in the free exercise of his privilege of contracting and being contracted with, his right of personal security and personal liberty, and the overt act charged was the seizing of B., the placing of handcuffs on him, and compelling him, by force and against his will, to enter into a pretended contract to work for a long period of time for the defendant, it was held that the indictment did not state an offense within the jurisdiction of the federal courts, under section 5508, the citizen's right to personal liberty and security being within the primary jurisdiction of the state. *U. S. v. Eberhart*, (1899) 127 Fed. 254.

Right to trial by due process of law.—In *Ex p. Riggins*, (1904) 134 Fed. 404, the Circuit Court ruled that certain counts of the indictment were good, under the Thirteenth Amendment. It also held that two other counts based upon the Fourteenth Amendment were good, as the Fourteenth Amendment secured to a prisoner in custody of the sheriff, on accusation of crime against the state, the right, privilege, or immunity to have the benefit of a jury trial by the operation of the state's established course of judicial procedure, and that private individuals who lynched such a prisoner, to prevent his enjoying the benefit of such a trial, deprived him, in the constitutional sense, of a right secured to him under the Fourteenth Amendment, and could properly be indicted under this section and section 5500 Rev. Stat., 2 Fed. Stat. Annot. 864. The defendant Powell, who obtained a severance and demurred to the indictment, was a codefendant with Riggins, who appealed to the Supreme Court, (1905) 199 U. S. 547, 26 S. Ct. 147, 50 U. S. (L. ed.) 303, from a decision of the Circuit Court refusing to discharge him upon habeas corpus. The Supreme Court, holding that habeas corpus was not the proper mode of testing such questions, quashed the writ. Riggins's appeal was argued and submitted at the same term as the *Hodges Case*, (1906) 203 U. S. 1, 27 S. Ct. 6, 51 U. S. (L. ed.) 65, which involved like questions under the Thirteenth Amendment. After the Supreme Court thus disposed of the Riggins appeal, it decided the *Hodges case*, holding that similar rights to those claimed, under the Thirteenth Amendment, were not secured by the Constitution or laws, and made use of expressions in the latter opinion which, in the view the Circuit Court took of them, under the circumstances stated, made it doubtful whether the Supreme

Court did not intend to hold that the United States had no power, under any circumstances, to deal with lawless private individuals for violation of rights secured under the Fourteenth Amendment. The government insisted that the expression in the Hodges opinion as to the Fourteenth Amendment "went beyond the case" and should not "control the judgment" as to the rights and immunities here claimed under the Fourteenth Amendment. The Circuit Court, while satisfied as to the soundness of the Riggins case as regards the counts based on the Fourteenth Amendment, was nevertheless of the opinion that proper judicial subordination required the Circuit Court, under the circumstances stated, not to run counter to the last utterances of the Supreme Court as to the Fourteenth Amendment, though they "went beyond the case," and that the only court which could properly determine what was intended by these expressions is the Supreme Court itself, and accordingly held, sustaining the demurrers to the indictment, that no right, privilege, or immunity, under the Fourteenth Amendment, in respect of due process at any stage of the duty of the state in affording it, is secured under that amendment, unless there is actual denial of the right by the state or its officers; and that private individuals who take a prisoner from the custody of the state's officers and murder him, to prevent his enjoying the benefits of a trial by the operation of the state's established course of judicial procedure, do not deprive him of the enjoyment, in the constitutional sense, of any right secured to him by the Constitution or laws, and were not therefore indictable under sections 5508 and 5509 of the Revised Statutes. *U. S. v. Powell*, (1907) 151 Fed. 648, *affirmed* (1909) 212 U. S. 564, 29 S. Ct. 690, 53 U. S. (L. ed.) 653, on the authority of *Hodges v. U. S.*, (1906) 203 U. S. 1, 27 S. Ct. 6, 51 U. S. (L. ed.) 65.

Sufficiency of evidence.—On the trial of defendants charged with conspiracy to deprive a person named of his rights under the Constitution and laws of the United States by subjecting him to involuntary servitude, there was evidence that one of the defendants went to Memphis, Tenn., and there hired fifteen or more negroes to go with him to his place in Missouri to work in a mill, promising liberal wages. On their arrival in the night, they were met at the station by another of the defendants with hacks and taken to a farm twelve miles distant, where they were searched for weapons, and then placed in a cabin under the guard of others of the defendants armed with repeating rifles and revolvers. They were kept under such guards night and day and worked on the farm in clearing and ditching, were subjected to brutal punishments, and few, if any, received the promised wages. Some who succeeded in escaping were brought back by some of the defendants armed with guns. Each of the defendants convicted participated in some

way in such transactions, either as owner of the farm, overseer, or guard. It was held that such evidence was sufficient to warrant the submission of the case to the jury, and to support a finding of conspiracy as charged. *Smith v. U. S.*, (C. C. A. 1907) 157 Fed. 721.

Indictment.—An indictment under this section which charges that defendants conspired to injure, etc., certain named persons, male citizens over twenty-one years of age. "in the free exercise and enjoyment of a right and privilege secured to them," was held to be bad as indefinite, in that it failed to state what particular right and privilege was meant, though it continued with a recital that defendants were officers of an election precinct, and conspired together "for the purposes aforesaid," and "to carry out and effect the object of the same" failed to open the polls promptly, and by a tardy discharge of their duties and frequent absences prevented the persons named from voting. *McKenna v. U. S.*, (C. C. A. 1904) 127 Fed. 88.

In an indictment under this section for conspiracy to deprive a citizen of a right secured to him by the Constitution or laws of the United States, it is not necessary to aver any overt act, and any averment in such an indictment of acts done must necessarily be referred to the charge of conspiracy as describing or particularizing such charge. *Smith v. U. S.*, (C. C. A. 1907) 157 Fed. 721.

An indictment which charges the accused in the language of the statute with having conspired to injure, oppress, threaten, and intimidate a citizen named in the free exercise of a right secured to him by the Constitution and laws of the United States, and which by way of further particularizing averred that such right was the right to the free exercise and enjoyment of freedom from involuntary servitude and slavery, and that the conspiracy was to be effected by arresting, imprisoning, guarding, and compelling him by threats and intimidation to work and labor against his will for the defendants, was held to sufficiently describe the offense, without excluding the defendants from the operation of the exception in the Thirteenth Constitutional Amendment by an averment that such person was not held in servitude as a punishment for crime. *Smith v. U. S.*, (C. C. A. 1907) 157 Fed. 721.

Effect of acquittal in state court.—An acquittal of murder after a regular trial in a state court having full jurisdiction in the premises is a bar to so much of an indictment for conspiring criminally in violation of sections 5508, 5509, as seeks, by charging defendants with the commission of such murder, to enforce the provision of section 5509, that if, in carrying out such conspiracy, an offense against the state has been committed, the punishment provided for by the state for such offense shall be imposed. *U. S. v. Mason*, (1909) 213 U. S. 116, 29 S. Ct. 480, 53 U. S. (L. ed.) 725.

Vol. I, p. 804, sec. 5510.

Civil action for damages for infringement.—This is a penal statute, the infringement of which will not give rise to a civil action for damages. *Browner v. Irvin*, (1909) 169 Fed. 964.

CIVIL SERVICE.

Vol. I, p. 811, sec. 3. [*Boards of examiners — examinations.*]

Detail of clerks. — This section authorizes the detail of persons in the official service of the executive departments to be members of the boards of examiners in the Civil Service Commission, but does not authorize such detail for any other purpose or service. (1905) 25 Op. Atty.-Gen. 379.

Place of examination. — As to the present

rule regarding place of all examinations, see the Census Act of July 2, 1909, sec. 7, first proviso, 1909 Supp. Fed. Stat. Annot. 716, and annotations thereunder.

Residence. — As to the present rule regarding residence, see the Census Act of July 2, 1909, sec. 7, first proviso, 1909 Supp. Fed. Stat. Annot. 716, and annotations thereunder.

Vol. I, p. 813, sec. 6. [*Certain clerks to be classified.*]

Positions included. — The protection of the President's order of July 27, 1897, against removals from the civil service except upon written charges, with opportunity for defense, extends to an employee in the office of the United States surveyor-general for the state of Idaho, certified by the secretary of the interior as within the terms of this Act, and the executive order of May 6, 1896, made in pursuance thereof, extending the departmental service classified under that Act so as to include all executive officers and employees outside of the District of Columbia, whether compensated by a fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are in whole or in part of a clerical nature. *U. S. v. Wickersham*, (1906) 201 U. S. 390, 26 S. Ct. 469, 50 U. S. (L. ed.) 798.

Promotions. — There is nothing in this Act nor in section 4 of the Act of August 5, 1882, which prohibits the Civil Service Commission from approving a promotion, otherwise unobjectionable, where it is informed that the appointing officer expects or intends to assign to the appointee duties not included within the designation given to his position in the specific appropriation providing for his compensation. (1908) 26 Op. Atty.-Gen. 522.

Certifications. — There is nothing in this Act preventing the certification by the Commission of eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the position given in the specific appropriation providing for the compensation of the employee. (1908) 26 Op. Atty.-Gen. 522.

Vol. I, p. 813, sec. 6, cl. third.

Persons included. — Congress undoubtedly intended that the provisions of the civil service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the government, whether such persons were or were not technically in the employ of the United States. (1907) 26 Op. Atty.-Gen. 363.

Deputy collectors of internal revenue would seem to be officers of the United States, at least in the sense that they are subject to classification under the civil service law; but if not officers, they are employees of the United States; and, considered as either, the President has the right to include them in the competitive classified service. (1907) 26 Op. Atty.-Gen. 363.

Vol. I, p. 814, sec. 7.

Preference where reductions are made. — See under p. 828, sec. 1754.

Vol. I, p. 815, sec. 9.

Eligibility. — In (1907) 26 Op. Atty.-Gen. 301, it was held that an applicant for a position in the competitive classified service who resided with her father, a clerk in the post-office department, and who had two brothers also in the classified service who maintained separate homes apart from their father, was entitled to appointment if otherwise qualified under the civil service law.

Certification. — The Civil Service Commis-

sion is authorized and required to withhold from certification the name of any person where two or more members of the same family are already in the public service under the Civil Service Act. (1907) 26 Op. Atty.-Gen. 260.

The question whether there are already two or more members of the same family. — To the same effect as the original note, see (1907) 26 Op. Atty.-Gen. 260.

Vol. I, p. 815, sec. 11.

Solicitation by federal officers. — The sending of a circular letter by a political committee to federal officers and employees, soliciting financial aid in congressional or state elections, upon or attached to which appear the names of federal officers or employees, is a violation of this section. (1902) 24 Op. Atty.-Gen. 33.

Vol. I, p. 816, sec. 12.

Solicitation by letter received in public office. — Solicitation by a letter intended to be received and read by a post-office employee in the post-office building, is embraced by the provision of this section, that no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in such Act, solicit, "in any manner whatever," or receive, any contribution of money or any

Form of words used. — The statute unquestionably condemns all such circulars notwithstanding the particular form of words adopted in order to show a request rather than a demand and to give the responses a *quasi*-voluntary character. (1902) 24 Op. Atty.-Gen. 133.

other thing of value for any political purpose whatever. *U. S. v. Thayer*, (1908) 209 U. S. 39, 28 S. Ct. 426, 52 U. S. (L. ed.) 673, *reversing* (1907) 154 Fed. 508.

The personal delivery to a postmaster in his office of a sealed letter containing a request for a contribution for a political campaign constitutes a criminal offense, under this section. *U. S. v. Smith*, (1908) 163 Fed. 926.

Vol. I, p. 822, sec. 4.

The purpose of this section is to prevent the expenditure of public money in the employment of subordinate persons at the seat of government out of appropriations made for general purposes, so as to insure the efficient control by the Congress not only over the amounts of money expended, but also over the number and character of subordinate officers and employees in the service of the United States employed at the seat of

government. It in no wise limits the discretion of the heads of the several departments as to the character of the work which shall be required of their several employees, but is intended to prevent the employment of subordinate officers or employees at the seat of government without specific appropriations for their payment. (1908) 26 Op. Atty.-Gen. 522.

Promotions. — See under p. 813, sec. 6.

Vol. I, p. 828, sec. 1754.

Preference where reductions are made. — Ex-soldiers or sailors, or the widows and orphans of deceased soldiers and sailors, are not entitled, under the provisions of this section or section 3 of the Act of Aug. 15, 1876, 19 Stat. L. 169, 1 Fed. Stat. Annot. 823, or

section 7 of the Civil Service Act of Jan. 16, 1883, 22 Stat. L. 406, 1 Fed. Stat. Annot. 814, to preference over other persons, when reductions in salary and rank are to be made, even though their qualifications are equal. (1909) 27 Op. Atty.-Gen. 490.

CLAIMS.

Vol. II, p. 7, sec. 3477.

Assignments before allowance. — So far as the contract for the prosecution of a claim against the United States makes the payment of the compensation for services rendered thereunder a lien upon the claim and upon any draft, money, or evidence of indebtedness which may be issued thereon, it is repugnant to this section. *Nutt v. Knut*, (1906) 200 U. S. 13, 26 S. Ct. 216, 50 U. S. (L. ed.) 348.

An assignment of shipbuilding contracts with the federal government, with power to collect the payments to become due thereunder, being valid between the parties, was not made invalid by the statute, where the

government voluntarily deposited the money in court to be disposed of by the parties upon completion of the contracts. *Hawes v. Wm. R. Trigg Co.*, (1909) 110 Va. 165, 65 S. E. 538.

Assignment by public contractor. — In *Henningsen v. U. S. Fidelity, etc., Co.*, (C. C. A. 1906) 143 Fed. 811, *affirmed* in (1908) 208 U. S. 404, 28 S. Ct. 389, 52 U. S. (L. ed.) 547, it was held that an assignment by a public contractor of a claim against the United States for money accruing on a building contract was void, both as against the United States, the contractor's surety, the laborers, and materialmen.

Assignment by bankrupt.—An assignment of a claim against the United States for money due under a contract is void to transfer the claim, as against the trustee in bankruptcy of the assignor, unless executed with the formalities required by this section, and unless the claim has been previously allowed and a warrant issued for its payment, which is essential to its assignability under said section. *Guarantee Title, etc., Co. v. Huntingdon First Nat. Bank*, (C. C. A. 1911) 185 Fed. 373.

Assignments as collateral security for a loan of unallowed claims against the United States on account of contracts for furnishing materials to the various departments of the government, being in direct opposition to this section, can confer no interest in the assignees as against the trustee in bankruptcy of the assignors. *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065.

In *In re Ghazal*, (C. C. A. 1909) 174 Fed.

809, it was held that a bankrupt could not have assigned an expectancy of reward for information concerning smugglers prior to the allowance of the reward by the secretary of the treasury, which did not occur until after the bankruptcy adjudication, and that the reward subsequently awarded passed to the bankrupt, and not to his trustee for the benefit of creditors.

Effect of assignment as between parties.—The illegality, under this section, of a clause in a contract for the prosecution of a claim against the United States, making the payment of compensation for the services rendered thereunder a lien upon the claim and upon any draft, money, or evidence of indebtedness that may be issued thereon, does not invalidate so much of the contract as provides for the payment for such services of a sum equal to one-third of the amount allowed on the claim. *Nutt v. Knut*, (1906) 200 U. S. 13, 26 S. Ct. 216, 50 U. S. (L. ed.) 348.

Vol. II, p. 18. [Act of March 3, 1875.]

Construction of Act.—"The Act does not create a lien in favor of the government. It does not purport to do so. It merely prescribes the procedure for enforcing a set-off. It imposes upon the secretary of the treasury the duty of deducting from the claim of a creditor of the government any counterclaim of the government, and if the creditor will not consent to such set-off, then the secretary is required to cause legal proceedings to be commenced, to the end that the counterclaim may be put into judgment and judicially enforced. The Act is evidently intended for the security and protection of the government, but it forms no part of the contract between the government and the sureties on a bond given to the government. It

is a well-settled rule of law, founded on principles of public policy, that the government does not agree with its contractors or their sureties that its public officers will perform their duties." *U. S. v. Ennis*, (1904) 132 Fed. 133, citing *Hart v. U. S.*, (1877) 95 U. S. 316, 24 U. S. (L. ed.) 479.

Liability of sureties.—The failure of the treasury department to withhold any part of a payment due to a government contractor on account of a claim of the United States against him for a prior breach of the contract, as authorized and required by this Act, does not release the sureties on the contractor's bond from liability for such claim. *U. S. v. Ennis*, (1904) 132 Fed. 133.

Vol. II, p. 26. [Act of March 3, 1885.]

Right of government to reclaim after payment.—Where the claim of an army officer for the loss of private property in the service, filed under this Act, was audited, allowed, and paid in the usual manner it was

held that the government could not reclaim the money without showing that it was obtained by fraud or paid under a mistake of fact. *U. S. v. Olmsted*, (C. C. A. 1902) 118 Fed. 433.

Vol. II, p. 29, sec. 3490.

Remedy cumulative.—The right of the United States to sue for recovery of money obtained from it by means of a fraudulent claim is one existing at common law, and

the remedy by penal suit given by this section is cumulative, and not exclusive. *Pooler v. U. S.*, (1904) 127 Fed. 519, 62 C. C. A. 317.

Vol. II, p. 31, sec. 5438.

What constitutes false presentation of claims.—Under Act July 1, 1890, 26 Stat. L. 209, which authorizes any officer authorized to administer oaths for general purposes in the state, city, or county where he resides to administer oaths to all affidavits and declarations to be made or used in any pension or bounty case, a notary public having authority

to administer oaths under the laws of the state may take affidavits to be used in support of an application for the entry of a soldier's additional homestead, and the presentation of false proofs and affidavits, purporting to have been sworn to before a notary in support of such an application, if done wilfully and fraudulently, constitutes the offense of pre-

senting false evidence in support of a claim against the United States, within this section. *U. S. v. Lair*, (1902) 118 Fed. 98.

False claim by Indian agents.—Under the statutory provisions and the rules and regulations of the Indian department, which require all accounts and vouchers for claims and disbursements connected with Indian affairs to be transmitted to the commissioner of Indian affairs for administrative examination, approval, and allowance, or correction or rejection, and to be by him passed to the proper accounting officer of the treasury department for settlement, such commissioner is an officer required to pass upon, and, if found correct, to approve and allow the accounts and vouchers of Indian agents, who have authority to make purchases and disbursements, and the transmission to the commissioner by such an agent of a false and fraudulent voucher for disbursements claimed to have been made, and for which he claims credit in his quarterly account, knowing such voucher to be false, constitutes the presenting of a false claim against the United States, which is made a criminal offense by this section. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Making and using false pension voucher.—While R. S. sec. 4746, 5 Fed. Stat. Annot. 665, 30 Stat. L. 718, expressly covers the offense of making, or aiding or assisting to make, any false voucher concerning a claim for pension, it does not cover the offense of using such a voucher, which comes within the terms of section 5438, and where, as is permissible, an indictment charges defendant with having made and used such a false voucher, it is sustainable under the latter section, and, upon a general verdict of guilty, which is presumed to find true everything alleged, the punishment prescribed by the latter section may be imposed. *Pooler v. U. S.*, (C. C. A. 1904) 127 Fed. 509.

Indictment.—An indictment, under this section, for presenting a false claim against the United States, which charges that defendant, as Indian agent, transmitted to the commissioner of Indian affairs, with his accounts, a false voucher purporting to be a receipt for money paid out by him, knowing that the same was false and fictitious, in that he had not paid such money, sufficiently alleges wherein the claim was false to apprise the defendant of what he is required to meet. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

In an indictment, under this section, for making and presenting to an officer for approval a false, fictitious, and fraudulent claim against the United States, which sets out the claim, showing it to be an itemized account, averments that certain sums charged therein "should have been" smaller sums stated, sufficiently shows wherein the claim is false and fraudulent. *U. S. v. Franklin*, (1909) 174 Fed. 161.

Duplicity.—An indictment under this section is not bad for duplicity because it charges in the same count both the making and the presenting of a false claim against the United States; the gist of the offense

being the obtaining, or attempting to obtain, money from the United States by means of a fraudulent claim, and the acts charged being but different steps in the commission of such offense, although either alone is made punishable. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577; *U. S. v. Franklin*, (1909) 174 Fed. 161.

Officer to whom claim presented.—An indictment under this section which charges that the defendant, for the purpose of obtaining the approval of a certain claim against the United States, did use a certain false voucher, described, which contained false and fictitious statements, well knowing the same to be false and fictitious, charges every element of the offense as defined in the statute, and need not allege to whom the voucher was presented, nor the manner of its use. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

An indictment, under this section, for making and presenting to an officer for approval a false, fictitious, and fraudulent claim against the war department of the United States for supplies furnished the cadet mess at West Point, which described such officer as a brigadier-general in the army and superintendent of the Military Academy at West Point, and alleged that he was an officer authorized to approve such claim, was held, on demurrer, sufficiently to show such authority. *U. S. v. Franklin*, (1909) 174 Fed. 161.

Place of crime.—An indictment for making a false voucher for the purpose of obtaining payment of a false and fraudulent claim against the United States sufficiently alleged the place of the crime, where it charged that it was committed at a certain Indian agency named, which was alleged to have been within the state and district where the indictment was found. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Allegation of falsity of claim.—A count in an indictment under this section, charging the use of a false voucher for the purpose of obtaining the approval of a claim against the United States, is not bad because it does not aver in express words that the claim itself was false and fraudulent, where it shows that the voucher is the same described in a preceding count as constituting the claim, it being there alleged to have been false and fraudulent to defendant's knowledge. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Intent.—An indictment which charges a wilful attempt by defendant to obtain money from the United States by presenting a false, fictitious, and fraudulent claim, the false, fictitious, and fraudulent character of which was known to him, necessarily imports an intent to defraud the government, and such intent need not be specifically alleged. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Variance.—An allegation in an indictment for making and presenting a false claim against the United States of the date when the same was made and presented is not an essential part of the description of the offense, and the fact that the paper introduced in support of the charge bears a different date does

not constitute a fatal variance. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Evidence.—On the trial of a defendant charged with having, as Indian agent, made and presented a false claim and voucher against the United States, knowing the same to be false and fictitious, testimony that it was a custom or practice of other Indian agents to sign and forward their accounts and vouchers as the same were prepared by the clerks, without reading them, was held to be irrelevant, and properly excluded. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Other offenses.—Since in a prosecution for knowingly purchasing clothing from certain marines in the government service, in alleged violation of this section, the government is required to prove guilty knowledge, evidence of the commission of other similar offenses by the accused than those charged in the indictment is admissible. *Lobosco v. U. S.*, (C. C. A. 1911) 183 Fed. 742.

Purchase or pledge of military clothing and equipment.—Under the provision in this section making it an offense for any one knowingly to purchase or receive in pledge from

a soldier or sailor any arms, equipment, ammunition, clothing, stores, or other public property, it is not material that the clothing purchased by accused was furnished to them under their clothing allowance. *U. S. v. Hart*, 146 Fed. 202; *U. S. v. Smith*, (1907) 156 Fed. 859; *Lobosco v. U. S.*, (C. C. A. 1911) 183 Fed. 742. See also *Ontai v. U. S.*, (C. C. A. 1911) 188 Fed. 311, decided under section 35 of the Penal Code (Act of March 4, 1909, ch. 321, 35 Stat. L. 1095). *Contra*, *U. S. v. Michael*, (1907) 153 Fed. 609.

"Knowingly."—In that provision of R. S. sec. 5438, which makes it a criminal offense if any one "knowingly" purchases or receives in pledge from any soldier clothes or other public property, such soldier not having the lawful right to pledge or sell the same, the word "knowingly" applies only to the question whether a person purchasing or receiving such property in pledge knew, or should have known from facts which put him on inquiry, that the person offering the same was a soldier. *U. S. v. Koplik*, (1907) 155 Fed. 919; *Lobosco v. U. S.*, (C. C. A. 1911) 183 Fed. 742.

Vol. II, p. 41, sec. 951.

Where the claim has never been allowed.—*Smythe v. U. S.*, (1903) 188 U. S. 156, 23 S. Ct. 279, 47 U. S. (L. ed.) 425, *affirming* (C. C. A. 1901) 107 Fed. 376, cited in the second paragraph of the original note.

Presentation and disallowance.—Since a set-off is a creation of statute, and does not exist at common law, if it is available at all

in an action brought by the United States it must appear that the claim has been presented to an accounting officer of the treasury and disallowed, as required by this section, or that it is within one of the exceptions specified in such section. *U. S. v. Cantrall*, (1910) 176 Fed. 949.

Vol. II, p. 45, sec. 3466.

Jurisdiction of state courts.—The New York Banking Law (Consol. Laws 1909, ch. 2), sec. 19, declares that dividends to be paid by the superintendent of banks out of the assets of institutions in his charge for administration shall be paid to such persons and in such amounts and upon such notice as may be directed by the Supreme Court in the judicial district in which the principal office of such corporation or individual banker is located. It has been held that where a New York trust company, prior to failure, had been appointed a depositary for bankruptcy funds, whether deposits made by trustees in bankruptcy were entitled to preference under R. S. sec. 3466, giving preference to debts due the United States, was solely within the jurisdiction of the state Supreme Court, and could not be determined on a motion in bankruptcy for orders requiring the superintendent of banks to pay out such deposits. *In re Bologh*, (1911) 185 Fed. 825.

Bond for performance of contract and payment of debts by contractor.—In an action brought upon a bond given under the Act of Congress of Aug. 13, 1894, ch. 280, sec. 1, 28 Stat. L. 278, 6 Fed. Stat. Annot. 125, against the principal and surety therein named, demurrer was filed to the declaration because it was not averred therein that the claim of the United States thereunder, if any, had

been paid. It was held that such averment was unnecessary, because the United States is not a preferred creditor under such a bond. *U. S. v. Perth Amboy Shipbuilding, etc., Co.*, (1905) 137 Fed. 688.

Claims for trespassing on government land.—Under R. S. secs. 3466 and 3467, the claim of the United States against an insolvent, based on the insolvent trespassing on government land and cutting and removing the timber thereon, is prior to other claims against the insolvent. *U. S. v. Flint Lumber Co.*, (1908) 87 Ark. 80, 112 S. W. 217.

Bankruptcy Act.—The provisions of the Act of July 1, 1898, ch. 541, sec. 64, 30 Stat. L. 563, 1 Fed. Stat. Annot. 682, with respect to the payment of taxes and the debts which shall have priority in the distribution of a bankrupt's estate, do not lessen or affect the rights of the United States under this section, nor the right of a surety in a bond given by the bankrupt to the United States who pays the money due on such bond to be subrogated to a "like priority" under the provisions of section 3466. *Title Guaranty, etc., Co. v. Guaranty Title, etc., Co.*, (C. C. A. 1909) 174 Fed. 385. See also *In re Stoeper*, (1904) 127 Fed. 394.

Under this section see also *Smythe v. U. S.*, (1903) 188 U. S. 156, 23 S. Ct. 279, 47 U. S. (L. ed.) 425.

Vol. II, p. 49, sec. 3467.

Rights of sureties paying claim.—Where the liability of the estate of a deceased surety on the bond of a collector of internal revenue was established in a suit in the federal courts, whereupon the decedent's cosureties paid the entire claim without rendition of judgment

against the estate, it was held that they were thereby subrogated to the rights of the United States against the estate, and their assignee was entitled to recover contribution therefrom. *Pond v. Dougherty*, (1907) 6 Cal. App. 686, 92 Pac. 1035.

Vol. II, p. 50, sec. 3468.

Right of priority in fund paid in by surety.—Sections 3466-3468 do not give the United States such right of priority in a fund paid into court by the surety on the bond of a contractor for government work in discharge of the obligation of the bond, which under

the statute and its terms secures the claims of other creditors of the insolvent contractor as well as that of the United States, and in the absence of statutory provision such right of priority does not exist. *U. S. v. Heaton*, (C. C. A. 1904) 128 Fed. 414.

Vol. II, p. 55, sec. 1059.

Cases sounding in tort.—See *Coleman v. U. S.*, (1910) 181 Fed. 599.

Vol. II, p. 72, sec. 1088.

The Indian Depredation Act.—To the same effect as the original note see *Sanderson v. U. S.*, (1908) 210 U. S. 168, 28 S. Ct. 661, 52 U. S. (L. ed.) 1007.

Limitation applicable to time of filing motion.—A limitation applicable to the time for filing the motion, and not to the time for

making the decision thereon, is made by the provision of this section that the Court of Claims, "within two years next after the final disposition" of a claim, may, on motion on behalf of the United States, grant a new trial. *Sanderson v. U. S.*, (1908) 210 U. S. 168, 28 S. Ct. 661, 52 U. S. (L. ed.) 1007.

Vol. II, p. 73, sec. 1091.

Interest on Indian claims.—In *U. S. v. Cherokee Nation*, (1906) 202 U. S. 101, 26 S. Ct. 589, 50 U. S. (L. ed.) 948, it was held that interest included in the account of the sums due the Indians under treaty stipulation, transmitted by the Secretary of the Interior to the Cherokee Nation pursuant to the agreement for the cession to the United States of the Cherokee Outlet, made between the United States and the Cherokee Nation on Dec. 19, 1891, and ratified by Congress in the Act of March 3, 1893, was properly allowed by the Court of Claims, notwithstanding the provision of section 1091, forbidding the allowance of interest on "any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," where the question of in-

terest was a subject of difference while the negotiations were being carried on, the determination of which was provided for in the agreement itself.

Condemnation proceedings.—A proceeding by the United States for the condemnation of land for public use, and for the assessment and payment of damages therefor, is not a proceeding to collect an account or claim against the United States, but an adversary proceeding instituted by the United States against landowners for the taking thereof. *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

Interest was allowed in *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

Interest was not allowed in *Watts v. U. S.*, (1904) 129 Fed. 222; *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

Vol. II, p. 80, sec. 1, cl. first.

Claims founded on tort.—This section does not authorize a recovery of damages for a consequential injury to property not amounting to a taking and for which recovery could be had only in an action of tort. *Coleman v. U. S.*, (1910) 181 Fed. 599.

A claim against the United States for compensation on account of the unlawful and unnecessary destruction of property during the war, under the order of the general commanding, is one "sounding in tort" within the meaning of this Act. *Juragua Iron Co. v. U. S.*, (1909) 212 U. S. 302, 29 S. Ct. 385, 53 U. S. (L. ed.) 522.

In *Hijo v. U. S.*, (1904) 194 U. S. 315, 24 S. Ct. 727, 48 U. S. (L. ed.) 994, it was held that the United States was not suable under this Act on a claim for the value of the use by the army of a Spanish merchant vessel captured during the war with Spain, since the action was one sounding in tort, and was not converted into one of implied contract because the claim was in form for the use of the vessel after actual hostilities were suspended by the protocol of Aug. 12, 1898, especially in view of the provision of the treaty of peace for the mutual relinquishment of all claims for national or individual indemnity that

might have arisen since the beginning of the Cuban insurrection, and prior to the exchange of ratification of such treaty.

Claims founded on contract.—In *Harley v. U. S.*, (1905) 198 U. S. 234, 25 S. Ct. 634, 49 U. S. (L. ed.) 1030, *affirming* (1903) 39 Ct. Cl. 106, the use by the United States of a device patented by a government employee with the understanding on his part, not shared by the government officials, that compensation would be made, was held not to give a contract right to such compensation on which a claim could be founded within the jurisdiction of the Court of Claims, especially where demand was first made by the petition in that court, after a delay of fourteen years.

Implied contract.—The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employees in charge of it will exercise due care, so as to confer jurisdiction on a federal court, under this Act, of an action to recover damages for personal injuries sustained by reason of the negligence of such employees, on the theory that such action is upon a "contract, express or implied, with the government of the United States," within the meaning of that Act; but the case is one "sounding in tort," which by that Act is excluded from judicial cognizance. *Bigby v. U. S.*, (1903) 188 U. S. 400, 23 S. Ct. 468, 47 U. S. (L. ed.) 519.

Tobacco tax rebate claim.—In *U. S. v. Hyams*, (C. C. A. 1906) 146 Fed. 17, it was held that the Circuit Court had jurisdiction of a claim, involving the requisite amount, for a tobacco tax rebate granted by Act Cong. April 12, 1902, ch. 500, sec. 4, 32 Stat. L. 97, 3 Fed. Stat. Annot. 730, though it involved no contractual liability.

Rent in excess of Congressional appropriations.—The owners of a building who have received the entire sums which Congress has

from year to year appropriated as full compensation for the rent of quarters secured for the Civil Service Commission by the secretary of the interior, in the discharge of his duty under the Act of Jan. 16, 1883, 22 Stat. L. 403, 405, ch. 27, 1 Fed. Stat. Annot. 812, cannot maintain suit against the government under this Act to recover the difference between such sums and the fair rental value of the building, including the basement, which was used without consent, on the theory that the claim is founded either upon a contract, express or implied, or upon the constitutional obligation to make just compensation for private property taken for public use, in view of R. S. secs. 3679, 3732; providing respectively that "no department of the government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," and that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment," and of the Acts of Congress of June 22, 1874, 18 Stat. L. 133, 144, ch. 388, and March 3, 1877, 19 Stat. L. 363, 370, ch. 106, prohibiting contracts for the rental of property for government purposes until an appropriation therefor shall have been made in terms by Congress. *Hooe v. U. S.*, (1910) 218 U. S. 322, 31 S. Ct. 85, 54 U. S. (L. ed.) 1055.

Petition for reformation of contract and damages for breach thereof.—A petition for the reformation of a contract with the federal government, and for damages for breach of such contract as reformed, is within the jurisdiction of the Court of Claims. *U. S. v. Milliken Imprinting Co.*, (1906) 202 U. S. 174, 26 S. Ct. 572, 50 U. S. (L. ed.) 983.

Vol. II, p. 81, sec. 1, cl. second.

Set-offs, etc.—In *Allen v. U. S.*, (1907) 204 U. S. 584, 27 S. Ct. 324, 51 U. S. (L. ed.) 636, it was held that a set-off in favor of the United States against the demand of a commissioner of a federal Circuit Court for five cents more per folio for drawing complaints in civil rights cases than the amount he had been paid as in full for such services, could be allowed by the Court of Claims, under section 1, to the extent of fees improperly and unlawfully paid him in the settlement of his former account, which was approved by the Circuit Court "subject to revision by the accounting officers of the United States treasury," even though some of such illegal payments were made later than the filing of the claim.

The limitation provision.—This Act did not supersede R. S. secs. 3226, 3227, 3 Fed. Stat. Annot. 391, 392, specifically authorizing

suits for the recovery of internal taxes paid, and claimed to have been erroneously or illegally assessed or collected, within two years after an appeal has been taken and determined by the department; and such suits are governed by the limitation contained in those sections, which is made one of the conditions of the right of action thereby given. *Christie-St. Commission Co. v. U. S.*, (1903) 126 Fed. 991.

The limitation contained in this clause in the case of a suit by a marshal to recover fees or disbursements, begins to run as to each item from the time the service was rendered or the disbursement made, and not from the expiration of the plaintiff's term of office. *Walker v. U. S.*, (1905) 139 Fed. 409, *affirmed* in (C. C. A. 1906) 148 Fed. 1022.

Vol. II, p. 82, sec. 2, first clause.

Effect of Circuit Court of Appeals Act.—The limitation with reference to the amount in dispute, prescribed by this section for ap-

peals from or writs of error to a federal District Court sitting as a Court of Claims, remains in force, notwithstanding the provision

of the Circuit Courts of Appeals Act of March 3, 1891, 26 Stat. L. 826, ch. 517, sec. 14, 4 Fed. Stat. Annot. 431, that "all Acts and parts of Acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections 5 and 6 of this Act are hereby repealed." *Reid v. U. S.*, (1909) 211 U. S. 529, 29 S. Ct. 171, 53 U. S. (L. ed.) 313.

Salvage claim against the United States.—A federal District Court has jurisdiction under the provisions of this Act of a petition which is, in effect, a libel *in personam* for the

salvage of duties collected and paid over to the federal government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, since the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a court of admiralty if the United States were suable. *U. S. v. Cornell Steamboat Co.*, (1906) 202 U. S. 184, 26 S. Ct. 648, 50 U. S. (L. ed.) 987.

Vol. II, p. 82, sec. 2, second clause.

Suit to reimburse marshal for payments to court bailiffs.—The second clause of section 2, as amended in 1898, which withholds from the jurisdiction conferred on the Circuit and District Courts by said section suits brought against the United States to recover "fees,

salary, or compensation for official services of officers of the United States," does not apply to a suit to recover disbursements made by a marshal in paying for the services of court bailiffs. *U. S. v. Swift*, (C. C. A. 1905) 139 Fed. 225.

Vol. II, p. 85, sec. 7.

Nature of opinion.—The opinion mentioned in this section is not the usual opinion of the trial judge, but constitutes a part of the record to enable the public and the appellate court to find on the record a formal statement of the Circuit Court's findings both on questions of law and fact and the reasons for such findings. *U. S. v. Swift*, (C. C. A. 1905) 139 Fed. 225; *Hyams v. U. S.*, (1905) 139 Fed. 997, *affirmed* (C. C. A. 1906) 146 Fed. 15.

Review.—The findings of fact mentioned in this section have the weight of the verdict of a jury, and cannot ordinarily be revised by the appellate court. It has been held that where the record contains all the testimony upon which the judge's findings of fact are based, the appellate court may examine if there is competent evidence to support the

findings, and, if there be no evidence, may disregard the findings and reverse the judgment. *U. S. v. Clark*, (1877) 96 U. S. 37, 24 U. S. (L. ed.) 696; *Copners v. U. S.*, (C. C. A. 1905) 141 Fed. 16, 19. See *Collier v. U. S.*, (1899) 173 U. S. 79, 81, 19 S. Ct. 330, 43 U. S. (L. ed.) 621.

Sufficiency of finding.—Where the trial judge, in a suit to recover a tobacco tax rebate, filed two papers, one entitled a decree for the petitioner, and the other the opinion of the court, which the statute makes in effect a part of the record, the two setting out sufficient findings of fact to sustain the court's conclusions, it was held that such papers were sufficiently formal to constitute a compliance with the section. *U. S. v. Hyams*, (C. C. A. 1906) 146 Fed. 15.

Vol. II, p. 91. [*French spoliation claims, etc.*]

Identification of distributees.—In *Buchanan v. Patterson*, (1903) 190 U. S. 360, 23 S. Ct. 764, 47 U. S. (L. ed.) 1096, it was held that Congress by making an appropriation in the Act of March 3, 1899, in accordance with the report of the Court of Claims on certain French spoliation claims, to an administratrix "representing" a designated firm, and a similar appropriation to the same person as administratrix of the estate of a person designated as "the surviving partner" of such firm, cannot be deemed thereby to have deter-

mined that the next of kin of such surviving partner should share in the distribution, where such administratrix represented in the Court of Claims all the interested parties, and that court mistakenly supposed such surviving partner to have been a member of the firm at the time of the illegal seizures of its property, but must be regarded as having intended such appropriation for the next of kin of those composing the firm at the time of the seizures, without attempting to identify the particular persons belonging to that class.

Vol. II, p. 96, sec. 3.

Amendment of petition.—In *U. S. v. Martinez*, (1904) 195 U. S. 469, 25 S. Ct. 80, 49 U. S. (L. ed.) 282, it was held that a petition in an action under the Indian Depredation Act of March 3, 1891, in which the wrong was alleged to have been committed by a particular Indian tribe, could not be amended after the three years' limitation prescribed by that

Act had expired, by stating another and different tribe as the wrongdoer, since it was manifestly intended by the statute, taken as a whole, that the tribe by which the depredation was committed should be joined in the petition where it can be identified, though the Act does not in terms provide for service of process upon such tribe.

COINAGE, MINTS, AND ASSAY OFFICES.

Vol. II, p. 116, sec. 3506.

Cashier not an officer.—Though under R. S. sec. 3496, 2 Fed. Stat. Annot. 113, the cashier of the mint is not an officer thereof, and by this section the superintendent of the mint is declared to be the keeper of all bullion or coin therein, except while it is legally in the hands of other officers, yet under R. S. sec. 3501, 2 Fed. Stat. Annot. 114, providing that each officer of the mint shall give bond for faithful and diligent performance of the duties of his office, and that similar bonds may be required of the assistants and clerks, which shall not relieve the officers from liability for acts and omissions of their subordinates or employees,

the cashier of the mint may be required to give a bond for the faithful performance of any duty intrusted to him; and a bond taken of him, describing him as cashier of the mint, conditioned that he will perform, execute, and discharge all the duties of his position according to the laws and the regulations of the department, will be assumed to have been taken under section 3501, though the bond recites, and the complaint alleges, that the cashier was an officer of the mint; such allegation and recital being treated as surplusage, as may be done. *U. S. v. Cole*, (1904) 130 Fed. 620.

Vol. II, p. 149, sec. 3.

The words "device, print, or impression, or any other thing whatsoever," as used in this section, must be read in connection with and construed as being of the same general nature as their companion words "business or pro-

fessional card, notice, placard, token," and not to cover counterfeit molds and counterfeit coins. *Kaye v. U. S.*, (C. C. A. 1910) 177 Fed. 147.

COLLISIONS.

Vol. II, p. 153, sec. 1. [*Regulations for preventing collisions at sea.*]

English precedents.—It is essential to the effectiveness of the international navigation rules that there should be close conformity between the admiralty courts of England and the United States in the interpretation of such rules, and for that reason, as well as because of the eminent ability of the judges composing them, the admiralty decisions of the higher English courts are given high consideration as precedents by the admiralty courts of the United States. *The Gov. Ames*, (C. C. A. 1910) 187 Fed. 40.

War vessels in time of war.—Where Congress by a special Act has authorized a suit against the United States in a court of ad-

miralty to determine its liability for a collision at sea between a vessel of the navy in time of war and a merchant vessel, such liability must be determined by the admiralty law, and such war vessel cannot be relieved from fault for a violation of the statutory rules of navigation in failing to sound fog signals while navigating in a dense fog at night, on the ground that the omission was by order of her commander, made in the exercise of his discretion, nor in masking her lights in obedience to orders of the commander of the squadron; there being at the time no statutory authority for such order. *Watts v. U. S.*, (1903) 123 Fed. 105.

Vol. II, p. 153. [RULES CONCERNING LIGHTS, AND SO FORTH.]

Exhibiting wrong light.—In *The Furnessia*, (1905) 137 Fed. 955, a schooner was held not to be in fault because the mate, in the extremity of the collision, set out a false and misleading light, it being doubtful whether it contributed in any way to the col-

lision, which was fully accounted for by the plain faults of the steamship.

Evidence as to lights.—Direct and positive evidence from a brig that her lights were properly lighted and set forty-five minutes before the collision was sufficient to estab-

lish the fact that they were burning at the time of collision, when corroborated by the log of the steamer, kept by the acting master, stating that the brig's lights were reported and were seen by him immediately before the collision, as against the testimony of persons from the steamer that they were not burning when they went on board the brig after the collision, which was of such force as to throw her substantially on her beam ends. *Pennell v. U. S.*, (1906) 162 Fed. 64.

The failure of those in charge of one of two vessels to see or observe the lights of the other prior to collision does not disprove their existence, and cannot be accepted to outweigh the positive testimony of the officers and crew of such other vessel that the lights were properly set, and were seen to be burning up to within five minutes before the collision. *The Richmond*, (1902) 114 Fed. 208.

The testimony of men engaged in navigating a schooner, which was sunk by collision

with a tug at night, that the schooner's side lights were burning, is not weakened by the fact that they also testify that they looked at the lights after the tug was seen approaching, such act being a natural one with careful navigators; and their positive testimony to the fact will outweigh the negative testimony of those navigating the tug that they did not see the schooner's lights, especially where their position on the tug was not a favorable one for the purpose. *Brigham v. Luckenbach*, (1905) 140 Fed. 322.

Where it is shown that a vessel was equipped with lamps of an approved style, bought from a reputable dealer, the court will be slow to find that they were inefficient, or that those navigating the vessel failed to light and keep them burning on a dark and stormy night, when the vessel was sailing in a locality where there was a probability of encountering other vessels. *The Richmond*, (1902) 114 Fed. 208.

Vol. II, p. 155, art. 5.

Obstruction of lights.—In *The Iberia*, (1902) 117 Fed. 718, *affirmed* (C. C. A. 1903) 123 Fed. 865, a collision at sea, in the night, between a steamer and sailing vessel, meeting, was held to have been due to the fault of the latter in failing to keep her side lights unobstructed as required by statute; the evi-

dence showing that to the extent at least of one point on either side of directly ahead such lights were obscured by the foresail, which fact prevented the steamer from making out her character or course, and brought about the collision without the steamer's fault.

Vol. II, p. 156, art. 7, cl. third.

Violation of rule.—In *The Our Friend*, (1905) 142 Fed. 274, a catboat was held to be in fault for failure to carry a light as required by this rule.

Vol. II, p. 158, art. 10.

Necessity for lookout with flare-up light.—If an overtaken vessel elects to use a flare-up light, instead of a set screened light, it is her duty at least to maintain an efficient lookout astern, and to display the flare-up light as soon as an overtaking vessel can be seen. *The Bernicia*, (1903) 122 Fed. 886.

Vessels crossing.—A schooner cannot be charged with fault because she did not show a flare-up light to a steamer approaching from forward of her beam, but such action would, on the contrary, have been a fault. *Brigham v. Luckenbach*, (1905) 140 Fed. 322.

Sufficiency of light.—In *The John Bossert*, (1906) 148 Fed. 903, *affirmed* (C. C. A. 1909) 168 Fed. 1021, it appeared that the schooners *Charles A. Witler* and *John Bossert*, each laden with lumber, were sailing northward off Cape Hatteras when the *Witler*, which had passed the *Bossert* during the day and was leading, lay to on the port tack at about

eight in the evening. Shortly thereafter she was struck by the *Bossert*, which approached on the same tack at a speed of about four knots. For fifteen or twenty minutes prior to the collision the *Witler* had exhibited at her stern a white light consisting of a globe lantern, unscreened, but such light was not seen by the lookout of the *Bossert* until too late to avoid the collision. It was held that such light was a sufficient compliance with this article.

In *The Kaiserin Maria Theresa*, (1906) 149 Fed. 97, 78 C. C. A. 681, *reversing* (1903) 125 Fed. 145, a schooner was held to be in fault for a collision with an overtaking steamship at night because of her failure to exhibit a white light or flare-up astern, on evidence which showed that while she had a torch, it was not in condition for use for lack of oil, so that when its use was attempted it quickly blew out.

Vol. II, p. 158, art. 11.

Sufficiency of evidence to show anchor light in place.—Evidence that a light was hung in the rigging of an anchored schooner at dark, and that it was burning twenty or thirty minutes before she was struck and

sunk by a passing steamer at about eleven o'clock, was not sufficient to establish that it was burning at the time of the collision, against the positive testimony of the lookout and two officers of the steamer, who were at

the wheel and in good position to see, all of whom testified that there was no light on the schooner and she was not seen until they were within two hundred feet. *The John H. Starin*, (1903) 122 Fed. 236, 58 C. C. A. 600, *reversing* (1902) 113 Fed. 419.

In *The Maggie Ellen*, (1903) 120 Fed. 662, 57 C. C. A. 124, *affirming* (1902) 115 Fed. 442, the evidence was held to show that the collision was due to a failure to maintain a proper anchor light.

Vol. II, p. 158, art. 12.

Rule not mandatory.—*The Pacific*, (1907) 154 Fed. 943, 83 C. C. A. 515.

Use of globe light.—In *The Martha E. Wallace*, (1906) 148 Fed. 94, it appeared that instead of the flare-up light prescribed in the rule an ordinary globe lamp was used. It

was held that as the use of any light was not mandatory, and as the use of the globe light did no apparent harm, the vessel would not be held in fault for using it.

As to sufficiency of lights, see *The Maggie Ellen*, (1902) 115 Fed. 442.

Vol. II, p. 159, art. 15, cl. (a).

War vessels in time of war not exercised.—*Watts v. U. S.*, (1903) 123 Fed. 105.

Rule applied.—*The Eagle Point*, (C. C. A. 1903) 120 Fed. 449.

Vol. II, p. 159, art. 15, cl. (c).

"Under way."—A sailing vessel lying to in a fog, but having some of her sails up, is "under way," and is governed by this clause, and where the wind is on her starboard bow she is on the starboard tack, and the proper fog signal is one blast. *Burrows v. Gower*, (1902) 119 Fed. 616.

Improper sounding of signals.—Where it was shown that the fog signals were sounded only once in two minutes, instead of once a minute as the rule requires, it was held that a presumption of fault arose which could only be overcome by proof that the fault did not contribute to the collision. *The Frank S. Hall*, (1902) 116 Fed. 559.

Vol. II, p. 159, art. 15, cl. (d).

Rule applied.—*The Commerce*, (1903) 123 Fed. 178.

Vol. II, p. 159, art. 15, cl. (e).

Vessel towed.—A vessel that is being towed is not bound to give fog signals. *The Patience*, (1908) 167 Fed. 855.

Vol. II, p. 160, art. 16.

What constitutes moderate speed.—Moderate speed is such speed as would enable a vessel to stop in time to avoid a collision after an approaching vessel came in sight, provided such approaching vessel were itself going at the moderate speed required by law. *The Belgian King*, (1908) 125 Fed. 869, 60 C. C. A. 451, *affirmed* (1902) 113 Fed. 525; *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973; *Palmer v. Merchants', etc., Transp. Co.*, (1907) 154 Fed. 683; *Pennell v. U. S.*, (1908) 162 Fed. 64.

A steamship navigating in a fog at such rate of speed that when another vessel, which was practically motionless, came into view, the steamship was unable to stop in time to avoid collision, was in fault for excessive speed. *The Kentucky*, (1906) 148 Fed. 500.

A speed of three to three and one-half miles an hour on the part of a brig has been held not excessive. *Pennell v. U. S.*, (1908) 162 Fed. 64.

A speed of from four to six knots on the part of a tug with tows navigating at sea at night in a fog is not ordinarily negligent. *The Patience*, (1908) 167 Fed. 855.

Excessive speed.—A steamer at sea, proceeding at night in a dense fog, in frequented waters, at a speed of ten or eleven knots an hour, is not going "at a moderate speed, having careful regard to the existing circumstances and conditions," as required by this article. *Palmer v. Merchants', etc., Transp. Co.*, (1907) 154 Fed. 683.

In *The Chelsea*, (1905) 135 Fed. 616, a steamer was held at fault for a collision with a schooner in Long Island Sound in a fog, because of her excessive speed of ten knots, and her change of course after the schooner was seen on nearly a meeting course. The schooner was held not chargeable with contributory fault, although her speed was about six knots, it appearing that the fog was not thick where she was, and that she was reducing sail as she entered the dense fog.

A war vessel having a full speed of about eighteen knots, which was proceeding at night in a dense fog at a regular cruising speed of six knots across the track of outgoing and incoming steamers, such speed being too great to enable her to come to a standstill by reversing before she should collide with a vessel which she could see through the fog, was

not going at a moderate speed as required by this article, and was in fault for a resulting collision with a crossing steamer. *Watta v. U. S.*, (1903) 123 Fed. 105.

In the following cases the speed in a fog was held to be excessive under the particular facts of each case: *The El Monte*, (1902) 114 Fed. 796 (six or seven knots); *Consolidation Coal Co. v. The Admiral Schley*, (1902) 115 Fed. 378, *affirmed* (C. C. A. 1904) 131 Fed. 433 (eight knots); *The Frank S. Hall*, (1902) 116 Fed. 559 (ten or eleven knots); *The Eagle Point*, (C. C. A. 1903) 120 Fed. 449 (nine knots); *In re Clyde Steamship Co.*, (1904) 134 Fed. 95, *affirmed* (C. C. A. 1906) 146 Fed. 724, which was *affirmed* in (1907) 207 U. S. 398, 28 S. Ct. 133, 52 U. S. (L. ed.) 264 (six knots); *The Chelsea*, (1905) 135 Fed. 616 (ten knots); *The Furnessia*, (1905) 137 Fed. 955 (six knots); *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433 *reversing* (1902) 117 Fed. 261, *affirmed* (1908). 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973 (ten knots); *The Sif*, (1907) 157 Fed. 454 (five or six knots); *Pennell v. U. S.*, (1908) 162 Fed. 64 (seven knots).

Rule absolute.—A speed of eight miles an hour by a steamship proceeding in the night and in a dense fog, 150 miles east of Sandy Hook, in the customary track of transatlantic steamers, is not a moderate speed, nor can such speed be justified on the expressed opinion of her officers that she could not be properly controlled at a lower rate of speed. The requirement of the rule is absolute, and liability for a collision caused or contributed to by its violation cannot be avoided because a vessel is so constructed or is running so light that she cannot be navigated at such a slow speed as will comply with such requirement. *The Eagle Point*, (1903) 120 Fed. 449, 56 C. C. A. 599, *reversing* (1902) 114 Fed. 971, cited in the original note.

Speed of both vessels excessive.—A steamship was held to be in fault for a collision with another in a fog, notwithstanding the clear fault of the latter in running at an excessive speed, where she was likewise maintaining an excessive speed, and also violated this article by failing to stop her engines on hearing the fog signals of the other vessel apparently forward of her beam. *In re Clyde Steamship Co.*, (1904) 134 Fed. 95, *affirmed* (C. C. A. 1906) 146 Fed. 724, which was *affirmed* in (1907) 207 U. S. 398, 28 S. Ct. 133, 52 U. S. (L. ed.) 264.

In a suit for collision between two ocean steamships in a dense fog, while on crossing courses, it appeared that after entering the fog both continued at more than half speed, in violation of the first provision of this article, and that, after hearing each other's fog signals, both proceeded without stopping for some time, in violation of the second clause of the article; the vessels when they saw each other being within five hundred feet,

and unable to check their momentum in time to avoid collision. Both were held to be in fault, and the damages were divided. *The El Monte*, (1902) 114 Fed. 796.

Tows meeting in fog.—A collision between the tows of two tugs bound in opposite directions in Long Island Sound in a dense fog was held due to the fault of the two tugs in not stopping when fog signals were heard ahead from vessels they were unable to see. *The John A. Hughes*, (1907) 156 Fed. 879.

Sufficiency of precautions.—In *Dunton v. Allan Line Steamship Co.*, (1902) 115 Fed. 250, it appeared that a collision occurred at sea, during a thick fog, between a schooner and a steamship, which met on nearly parallel courses. Each heard the fog signal of the other, and the steamer at once slowed down to a moderate speed and proceeded with caution, while the schooner, which was sailing closehauled on the port tack at a speed of about two knots, kept her course and speed; the wind being very light. Both vessels were properly manned and equipped, and had proper lookouts. After they sighted each other, when they were about one hundred yards apart, the steamer did all that was possible to prevent collision. It was held that neither vessel was chargeable with any fault, and that the collision must be attributed to unavoidable accident.

Duty to stop.—In *Palmer v. Merchants', etc., Transp. Co.*, (1907) 154 Fed. 683, it was held that when the master of a steamer at sea at night in a dense fog heard a single blast of the fog horn of another vessel nearly ahead and apparently only a short distance away, he was not justified in assuming that he could locate the precise position of such vessel, and that he was overtaking her; but it was his duty to at once reverse and go full speed astern until the steamer was stopped and the location and course of the other vessel was definitely ascertained. See also *Hunter v. The Tellus*, (1902) 113 Fed. 525, *affirmed* (C. C. A. 1903) 125 Fed. 869; *The El Monte*, (1902) 114 Fed. 796.

Navigation of fairway in fog.—When dense fog obscures a waterway through which there is a well-defined track for moving vessels, prudence requires vessels then moving therein to continue with extreme caution, availing of such sights and sounds as they can make out till they reach some anchorage to which they can withdraw from the regular track, leaving the thoroughfare unobstructed by their presence. *The Persian*, (C. C. A. 1910) 181 Fed. 439, *reversing* (1908) 159 Fed. 788.

Care in fog sufficient.—See *Dunton v. Allan Steamship Co.*, (1903) 119 Fed. 590, 55 C. C. A. 541, *affirmed* (1902) 115 Fed. 250.

Evidence to show fault of steamer in not reducing speed.—*The Richmond*, (1902) 114 Fed. 208.

Vol. II, p. 161, art. 17, cl. (a).

Rule applied.—In *The Richard F. C. Hartley*, (1903) 124 Fed. 708, it appeared that a collision occurred in the night between the

bark Chase and the schooner Hartley, on crossing courses. Each vessel saw the other's lights when a mile or more distant. The

Chase was sailing closehauled, while the Hartley was running free and was therefore bound by the rules to keep out of the way and to avoid crossing ahead of the Chase; there being no circumstances to prevent. The evidence indicated, however, that she attempted to cross ahead, and thus brought about the collision. The Chase kept her course and speed, as required by the rules, until a collision became imminent, when she changed her course in an attempt to prevent the collision. It was held that the Hartley was solely in fault.

In *The Metamora*, (C. C. A. 1906) 144 Fed. 936, two schooners were held to be in fault for a collision when meeting at night in the open ocean. The one, which was light and sailing free, for not making sufficient allowance for the yawing of the other, which was closehauled in a strong wind and heavy sea; and the other for probably allowing herself to fall off owing to the fact that her master was performing the duties of both wheelman and lookout.

For other cases applying the rule, see *The Queen Elizabeth*, (C. C. A. 1903) 122 Fed. 406, *reversing* (1900) 100 Fed. 874, petition for certiorari denied (1903) 190 U. S. 560, 23 S. Ct. 855, 47 U. S. (L. ed.) 1184; *The Martha E. Wallace*, (1906) 148 Fed. 94.

Vol. II, p. 161, art. 17, cl. (e).

"Wind aft."—Within the meaning of this clause a vessel has the "wind aft" when it is not more than two and a half points from

Right of closehauled vessel.—A vessel sailing closehauled is justified in maintaining her course as against an approaching vessel sailing free, in the absence of some clear indication that the latter will fail in her duty to keep out of the way. *The Pierre Corneille*, (1904) 133 Fed. 604.

Unwarranted change of course.—One of two sailing vessels approaching each other from opposite directions in the night was sailing free on the starboard tack, while the other was closehauled on the port tack. So long as such courses were maintained, there was no danger of collision, but when a short distance apart the vessel running free twice changed her course, the last time taking a course in which she was closehauled on the starboard tack, and making a collision inevitable if both maintained their courses. It was held that in such situation the other vessel, which had previously been privileged and required to maintain her course, became the burdened vessel, and was not in fault for changing her course, although a collision resulted by reason of both changing at the same time; and that the one making the first changes, bringing about the dangerous situation without necessity, was solely in fault. *The Mary Buhne*, (1902) 118 Fed. 1000, 55 C. C. A. 494, *affirming* (1899) 95 Fed. 1002.

directly aft. *The Gov. Ames*, (C. C. A. 1910) 187 Fed. 40.

Vol. II, p. 162, art. 19.

Rule applied.—*The Dorchester*, (1902) 121 Fed. 889, *affirmed* (1904) 134 Fed. 1023, 68 C. C. A. 518.

Rule applied to war vessels in time of war.—*Watts v. U. S.*, (1903) 123 Fed. 106.

Crossing courses in fog.—Where two ferryboats approaching each other attempted to cross courses in a dense fog, when neither could see the other in time to avoid a colli-

sion, they were both at fault—the one for attempting the manoeuvre, and the other in assenting to it and putting her wheel hard astarboard, causing her to swing one point nearer to the other boat, though she immediately stopped and reversed her engines. *Hall v. North Pac. Coast R. Co.*, (1904) 134 Fed. 309.

Vol. II, p. 162, art. 20.

Rule applied.—A tug with three barges in tow on a long hawser, the last being six hundred fathoms behind, was held solely in fault for a collision, in the night, in Delaware bay, between the last tow and a meeting schooner, which was at the time tacking and on a crossing course, on the ground that, although the schooner's lights were seen half an hour before, when she was approaching on the other tack, no proper lookout was kept for her return, and no measures taken to avoid collision when she was seen again. *The Prudence*, (1904) 134 Fed. 358.

In *The Delmar*, (1903) 125 Fed. 130, it appeared that a collision occurred at night in Chesapeake bay between a schooner coming into Hampton Roads, and a barge 342 feet long, loaded with freight cars, which was

passing out in tow of a tug on a hawser 300 feet long. There was a strong wind, and the vessels were admittedly on parallel courses until shortly before the collision, the tug passing to windward of the schooner. Each vessel claimed that she made no change in her course, and the testimony from each supported her contention. There was plenty of sea room, and the tug could have given the schooner a wider berth than she admittedly did. It was held that, under the evidence, she must be charged with the sole fault for the collision.

For other cases applying this rule, see *Medero v. La Compagnie Generale Transatlantique*, (1903) 122 Fed. 1018; *The Our Friend*, (1905) 142 Fed. 274; *The Gladys*, (C. C. A. 1906) 144 Fed. 653, *reversing* (1905) 135 Fed.

601; *The Job H. Jackson*, (1906) 144 Fed. 896; *The Old Point Comfort*, (C. C. A. 1911) 187 Fed. 765.

Change of course by sailing vessel.—In *The Stamford*, (1906) 148 Fed. 509, *affirmed* (C. C. A. 1907) 153 Fed. 1022, the testimony of disinterested witnesses was held to sustain the contention of a tug that a collision between her tow and a meeting schooner in Long Island Sound was brought about solely

by a change of course on the part of the schooner, after she had passed the tug at a safe distance, and not to the failure of the tug to allow sufficient margin for passing.

Rule does not exempt from duty to avoid collision by taking all proper steps.—*The Aries*, (1908) 165 Fed. 514.

Presumptions are in favor of sailing vessel.—*The Delmar*, (1903) 125 Fed. 130; *Newhall v. Jordan*, (1906) 149 Fed. 586.

Vol. II, p. 162, article twenty-one.

Rule applied.—Where a sailing vessel by her unnecessary deviation from her course renders a collision with a steamer unavoidable, the steamer cannot be charged with liability. *The Georg Dumois*, (1907) 153 Fed. 833, 83 C. C. A. 15.

A schooner which is sailing closehauled, and is privileged over a tug approaching on a crossing course, will not be held in fault for a collision because she keeps her course as required by the rules, unless it clearly appears that there are special circumstances

which require a change of course. *Brigham v. Luckenbach*, (1905) 140 Fed. 322.

For other cases applying the rule, see *The Queen Elizabeth*, (C. C. A. 1903) 122 Fed. 406, *reversing* (1900) 100 Fed. 874, petition for certiorari denied (1903) 190 U. S. 560, 23 S. Ct. 855, 47 U. S. (L. ed.) 1184; *The Richard F. C. Hartley*, (1903) 124 Fed. 708; *The Eagle Wing*, (1905) 135 Fed. 826; *The Mary P. Mosquito*, (1906) 145 Fed. 960; *Oceanic Steamship Co. v. Simpson Lumber Co.*, (C. C. A. 1911) 186 Fed. 764; *The Old Point Comfort*, (C. C. A. 1911) 187 Fed. 765.

Vol. II, p. 162, article twenty-one, Note.

Special circumstances.—In *The Transfer* No. 10, (C. C. A. 1906) 144 Fed. 676, it appeared that the tug *McCaldin*, with a schooner in tow on a hawser, was proceeding eastward in East river between North Brother Island and the north shore, when her tow came into collision with a car float on the side of the tug *Transfer* No. 10. The tide was flood running eastward at four miles an hour or more, and the *McCaldin* was making twelve miles an hour by the land. She had followed the *Transfer*, and the latter had rounded to for the purpose of making her landing against the tide at the Oak Point docks, toward which she was proceeding when the collision occurred. The *McCaldin* was within sight of her for a considerable distance, but kept her speed and passed between the *Transfer* and the docks. It was held that the *Transfer* was in fault, because the approach of the *McCaldin* and her tow at such high rate of speed created special circumstances, and required her, under this article, to take action to avert the collision, which she could have done by

holding herself against the tide until the tug and tow had passed.

Presumptions.—Under the navigation rules requiring a steam vessel to keep out of the way of a sailing vessel when there is risk of collision, and requiring the latter to keep her course and speed, where it appears that she did so a presumption arises that the fault for a collision was that of the steam vessel, and such presumption must be acted upon unless the accident is shown to have been inevitable, or that it was the result of neglect or omission on the part of those navigating the other vessel. *The Richmond*, (1902) 114 Fed. 208.

While there is a presumption that the privileged one of two meeting vessels, which came into collision, obeyed the law and kept her course, yet, when such presumption is overthrown, and her fault is clearly established, and is in itself sufficient to account for the collision, she can only avoid full liability by proving the fault of the other vessel beyond reasonable doubt. *The Eagle Wing*, (1905) 135 Fed. 826.

Vol. II, p. 162, art. 22.

Rule applied.—For cases applying this rule, see *The Queen Elizabeth*, (C. C. A. 1903) 122 Fed. 406, *reversing* (1900) 100 Fed. 874, petition for certiorari denied (1903) 190 U. S.

560, 23 S. Ct. 855, 47 U. S. (L. ed.) 1184; *The Richard F. C. Hartley*, (1903) 124 Fed. 708.

Rule applicable to war vessels in time of war.—*Watts v. U. S.*, (1903) 123 Fed. 105.

Vol. II, p. 162, art. 23.

Duty to stop and reverse.—In *The Diana*, (1910) 181 Fed. 263, a collision at sea at night between a steamer and a bark meeting on slightly converging courses was held due solely to the fault of the steamer in changing her course when she was apparently upon and crossing the course of the bark, whose lights were both seen, under the erroneous

assumption that the bark was also changing her course; it having been the duty of the steamer to stop and reverse if in doubt as to the course of the bark, whereas she continued at full speed.

Rule applied.—*The Prudence*, (C. C. A. 1904) 134 Fed. 358, *affirming* (1903) 124 Fed. 939.

Vol. II, p. 162, art. 24.

Violation of rule.—A collision off the New Jersey coast at night in a dense fog between a steamship south bound and a meeting bark was held due solely to the fault of the steamship; the evidence showing that she was going at an excessive speed, not less than eight knots an hour, and that on hearing the foghorn of the bark on her starboard bow, instead of stopping and navigating with caution, as required by International Rules, art. 16, 2 Fed. Stat. Annot. 160, her master, misunderstanding the number of blasts, ported the helm and proceeded without reduction of speed across the course of the bark, which was sailing free at a speed of about four knots and giving three blasts of her foghorn, properly indicating her course, which was not changed. *The Seneca*, (1908) 159 Fed. 578, *affirmed* (C. C. A. 1909) 170 Fed. 937. See also *The Transfer No. 10*, (C. C. A. 1906) 144 Fed. 676; *The Charles C. Lister*, (1909) 174 Fed. 288.

Tow overtaking schooner.—Under this article it was held that where a tug with a tow saw a schooner a quarter of a mile ahead, on nearly the same course, and overtook and passed her, but the tow, which was on a 200-fathom line, did not see the schooner until within 200 feet, and struck her directly

astern, negligence must be inferred on the part of both tug and tow, unless there was evidence to warrant a finding that the schooner in some way brought about the collision. *The Nathan Hale*, (1902) 113 Fed. 865, 51 C. C. A. 469.

Steamer overtaking tow.—A collision which occurred at night in a fog between the last of three tows and an overtaking steamer which ran into the towline after passing the tow was held due solely to the fault of the steamer either in failing to locate the tow or in failing to keep away, it appearing that the tows all carried proper lights and that the steamer's lights were seen from the second and third tows before the collision. *The Patience*, (1908) 167 Fed. 855.

Overtaking vessel.—In a suit for collision on a clear day, between two sailing vessels on courses varying not more than one point, the evidence was considered, and was held to show that libelants' was the overtaking vessel, and in fault for the collision in failing to change her course and keep out of the way. *The Horace P. Shares*, (1905) 139 Fed. 809.

In *The Gladys*, (C. C. A. 1906) 144 Fed. 653, the evidence was held to show that a vessel was not overtaking another.

Vol. II, p. 163, art. 27.

Errors in extremis.—Where the master of a vessel, who is a navigator of experience and good judgment, is confronted with a sudden peril, caused by the action of another vessel, so that he is justified in believing that collision is inevitable, and he exercises his best judgment in the emergency, his action, even though unwise, cannot be imputed to his vessel as a fault. *The Queen Elizabeth*, (C. C. A. 1903) 122 Fed. 406. See also *The Ponce*, (1902) 116 Fed. 55; *Medero v. La Compagnie Generale Transatlantique*, (1903) 122 Fed. 1018; *The Our Friend*, (1905) 142 Fed. 275; *The John A. Hughes*, (1907) 156 Fed. 879.

To enable a vessel to avail itself of the plea of mistake in *extremis* it must appear that the situation was induced by the fault of the other party. *Southern R. Co. v. U. S.*, (1910) 45 Ct. Cl. 322.

Inevitable accident cannot be maintained as a defense unless it be shown that the master acted seasonably, that he did everything which an experienced mariner could do, and that the collision ensued in spite of ordinary caution and his exertions. *Southern R. Co. v. U. S.*, (1910) 45 Ct. Cl. 322.

A collision at sea on a foggy night between a schooner and a steamship on crossing courses was brought about primarily by the fault of the steamer in maintaining an excessive speed in the fog, and not keeping an efficient lookout, in consequence of which she was close upon the schooner before she saw her or heard her fog signals. Just prior to the collision, the mate of the schooner took the light from the binnacle and placed it on top of the house, where it was mistaken by

the steamer for the stern light of an overtaken vessel, in consequence of which the steamer ported when she should have starboarded, and thus made collision certain. It was held that such act of the mate did not render the schooner liable as for a contributory fault, because it was done in *extremis*, when the steamer was bearing down directly upon the schooner at high speed, apparently without seeing her. *The Furnessia*, (1907) 154 Fed. 348, 83 C. C. A. 126, *affirmed* (1906) 137 Fed. 955.

In *The Queen Elizabeth*, (C. C. A. 1903) 122 Fed. 406, a ship was held not chargeable with contributory fault for a collision with a crossing schooner in the night because of her change of course, although she was the privileged vessel, where such change was not made until immediately before the collision, when the vessels were within a few hundred feet of each other, and when it became apparent that the schooner was attempting to cross ahead, in violation of the rules.

Steamer and pilot boat.—A steamer and a pilot boat which have agreed to come to a standstill, so that the pilot's boat yawl may bring a pilot to the steamer, are not navigating on independent courses, and the statute creates no presumption that one is the privileged and one is the burdened vessel, and defines no course of navigation to be followed by either. It is a case of special circumstances in which the vessels are co-operating in an agreed manœuvre, and each is bound to act prudently toward the agreed end. *The Monterey*, (C. C. A. 1908) 161 Fed. 95, *reversing* (1907) 153 Fed. 935.

Vol. II, p. 163, art. 29.

Failure to maintain lookout.—In the following cases the vessels were held to be in fault for failure to maintain a sufficient lookout, or for having no lookout at all. The *Helen G. Moseley*, (1902) 117 Fed. 760; The *Commerce*, (1903) 123 Fed. 178; The *Prudence*, (1903) 124 Fed. 939, *affirmed* (1904) 134 Fed. 358, 67 C. C. A. 340; The *Helen G. Moseley*, (1904) 128 Fed. 402, 63 C. C. A. 144, *affirmed* (1902) 117 Fed. 760; The *Furnessia*, (1905) 137 Fed. 955; *Brigham v. Luckenbach*, (1905) 140 Fed. 322; The *Charles A. Campbell*, (1905) 142 Fed. 996; The *Nottingham*, (C. C. A. 1906) 143 Fed. 942; The *John Bossett*, (1906) 148 Fed. 903, *affirmed* (C. C. A. 1909) 168 Fed. 1021; The *Charles C. Lister*, (1909) 174 Fed. 288.

Position of lookout.—It is the duty of a tug, navigating in the nighttime in a place frequented by all kinds of vessels, to have the highest degree of vigilance and care on the part of her lookout, who should be stationed in the very best place possible for seeing and hearing, where he cannot be interfered with by conversation, and sufficiently near the stem to enable him to see objects lying low in the water; and the absence of a lookout so stationed, and exercising such vigilance and care, is *prima facie* evidence that the tug was in fault for a collision with a sailing vessel, which should have been seen in time to have been avoided. *Brigham v. Luckenbach*, (1905) 140 Fed. 322.

Where a large ocean-going steamship, with decks considerably above the water, was navigating Chesapeake bay in the night in foggy weather, a lookout stationed in the crow's nest, sixty feet above the deck, and one hundred feet from the stem, was not properly located to see and hear objects in front of the vessel, and especially small vessels of the character that usually navigate the bay, frequently loaded down to their water mark; and the ship was in fault for a collision with a schooner, whose fog signal, regularly sounded, was not heard by the lookout until immediately before collision. The *Vedamore*, (C. C. A. 1905) 137 Fed. 844, *affirmed* (1904) 131 Fed. 154.

Position of lookout not contributing to accident.—The fact that the lookout was on the bridge instead of on the forward deck was held not to render a vessel in fault where it appeared that the lookout saw the only light that could have been seen from any position. The *Iberia*, (1902) 117 Fed. 718, *affirmed* (C. C. A. 1903) 123 Fed. 865.

Insufficient lookout.—Where the only two men on the deck of a schooner navigating in the night were engaged in taking down sail,

neither one nor both constituted a proper lookout, and she was in fault for a collision with another schooner having the right of way, and which should have been seen from a quarter to a half mile distant, but was not seen until immediately before the collision. The *Fannie Hayden*, (1905) 137 Fed. 280.

Lookout with other duty.—The fact that a lookout on a sailing vessel also has the duty of blowing the foghorn does not render him an improper lookout. *Pennell v. U. S.*, (1908) 162 Fed. 64.

Absence of lookout not contributory.—The absence of a lookout on a vessel, although a fault, is immaterial in fixing liability for a collision, where it clearly appears that the other vessel was seen in ample time, so that with proper navigation on the part of both vessels a collision would not have occurred. The *Georg Dumois*, (1907) 153 Fed. 833, 83 C. C. A. 15. See also The *Seneca*, (1908) 159 Fed. 578.

In a collision between a sailing vessel and a steamer, it appeared that neither vessel had a proper lookout, and it was held that such fault on the part of the schooner did not contribute to the collision, because it would have been her duty to keep her course under the circumstances if she had heard the signals, but that the steamer must be held solely liable as the burdened vessel, and because she might by the exercise of due care have avoided the collision. The *Gadsby*, (1902) 120 Fed. 851.

Lookouts during fog.—A war vessel, proceeding at sea, in the night and in a dense fog, at a speed of six knots, showing no lights and sounding no fog signals, was required to exercise the utmost vigilance, and to maintain lookouts as far forward and as near the water as possible, as well as at a height above the water and aloft; and she was in fault where she had only the lookouts usually maintained in clear weather, being one at each end of the bridge and two further aft—those on the bridge being ninety-four feet from the stem and thirty-seven feet above the water. *Watts v. U. S.*, (1903) 123 Fed. 105.

Care required in manœuvring tow.—The navigation of a tug with tows at sea involves such danger of collision that the utmost care is required on the part of those in charge, and unusual manœuvres which increase the danger are not justified unless in case of necessity, and then extraordinary precaution should be taken. *Consolidation Coal Co. v. The Admiral Schley*, (1902) 115 Fed. 378, *affirmed* (C. C. A. 1904) 131 Fed. 433.

Vol. II, p. 168, rule 3, cl. (e).

Absence of light not contributory.—The fact that a steamer's port light was out was held not to render it in fault for the collision where it appeared that this could not have contributed to the collision, which was caused

by the fault of the other vessel after the proper signals had been given and the vessels could be seen by each other. The *Livingstone*, (1902) 113 Fed. 879, 51 C. C. A. 560.

Vol. II, p. 169, rule 9.

Improper position of light.—In *Graves v. Lake Michigan Car Ferry Transp. Co.*, (C. C. A. 1910) 183 Fed. 378, a vessel at anchor was held to be guilty of contributory fault

for failure to have her stern light set fifteen feet lower than the forward light as required by the second part of the rule.

Vol. II, p. 170, rule 12.

Failure to show torch not contributory.—The failure of a schooner navigating on the Great Lakes to show a torch to a steamer approaching in the nighttime, as required by this rule, is not a fault contributing to a collision with the steamer, where she was seen

by the steamer and signaled when a mile distant, and thereafter kept her course, and the omission did not in any way tend to mislead or confuse the steamer. *The J. C. Ames*, (1903) 121 Fed. 918.

Vol. II, p. 170, rule 14, cl. (a).

Cannot substitute passing signals.—This rule is imperative, and a vessel is not relieved from the requirement by the fact that she is

giving passing signals. *Hawgood Transit Co. v. Mesaba Steamship Co.*, (1909) 106 Fed. 697, 92 C. C. A. 369.

Vol. II, p. 171, rule 15.

Construction of rule.—The rule does not require a vessel to stop in a fog nor to slow down to bare steerageway while progress appears safe, but requires running at moderate speed, commensurate with dangers which are either known or must be anticipated; she having the right to proceed in expectation of compliance on the part of others with the law in respect of fog signals. *Erie, etc., Transp. Co. v. Chicago*, (C. C. A. 1910) 178 Fed. 42.

Rule applied.—A steamer approaching the

port of Chicago at night in a fog, at half speed, which was at the rate of four and one-half miles an hour, and which, on the undisputed testimony, enabled her to clear another vessel or an obstruction on a warning received at a distance of twice her length, was held not in fault because of excessive speed for a collision with a waterworks crib from which no bell was sounded as she had a right to expect, and which was insufficiently lighted. *Erie, etc., Transp. Co. v. Chicago*, (C. C. A. 1910) 178 Fed. 42.

Vol. II, p. 171, rule 17.

Construction of rule.—This rule has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other. *The William Chisholm*, (1907) 153 Fed. 704, 82 C. C. A. 562.

Violation of rule.—In *The William Chisholm*, (1907) 153 Fed. 704, 82 C. C. A. 562, it appeared that a collision occurred at night in Lake St. Clair, a short distance below the lower end of the cut, between the steamships *Oceanica*, going up, and the *Chisholm*, coming down. The vessels were on the usual courses, which would bring them head on when they approached each other, and the night was calm and clear. There was evidence tending to show that signals for passing port to port in accordance with the rules were exchanged, although that was in dispute; but it was shown without contradiction that when the vessels were some 1,500 feet apart and head on the *Oceanica* gave a signal of two blasts, which was assented to, and that the *Chisholm* then put her helm hard astarboard and swung to port. It was also satisfactorily shown that the *Oceanica* did not starboard her wheel, but either stopped

and backed, or kept to the right, and that the collision occurred some distance to the eastward of her original course. It was held that she was clearly chargeable with fault adequate to account for the collision, and that under the rule, which in such case raises a presumption in favor of the other vessel which can be rebutted only by clear proof of contributory fault, the *Chisholm* could not be held in fault.

Negligent change of course.—In *In re Rend*, (1903) 126 Fed. 564, it appeared that the steamer *Thomas Wilson*, leaving Duluth, and the steamer *George G. Hadley*, coming in, were approaching each other in the daytime, port to port, on nearly parallel but slightly diverging courses, sufficiently far apart to involve no danger of collision if maintained. When 1,500 feet apart, the master of the *Hadley*, having received instructions from a tug to proceed to a different port, ordered the helm hard astarboard. The master of the *Wilson*, observing the change of course, and supposing the *Hadley* to be sheering, at once put his helm apart, and afterwards hard apart, maintaining his speed until his vessel was struck on the port side by the *Hadley* and sunk. Each vessel was going at a speed of about eleven or twelve miles, and no signal was given by either until they were within

nine hundred feet and approaching each other, when the Hadley gave a signal of two whistles, which was not answered, and she then reversed, but made no change in course. It was held that the Hadley was solely in fault; that, in view of the original courses, no signal was required from the Wilson by the rules; that she was prudently navigated, and was not in fault for failing to answer the Hadley's signal, because she could not then have avoided collision, and also because she acted in *extremis*.

Deviation of tow from course.—Where it is shown clearly that the navigation of one of the vessels in a collision was proper, and that the collision was due to the deviation of the other, which was in tow, from the course of the towing steamer, the burden rests upon such tow to make such explanation as will free her from liability. *Davidson v. American Steel Barge Co.*, (1903) 120 Fed. 250, 56 C. C. A. 86.

Both vessels in fault.—In *The Mary C. Elphicke v. Pittsburgh Steamship Co.*, (C. C. A. 1903) 123 Fed. 405, it appeared that the Elphicke, a large lake steamer, heavily laden, when passing down the St. Clair river, exchanged signals to pass port to port with the Poe, then about a mile below, coming up with tows. Shortly after, the Elphicke passed a bend in the river, which required a change to starboard of about six points, but she failed to port her helm soon enough or sufficiently, and her momentum and the current carried her too far to the eastward, and into the course of the Poe, and a collision resulted. The Poe, although initiating the signal, did not change her course, but kept it until the collision, even after she saw that the Elphicke was out of her proper position, although she had time and ample room to have gone to starboard sufficiently to have prevented the collision. It was held that both vessels were in fault.

Steamer meeting tow.—In *The Yuma*, (1902) 117 Fed. 894, the evidence was considered and was held to show that a steamer passing up the St. Clair river and a schooner coming down in tow were both in fault for a collision in which the schooner was sunk—the steamer for sheering to starboard, toward the course of the schooner, after passing the ship having the schooner in tow, and in fail-

ing to take timely action to keep at a greater distance after the exchange of passing signals, which she might safely have done; and the schooner for the same reason, it appearing that she did not promptly change her course, as did the ship having her in tow, which was exonerated from fault.

Violation of passing agreement.—Bar Point Light, which marks the mouth of Detroit river, is upon a crib in Lake Erie, some distance south of the mouth of the river, and northward from it on the Canadian side of the river at a distance of 2,800 feet is a gas buoy. The water in the lake between the light and the buoy is of sufficient depth for navigation, and it is the custom and usage for vessels either bound in or out of the river to pass between them. It was held that an agreement to pass port to port made between a vessel passing out of the river when a half mile north of the light, and a vessel coming in which was a half mile to the east of the light, both being headed toward the light, must be construed with reference to such custom, and required each vessel to keep to the starboard side of the channel between the light and the buoy, and that the incoming vessel was in fault for a collision which occurred four hundred feet to the northeast of the light for being on the wrong side of such channel. The locality being known as one which, in following the usual custom, required each vessel to turn before their courses would cross, the rule respecting crossing courses had no application, nor was it a violation of the passing agreement for the outgoing vessel to make the turn to port so as to pass to the north and east of the light. *Lake Erie Transp. Co. v. Gilchrist Transp. Co.*, (1906) 142 Fed. 89, 73 C. C. A. 313. See also *Ohio Transp. Co. v. Davidson Steamship Co.*, (1906) 148 Fed. 185, 78 C. C. A. 319.

Violation of agreement not to be anticipated.—One of two vessels which have made a passing agreement is not bound to anticipate that the other will not act lawfully and comply with her agreement, and so long as there is apparently reasonable opportunity for her to do so it is not a fault to act on the assumption that she will. *Lake Erie Transp. Co. v. Gilchrist Transp. Co.*, (1906) 142 Fed. 89, 73 C. C. A. 313.

Vol. II, p. 171, rule 17.

Failure of one to change—duty of other.—The failure of one vessel to change will not excuse the other for a failure to make a sufficient change in her own course to avoid danger of collision when it can safely be done, and she will be held equally in fault for a

collision which she might thus have prevented, although she did in fact make such a change in her course as would have avoided the collision if the other vessel had done likewise. *The Mary C. Elphicke*, (1902) 115 Fed. 375.

Vol. II, p. 171, rule 18.

Rule applied.—*U. S. v. Erie R. Co.*, (1909) 172 Fed. 50, 96 C. C. A. 538.

Courses not actually crossing.—The fact that each of two vessels approaching on converging courses knows the destination of the

other, and that their courses do not cross, does not affect the application of the starboard hand rule. *The Kingston*, (1909) 173 Fed. 992.

Vol. II, p. 172, rule 20.

Exception to rule.—This rule is subject to exception, by the terms of rules 27 and 28, where special circumstances render a departure from it necessary, in the exercise of good seamanship, to avoid immediate danger, and in such case the observance of it is a fault. *The Kingston*, (1909) 173 Fed. 992.

Presumptions.—The presumption of negligence on the part of the steam vessel does not

arise from a mere collision; it must also appear that it did not keep out of the way of the sailing vessel. *Chicago Transit Co. v. Campbell*, (1903) 110 Ill. App. 372.

Overtaken vessel.—It is the duty of an overtaken vessel to hold her course. *The Atlantis*, (C. C. A. 1903) 119 Fed. 568.

Rule applied.—See *U. S. v. Erie R. Co.*, (1909) 172 Fed. 50, 96 C. C. A. 538.

Vol. II, p. 172, rule 21.

Rule applied.—*The Kingston*, (1909) 173 Fed. 992.

Vol. II, p. 172, rule 22.

Duty of overtaking vessel.—The duty rests upon an overtaking vessel to keep out of the way of the vessel ahead, and she is only entitled to pass at a time and place where it is suitable and safe, taking all factors into account, including the danger of suction. *The J. G. Gilchrist*, (1909) 173 Fed. 666.

Effect of suction.—In *The J. G. Gilchrist*, (C. C. A. 1910) 183 Fed. 105, *affirming* (1909) 173 Fed. 666, it appeared that when the steamer *Simla*, bound down the St. Clair river, was being passed on her starboard side by the overtaking steamer *Gilchrist*, in accordance with a signal agreement, at a distance of one hundred feet or more and a moderate speed, the *Simla* sheered and struck the *Gilchrist*, and then took a violent sheer to port, coming into collision with the steamer *Smith*, which was passing up on a course six hundred or eight hundred feet distance. It was held, on the evidence that the *Gilchrist* was passing in a proper manner and in a proper place, and that the fault for the collision was wholly that of the *Simla*, which, although navigating a crowded river, had only the mate on deck, who failed to keep her on her course and allowed her to approach until she came within reach of the suction of the *Gilchrist*.

Where two steamers were proceeding down a river on a clear day in a broad channel from two hundred to four hundred feet apart, running abreast of each other, and the suction created thereby caused one of the steamers to sheer beyond control and come into collision with a barge, and the evidence showed that the colliding steamer was the overtaking vessel, and as such was illegally running abreast of the other steamer, she was thereby wholly at fault, and liable for the damages sustained. *The Falcon*, (1902) 116 Fed. 753.

In *The Atlantis*, (C. C. A. 1903) 119 Fed. 568, it appeared that the *Owen*, a large and heavily laden steamer, passing up the Detroit river, overtook and attempted to pass the *Atlantis*, a much smaller vessel, and while so passing, the *Atlantis* sheered and came into collision with the *Owen*. It did not appear that the sheer was due to any action of her helm, but rather that it was the effect of suction caused by the *Owen*, and that the helm was not changed until the effect of the suction

was felt, when it was used in an effort to overcome it. It was held that, it being the duty of the *Owen*, as the overtaking vessel, to keep out of the way and to pass at a safe distance, taking into account the danger from suction, the *Atlantis* was not in fault for not changing her course to give more room, even if it could safely have been done, which was a matter in dispute, nor because of any unskillful manoeuvres attempted in *extremis*, but that the fault was solely that of the *Owen* in coming too close to the *Atlantis* without necessity.

In *The Fontana*, (C. C. A. 1903) 119 Fed. 853, it appeared that the *Interocean*, an overtaking steamer, attempted to pass another steamer having a barge in tow going up the St. Clair river, but the towing vessel refused to assent to her signals, and she desisted, but kept alongside of the barge for some time, but at a safe distance, at no time less than one hundred feet, until the towing steamer was passing a meeting vessel, also with a tow, when the *Interocean* swung in toward the barge, and within from thirty to sixty feet, and almost immediately the stern of the barge swung to port, and she sheered to starboard, striking and sinking the passing tow, which was on a course one hundred and fifty feet distant. Up to that time the barge was following her steamer closely, and was under a starboard wheel, to counteract the effect of the current, which was put hard astarboard as soon as the sheer was felt. No fault in the management of the barge was shown. It was held that, while she had the burden to clear herself from fault in the deviation from her course, she did so when she showed that she was following her steamer, and was in the exercise of due care, and that she used all reasonable means to break the sheer; that under the facts shown the sheer must be attributed to the suction caused by the *Interocean*, and she must be held solely in fault in failing to keep at a safe distance, taking into account the danger from suction, as was her duty as an overtaking vessel.

Burden of proof.—Where, as an overtaking vessel was passing a much smaller vessel in St. Clair river, the latter suddenly sheered from her course, resulting in her collision with the overtaking vessel, and also with a third vessel passing on an opposite course,

the overtaking vessel has the burden of proving that she did not cause such sheer, taking into account the speed and distance at which she passed and the effect of her suction. The *J. G. Gilechrist*, (1909) 173 Fed. 666.

Steamer overtaking tug with raft.—A raft of logs two thousand feet long was being towed down the St. Clair river by three tugs, one of which was in front, to guide the forward end. An overtaking steamer was attempting to pass on the American side, when the head of the raft, reaching a bend in the river, came close to the shore, and the steamer, striking the land, sheered, and ran

into the raft with such force as to break the boom sticks and scatter the logs. It was held that the steamer was in fault for not being under better control, which was required in view of the manifest danger of collision; that the navigators of the raft were also in fault, it appearing that the forward tug was not making proper effort to keep the head of the raft off from the shore. *Hall v. Chisholm*, (1902) 117 Fed. 807, 55 C. C. A. 31.

In fault for violation of rule.—See *The Edward Smith*, (1905) 135 Fed. 32, 87 C. C. A. 506, *affirming* (1901) 105 Fed. 987.

Vol. II, p. 172, rule 23.

Not applicable to overtaking vessels.—Rules 23 and 26 relate to signals between steam vessels indicating their course to starboard or port, and do not prescribe the sig-

nals which are to be used between an overtaking vessel and the vessel ahead. *The North Star*, (1907) 151 Fed. 168, 80 C. C. A. 536.

Vol. II, p. 172, rule 24.

Mutual fault.—In *Wineman v. Drake*, (1907) 154 Fed. 933, 83 C. C. A. 505, the steamer *City of Berlin*, with a barge in tow on a line, both ore laden, bound down the Detroit river at night, as she made the turn of two points from the course leading from the Lake St. Clair channel into the Windmill Point ranges, met and passed the *Venus* bound up, with the barge *Tyrone* in tow. Behind the *Tyrone* and overtaking her was the steamer *Chili*. Signals for passing port to port were exchanged between the *Berlin* and both the *Venus* and *Chili*, but when the bow of the *Berlin*, which had made the turn and straightened on her course, was about opposite the port quarter of the *Tyrone* and about one hundred and fifty feet away, she came into collision with the *Chili*, which struck her port bow, inflicting injuries from which she afterwards sank. Under rule 24 the *Berlin* had the right of way. It was held on the evidence that the *Chili* came out from behind the *Tyrone*, heading toward the course of the *Berlin* as the latter was approaching, and was in fault for the collision; that the *Berlin* was also in fault under the circumstances for not allowing more room for pass-

ing, having five hundred feet of open water on her starboard side.

Rule applied.—In *Mitchell Transp. Co. v. Green*, (C. C. A. 1903) 120 Fed. 49, it appeared that the steamer *Susan E. Peck* met the steamer *Folsom*, with the barges *Mitchell* and *Nelson* in tow, when passing up through the "Lime Kiln Crossing" in the Detroit river, an artificial channel 440 feet wide. After safely passing the *Folsom* and *Mitchell* port to port, as agreed by signal, the *Peck* came into collision with the *Nelson*, which was sunk. It was held, on conflicting testimony, that the *Folsom* and her tows were at all times to the westward of the middle of the channel, and that the collision was due solely to the fault of the *Peck*, which, after passing the *Mitchell* on a port helm, starboarded to such an effect that, being 240 feet long, she swung so far across the channel that her bow was caught by the cross-current, and she was unable to correct herself before striking the *Nelson*. See also *The Mary C. Elphicke v. Pittsburgh Steamship Co.*, (C. C. A. 1903) 123 Fed. 405, *affirming* (1902) 116 Fed. 375.

Vol. II, p. 172, sec. 25.

Dangers from suction.—In *Kelley Island Lime, etc., Co. v. Cleveland*, (1906) 144 Fed. 207, it appeared that the *Ohio*, a flat-bottomed steam scow, when a short distance from the open draw of a bridge on the Cuyahoga river was overtaken and passed by the large tug *Lutz* without any signal or agreement, the stern of the *Lutz* passing her bow at about the time it entered the draw, where the channel was but sixty feet wide, the effect being to create a current or suction which caused the *Ohio* to sheer, striking some submerged timbers around the bridge pier, by which she was so injured that she sank. It was held that the injury was due to the fault of the *Lutz* in passing in violation of rule 25 and the inspectors' rules made thereunder,

which required her to signal, and not to pass without the consent of the overtaken vessel, and that she was liable for the injury; no want of care or improper navigation being shown on the part of the *Ohio*.

Burden of proof.—Where a collision between two barges in tow meeting in a channel was caused by the sheering of one past the middle of the channel, the burden rests upon her, in order to avoid liability, to show that such sheer was the result of inevitable accident or some force which she could not guard against by that reasonable degree of skill required of a navigator in the waters where it occurred. *The Australia*, (1903) 120 Fed. 220, 56 C. C. A. 568.

Vol. II, p. 172, rule 26.

Not applicable to overtaking vessels.—The *North Star*, (1907) 151 Fed. 168, 80 C. C. A. 536.

Failure to follow rule not contributory.—A vessel will not be charged with fault for failure to follow this rule where the failure in no wise contributes to the accident and the doing so would not in any way help matters. *In re Rend*, (1903) 126 Fed. 564.

Mutual fault.—In *Duluth Steamship Co. v. Pittsburg Steamship Co.*, (1910) 180 Fed. 656, 103 C. C. A. 622, it appeared that a collision occurred at night on Lake Superior between the steamer *Sylvania*, going down, and the steamer *Bessemer*, going up. The vessels saw each other when three-fourths of a

mile apart, each having the other about one-half point on her starboard bow and showing her green light. At that time they exchanged a passing signal of one whistle, but the *Sylvania* proceeded on her course or under a starboard wheel and continued to show her green light to the *Bessemer* until just before collision, and too late to avoid it, while the *Bessemer* proceeded under a port wheel. It was held that the *Sylvania* was in fault for navigating contrary to the agreement; that the *Bessemer* was also in fault for not stopping and giving alarm signals when it became apparent that the *Sylvania* was so navigating, and that it involved at least danger of collision.

Vol. II, p. 173, rule 27.

All navigation rules construed together.—All navigation rules pertinent to a given situation are to be construed together, and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules, or a passing agreement, when it becomes evident that either is not doing so, it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision. *U. S. v. Erie R. Co.*, (1909) 172 Fed. 50, 96 C. C. A. 538.

Placed in extremis by other vessel.—When a vessel is in *extremis*, placed there by the wrongful act of another vessel, the master

may be excused if he does not manoeuvre with perfect skill, or even if he acts mistakenly under such pressure, or omits to do all that he ought to do. *The Atlantis*, (C. C. A. 1903) 119 Fed. 568; to the same effect, see *The Livingstone*, (C. C. A. 1902) 113 Fed. 879.

Contributory fault of privileged vessel.—The fault of an overtaking vessel for a collision being established, in determining the question of the contributory fault of the vessel overtaken every reasonable doubt should be resolved in her favor. *The Atlantis*, (C. C. A. 1903) 119 Fed. 568.

Vol. II, p. 173, rule 28.

Lookouts.—In *The J. G. Gilchrist*, (1909) 173 Fed. 666, it was held to be negligence for the master of a steamer to navigate her down the St. Clair river without a lookout, and with no officer in charge of her navigation, except a mate, who was also acting as wheelman.

In the following cases a vessel was held to be in fault for failure to maintain a sufficient lookout: *The Sitka*, (1904) 132 Fed. 861; *Graves v. Lake Michigan Car Ferry Transp. Co.*, (C. C. A. 1910) 183 Fed. 378.

If the absence of a lookout did not contribute to the collision the vessel will not be held in fault because it failed to maintain a lookout. *The Livingstone*, (C. C. A. 1902) 113 Fed. 879.

Lookout must not be navigator.—The doctrine is well settled that the lookout required by the rules must be not only competent, but

charged with no other duty while so serving, and that the officer navigating the steamer cannot at the same time serve as lookout. *The J. C. Ames*, (1903) 121 Fed. 918.

Risk of collision—Duty to stop and reverse.—It is the duty of a vessel to slacken speed, or stop, or reverse if necessary when approaching another so as to invoke risk of collision, but there is no risk of collision within the meaning of the rule so long as the two vessels, by complying with their passing agreement, can certainly pass in safety, and each vessel may be navigated upon this supposition until the intervention of something which should operate as notice to an officer of skill and prudence of the presence of danger. *Lake Erie Transp. Co. v. Gilchrist Transp. Co.*, (1906) 142 Fed. 89, 73 C. C. A. 313.

Vol. II, p. 174, sec. 1.

State rules.—The rule requiring vessels to keep in the middle of the East River, established by the New York statutes, was not changed by the Act of June 7, 1897, ch. 4, 30 Stat. L. 96, 2 Fed. Stat. Annot. 173. *The Hartford*, (1903) 125 Fed. 559; *The Spartan Prince*, (1903) 126 Fed. 885.

Definitions.—A tug which is keeping a tow stationary against a strong tide is "under way," although she is not making headway over the ground. *The Charles C.*

Lister, (C. C. A. 1910) 182 Fed. 988, *modifying* (1909) 174 Fed. 288.

A steam vessel lying with her nose against the bank of a stream, and holding her position against the current by the movement of her wheel, is a vessel "under way" within the navigation rules, and not entitled to the rights of an anchored vessel. *The Ruth*, (C. C. A. 1911) 186 Fed. 87, *affirming* (1910) 178 Fed. 749.

Vol. II, p. 174, art. 1.

Evidence that lights were in position.—The positive testimony of credible witnesses, who were in a position to see, that the lights were set and burning on a vessel at the time

of a collision, is entitled to greater weight than the negative testimony of other witnesses that they did not observe such lights. *The Alabama*, (1902) 114 Fed. 214.

Vol. II, p. 174, art. 2, cl. (a).

Absence of lights not contributory.—The fact that a vessel is without a fore light will not be charged against her as a fault where it

appears that the absence of the light did not contribute to the collision. *The Virginia Jackson*, (1904) 130 Fed. 221.

Vol. II, p. 175, art. 3.

Position of lights.—A tug navigating with tows in the night in a harbor did not comply with this article where, although having two towing lights, they were suspended from either end of a horizontal cross-piece on the flagstaff, about a yard in length, and such

failure to observe the rule was a serious fault, which rendered the tug liable for damage caused by a collision between her tow and another vessel. *Foster v. Merchants', etc., Transp. Co.*, (1905) 134 Fed. 964.

Vol. II, p. 175, art. 5.

Pilot rules.—Rule 11 of the pilot rules, relating to the lights to be carried by barges and canal boats when towed alongside, does not apply to sailing vessels, which are gov-

erned by article 5 of the statutory rules for rivers and harbors. *The Merrill C. Hart*, (1908) 162 Fed. 371.

Vol. II, p. 176, art. 9, cl. (d).

Rule applies to scow.—This rule applies to a scow forming part of the equipment of a dredge engaged in deepening the channel of

a river and bay, and being used in the channel at night. *National Dredging Co. v. Monsen*, (C. C. A. 1903) 126 Fed. 930.

Vol. II, p. 176, art. 10.

Violation of rule by becalmed schooner.—In *The Baltimore*, (1907) 155 Fed. 405, 84 C. C. A. 84, a schooner was held in fault for a collision with a steamer in Chesapeake bay in the night, on the ground that, while becalmed, she had been drifted around by the

tide so that the steamer was an overtaking vessel, and could not see her side lights, and she failed to exhibit any white light or flare-up astern, as required by the rules, although the steamer was seen approaching for a considerable time before the collision.

Vol. II, p. 176, art. 11.

Rule must be strictly followed.—This rule is of great importance and must be strictly observed, and, if violated, a loss caused by a collision resulting must be borne by the vessel so violating it. Thus in *The Santiago*, (1908) 160 Fed. 742, a collision between a pilot boat and a barge 271 feet long anchored on the anchorage ground inside the Delaware breakwater on a dark night was held due solely to the fault of the barge, whose stern anchor light had been blown out five minutes before, and had been taken by the anchor watch into the pilot house to be relighted, and not restored, the evidence also being conflicting as to whether her forward light was burning.

In *Muller v. New York, etc., R. Co.*, (1906) 144 Fed. 241, a small launch, which had become disabled in the night and anchored in the channel in East river, near Hell Gate, was

held not entitled to recover for her injury by collision with a car float on the side of a tug which ran into her, on the ground that she did not carry the anchor light required by the rules, which would have prevented the collision, although the tug did not have a proper lookout; it appearing that she saw the light from the launch as soon as it was raised into view.

"Hull of vessel."—Under this statute where a vessel has a fore-castle reaching far back on her deck and a poop extending far forward, they are to be deemed a part of her hull. *The Europe*, (1909) 175 Fed. 596.

Vessel moored to wharf.—This rule is applicable to a vessel moored to the end of a wharf in the navigable portion of a narrow channel. *The Millville*, (1905) 137 Fed. 974,

Vol. II, p. 177, art. 15. [How given.]

Weight of testimony as to signals.—The testimony of witnesses on a steamer that they heard only a single fog signal from a schooner in a fog, with which the steamer shortly after came in collision, indicating that the schooner was on the starboard tack, when she was in fact on the port tack and approaching the course of the steamer, is not sufficient to establish such a fact as

against the testimony of persons on the schooner, one of whom was disinterested, reinforced by that of two other disinterested witnesses who were in the immediate vicinity, that the schooner gave the proper signal of two blasts. *The Charlotte*, (1903) 124 Fed. 989, *affirmed* (1904) 128 Fed. 38, 62 C. A. 546.

Vol. II, p. 177, art. 15, cl. (a).

Failure to sound signals prima facie negligence.—In an action to recover for personal injuries received by a passenger on a ferryboat caused by a collision with another boat it was held that a failure to comply with the

rule about sounding fog signals was *prima facie* evidence of negligence. *Schlotterer v. Brooklyn, etc., Ferry Co.*, (1902) 75 App. Div. 330, 78 N. Y. S. 202.

Vol. II, p. 177, art. 15, cl. (c).

Effect of improper signals not heard.—In a suit for collision between a steamer and a schooner in a fog, the questions whether those navigating the schooner were competent, or whether she gave improper fog signals, are immaterial, where there was no fault in the steering of the schooner, and the improper

signals, if given, were not heard on the steamer. *The Everett*, (1910) 182 Fed. 702.

Scows and dredges.—This rule applies to scows and dredges anchored in a navigable channel in a fog. *The Kennebec*, (1908) 167 Fed. 847.

Vol. II, p. 177, art. 15, cl. (d).

Dredge.—A dredge lawfully fixed in a channel for improving it is to be considered as a vessel at anchor, and is under obligation to use the same precautions to guard against collisions that a vessel at anchor is in respect to the exhibition of lights, maintaining a watch and other measures calculated to make its position known. *The Bailey Gatzert*, (C. C. A. 1910) 179 Fed. 44, *affirming* (1909) 170 Fed. 101.

Size of bell—New York harbor.—There is no statute or harbor regulation fixing the size of the fog bell to be used on scows permanently anchored in New York harbor, but the sufficiency of such bell is to be determined by the rule that reasonable care must be exercised in its selection, having reference to the locality and dangers to be encountered and the vessels to be warned. A bell seven inches in diameter and height, to be rung by hand, was held insufficient on a scow stationed 850 feet off the piers in East river, in the track

of steam vessels of all kinds. *The Annex No. 5*, (1902) 117 Fed. 754.

Evidence as to fog.—In *Baltimore Steam Packet Co. v. Coastwise Transp. Co.*, (1905) 139 Fed. 777, the conflicting evidence was considered and held to establish by a preponderance that there was a thick fog at the time of a collision in the early morning between a steamer and a schooner lying at anchor in Hampton Roads, which made it the duty of the schooner, under this subdivision, to sound fog signals, and to render her solely in fault for the collision because of her violation of such rule.

Density of fog.—The rule should be enforced when the fog is sufficient to prevent moving vessels from discovering a ship at anchor in sufficient time to make usual manoeuvres to avoid her. *The Mary Weaver*, (1903) 124 Fed. 977, *affirmed* (C. C. A. 1904) 130 Fed. 333.

Vol. II, p. 178, art. 16.

Moderate speed.—The moderate speed required of a vessel in a fog by this article is such speed as under existing conditions will enable her to stop before coming into collision with another vessel after the latter can be seen, assuming that the other vessel also observes the rule. *The No. 4*, (C. C. A. 1908) 161 Fed. 847; *The Kennebec*, (1908) 167 Fed. 847; *The Bailey Gatzert*, (1909) 170 Fed. 101, *affirmed* (1910) 179 Fed. 44, 102 C. C. A. 612; *The Cascades*, (1910) 178 Fed. 726; *The P. R. R. No. 5*, (C. C. A. 1910) 181 Fed. 833.

In *The McCaldin Brothers*, (1902) 117 Fed. 779, it appeared that the tug *Stone*, with three scows, was passing out from North river to the dumping grounds, when she was compelled, by a dense fog, to seek refuge, and made the scows fast to the breakwater on the Brooklyn shore. While there, the tug McCaldin Brothers, also seeking a place of safety, and making her way along the breakwater, came into collision with and injured one of the scows. She was going at such speed that she was unable to stop after coming near enough to see the dock. She

was blowing fog signals as she approached, but the Stone, which lay alongside but a little back of the scow, made no response, and took no steps to make known her presence or that of her tow. The place was one where it was customary for vessels to find refuge in such weather. It was held that both tugs were in fault—the Stone for failing to ring her bell or otherwise answer the fog signals of the McCaldin Brothers, which she must have known was approaching, and the latter for excessive speed under the circumstances.

A vessel maintaining a speed of eighteen knots per hour was held to be solely in fault for a collision, although the navigation of the other vessel was in some respects subject to criticism. *The Commonwealth*, (1910) 174 Fed. 694.

In the following cases vessels have been found guilty of fault in navigating at an excessive speed in a fog: *The Glenogle*, (1903) 122 Fed. 503 (seven to nine knots); *The Kaga Maru*, (1903) 123 Fed. 130; *The Bellingham*, (1905) 138 Fed. 619 (ten miles); *The Benjamin Franklin*, (C. C. A. 1906) 145 Fed. 13; *The City of Lowell*, (1907) 152 Fed. 593, 81 C. C. A. 583, *reversing* (1905) 139 Fed. 901; *The No. 4*, (C. C. A. 1908) 161 Fed. 847 (eight knots); *The Somerville*, (1908) 162 Fed. 681, 89 C. C. A. 473 (five miles in New York harbor); *The Matanzas*, (1908) 166 Fed. 985 (five or six knots in New York harbor); *The Cascades*, (1910) 178 Fed. 726; *The Kronprinz Wilhelm*, (C. C. A. 1911) 186 Fed. 324 (six knots in New York harbor).

Rule mandatory.—This rule is mandatory, and its violation creates a very strong presumption of fault, and casts upon the offender the burden of showing by clear testimony that his error did not contribute to an ensuing collision. *The Georgic*, (1910) 180 Fed. 863.

Rule is applicable to regular passenger steamers.—The law makes no exception in favor of passenger steamers running regularly on schedule time on an established route, and, for injuries resulting from excessive speed in

violation of the rules prescribed to insure safety to vessels and passengers, they must render compensation to the injured. *The Bellingham*, (1905) 138 Fed. 619.

Entering fog bank.—The rule applies to steamers entering a fog bank as well as to those in the fog. *The Charlotte*, (1903) 124 Fed. 989, *affirmed* (1904) 128 Fed. 38, 62 C. C. A. 546.

Vessel moored at dock.—A tug with a car float on her side was held solely in fault for a collision between the float and a tug moored at a dock in a dense fog for navigating in the fog at such speed that she could not stop in time to avoid collision after the moored vessel could be seen. *The P. R. R. No. 5*, (C. C. A. 1910) 181 Fed. 833.

Prior speed immaterial.—Where a steamship for some fifteen minutes prior to collision with a meeting vessel in a fog had been going at slow and dead slow speed, and was barely moving at the time of collision, her prior speed is immaterial. *The Georgic*, (1910) 180 Fed. 863.

Mutual fault.—In *The Georgic*, (1910) 180 Fed. 863, a collision in the main ship channel to New York bay in a fog, between the meeting steamships *Georgic* and *Finance*, in which the latter was sunk, was held due to the fault of both vessels, each of which heard the fog signals of the other forward of her beam in a position not ascertained, but did not stop as required by this article, but continued ahead until the signals had been repeated three or more times, each time closer, when both were going at moderate speed and a compliance with the rule would have avoided the collision.

Navigation in fog.—It is unlawful in the navigation of a steam vessel to assume that an approaching steamer, which cannot be seen because of prevailing fog, is on any particular course, and to continue onward without reducing speed after the failure of the approaching vessel to respond to a passing signal. *The Celtic Monarch*, (1910) 175 Fed. 1006.

Vol. II, p. 178, art. 18, rule 1.

Mutual fault.—A collision in New York harbor, about halfway between the Battery and Governor's Island, in the early morning, between a steamship passing out of the East river to sea and a tug with a car float on each side, was held due to the fault of both vessels, on a finding that they were on crossing courses, with the red light of the tug showing on the starboard hand of the steamship, which made the starboard hand rule applicable, whereas at the instance of the steamship a two-blast signal was made and agreed to. The steamship was held in fault for not navigating in accordance with such agreement, and the tug for assenting thereto, and both for not sooner stopping when it became apparent that there was a misunderstanding. *The Transfer No. 9*, (C. C. A. 1909) 170 Fed. 944, *affirming* (1906) 148 Fed. 456.

A steamship and a tug were both held in fault for a collision between the ship and

barges in tow of the tug, which occurred on the Delaware river in the night, on the ground that, although the two vessels saw each other when a mile apart, each held its course and approached head on until they were so close together that the danger of collision between them was imminent, and a confusion of signals resulted, which brought about the collision. *The John I. Brady*, (C. C. A. 1904) 131 Fed. 235, *affirming* (1902) 115 Fed. 204.

Crossing signals.—In *The Islander*, (1907) 152 Fed. 385, 81 C. C. A. 511, a collision in North river between Twenty-third street, New York, and the bay, between a ferryboat going up and a steam lighter descending, which were approaching each other nearly head on, each being a little to the port side of the other, was held, on conflicting evidence, to have been due solely to the fault of the lighter in crossing the signal of the ferryboat

to pass port to port, and attempting to pass to starboard of the ferryboat in violation of rules 1 and 3 of article 18 of the inland navigation rules.

In *The San Rafael*, (1905) 141 Fed. 270, 72 C. C. A. 388, *reversing* (1904) 134 Fed. 749, two meeting ferry steamers were both held in fault for a collision in the bay of San Francisco; one on the ground that she gave a passing signal which required the vessels to cross each other's course in a fog so dense that they could not see each other, and the other for assenting to such signal and attempting to carry it into effect.

A collision between the steamship *Dolphin*, which was passing up East river, within 250 or 300 feet of the Brooklyn docks, and the ferryboat *New York*, crossing to Brooklyn, but at the time headed nearly downstream, was held to be due to the fault of both vessels; the *Dolphin* being in fault for being so near the shore in violation of the harbor rules, which required her to keep as nearly as possible in the middle of the river, and for not stopping and reversing after her third signal of a single whistle was crossed, the *New York* then being on her port bow, and only about six hundred feet distant, instead of which she assented to such signal and turned to port; the *New York* being in fault for not having a proper lookout, for failing to hear or answer the first two signals from the *Dolphin*, and for then crossing the signal, and further confusing the signals by following with a single whistle when the vessels were near together. *Brooklyn Ferry Co. v. U. S.*, (1903) 122 Fed. 696.

Unencumbered vessel approaching tow.—An unencumbered vessel approaching a tug with tow should keep out of the way. *The Jamestown*, (1902) 114 Fed. 593.

While it is the duty of a steamer having full control of her own movements to keep out of the way of a tug encumbered with tows, she is not bound to anticipate negligent manœuvres on the part of the tug or a violation of the rules of navigation. *The Alabama*, (C. C. A. 1903) 126 Fed. 332, *modifying* (1902) 114 Fed. 214.

Failure to carry out passing agreement.—In the following cases vessels were held to be in fault for failure to carry out a passing agreement: *The Dauntless*, (1902) 116 Fed. 543; *The Electra*, (1905) 139 Fed. 858; *The Lowell M. Palmer*, (C. C. A. 1905) 142 Fed. 937; *The Werdenfels*, (1907) 150 Fed. 400; *The Sinaloa*, (1909) 173 Fed. 687; *The Wm. H. Taylor*, (1910) 174 Fed. 727, *affirmed* (C. C. A. 1911) 186 Fed. 155; *The Edna V. Crew*, (1910) 182 Fed. 890.

Steamer at rest—tug passing.—In *The John F. Gaynor*, (1902) 115 Fed. 382, it appeared that an incoming steamship in charge of a licensed pilot stopped off the quarantine station in the Delaware river in the usual place, which was near the western side of the channel, to undergo the customary medical inspection. She did not anchor, and it was not customary to do so. While so lying, with the quarantine flag up, and while the examination was being made, a tug came down the river with two heavily laden scows without

rudders in tow on a line some 1,400 to 1,600 feet long. Each vessel saw the other when a mile distant, and the tug understood the position of the steamship and the purpose for which she had stopped. The tug was properly on the westerly side of the channel, but there was ample room for her to pass to the eastward of the steamship, so as to avoid any danger of collision. She passed so close, however, that both of the scows sheered, and struck the steamship, which had not moved, and injured her. It was held that the tug was solely in fault for the collision in failing to keep at a safe distance in passing.

Conditions justifying passing starboard to starboard.—The passing of two tugs with large tows on hawsers starboard to starboard when meeting in the Hudson river below Poughkeepsie bridge, was held not to be a violation of this rule, it being shown that such had been the custom since the bridge was built, and was necessary to enable the up-bound tow to properly approach the bridge to pass through the centre span safely. *The Cornell*, (1905) 134 Fed. 694.

A tug proceeding up Puget sound with a large ship in tow on a line six hundred feet long, having on her starboard, and within a mile, a shore toward which the tide was setting, and along which there were shoals, was not guilty of a violation of the navigation rules in signaling her intention of passing a meeting steamer starboard to starboard where the shore on that side was four or five miles distant, and where the signal was given and assented to when the approaching steamer was a mile distant, coming nearly head on. In such case there was no danger of collision if both vessels promptly complied with the signals agreed on, and the course of the tug was justified by the greater safety to her tow, and did not cast upon her the burden of proof to avoid liability for a following collision between the steamer and the tow. *The Lakme*, (1902) 118 Fed. 972, 55 C. C. A. 466.

Violating passing agreement not to be anticipated.—*The Lowell M. Palmer*, (C. C. A. 1905) 142 Fed. 937.

Rule applied.—In the following cases the vessels were held to be in fault for violation of this rule: *The Peconic*, (1903) 124 Fed. 848; *The Edgar F. Luckenbach*, (1903) 124 Fed. 947; *The Richmond*, (1903) 124 Fed. 993; *The Trader*, (1904) 129 Fed. 462; *The Three Brothers*, (1905) 136 Fed. 479; *The C. R. Hoyt*, (1905) 136 Fed. 671; *The Northman*, (1905) 139 Fed. 692; *The Tug No. 32*, (1905) 140 Fed. 87, *affirmed* (C. C. A. 1906) 146 Fed. 1023; *The W. N. Bavier*, (1907) 153 Fed. 970, 83 C. C. A. 12; *The Phonix*, (1907) 154 Fed. 474, 83 C. C. A. 332; *The Gerry*, (1908) 161 Fed. 413; *The Maine*, (1909) 170 Fed. 915, 96 C. C. A. 131, *reversing* (1907) 153 Fed. 635; *The Volund*, (C. C. A. 1910) 181 Fed. 643, 183 Fed. 413; *The Aker*, (1910) 182 Fed. 719.

Vessel turning point—time for passing signal.—Where one of the approaching vessels is coming around a bend a signal should not be given by the other vessel until the course of the approaching vessel has been ascertained. *The Trader*, (1904) 129 Fed. 462.

Vol. II, p. 179, rule III.

Changing signal.—In *The Valley Forge*, (1903) 124 Fed. 192, 59 C. C. A. 608, *affirmed* (1901) 107 Fed. 999, the evidence was held to sustain a finding of the trial court that a tug which was passing up the Delaware river in the evening, with three tows abreast, was solely in fault for a collision with a steamship passing down, on the ground that after an exchange of proper signals for passing to the starboard she suddenly changed her signal and course, and attempted to pass on the starboard side of the steamship, when the vessels were so near together that the latter could not avoid the collision, although she did all that was possible to that end by at once giving alarm signals and reversing.

Confusion of signals.—Where both vessels are in fault in confusing signals both are liable for half of the costs and damages. In *re Brooklyn Ferry Co.*, (1902) 115 Fed. 564, *affirmed* (1903) 121 Fed. 741, 58 C. C. A. 23.

Steam vessels meeting in fog.—In *The*

Celtic Monarch, (1910) 175 Fed. 1006, a tug with a tow and a meeting steamer were both held in fault for a collision between them in a dense fog, for failing to reduce speed and sound alarm signals when they were aware that they were approaching each other, but neither could make out the other or her course because of the fog.

Rule applied.—In the following cases vessels were held to be in fault for violation of the rule: *The Joseph M. Clark*, (1902) 119 Fed. 459; *The Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86; *The Glenogle*, (1903) 122 Fed. 503; *The Kaga Maru*, (1903) 123 Fed. 139; *The Trader*, (1904) 129 Fed. 462; *The Georgetown*, (1905) 135 Fed. 854; *Gring v. Boyer*, (1907) 157 Fed. 220, 84 C. C. A. 668, *reversing* (1904) 130 Fed. 989; *The Robert Dollar*, (C. C. A. 1907) 160 Fed. 876; *The Volund*, (C. C. A. 1910) 181 Fed. 643. See *The Winnie*, (C. C. A. 1908) 161 Fed. 101.

Vol. II, p. 179, rule V.

For a case applying this rule, see *The Transfer No. 18*, (C. C. A. 1911) 188 Fed. 210.

Vol. II, p. 179, rule VIII.

Violation of rule.—In *The North Star*, (1904) 132 Fed. 145, it appeared that the steamship *North Star*, 320 feet long, with 46 feet beam and of 3,169 gross tons, overtook and tried to pass the steam yacht *Nourmahal*, 247 feet long, 30 feet beam, and 768 tonnage, in Swash channel, in rather shallow water. She was going with the tide, and at a speed of about seventeen miles through the water. She came up without any signal of her intention to pass as required by this rule, and within about 100 feet to the starboard of the yacht. When partly past, the yacht left her course, and although her helm was put to starboard, and then hard astarboard, her stem came into collision with the port side of

the steamship. It was held that the collision must be attributed to the suction of the larger vessel, and that she was solely in fault, for violation of the rules.

For other cases in which vessels were held to be in fault for violating this rule see *Gring v. Boyer*, (1907) 157 Fed. 220, 84 C. C. A. 668, *reversing* (1904) 130 Fed. 989; *The M. E. Luckenbach*, (1908) 163 Fed. 755.

Rule not designed for narrow waters only.—This rule is not designed for narrow waters only, but is applicable to any waters where an attempt to pass would involve danger of collision. *The M. E. Luckenbach*, (1908) 163 Fed. 755.

Vol. II, p. 179, rule IX.

Violation of rule not proximate cause of collision.—Where two tugs with tows established a passing agreement in a fog in violation of rule 9 and would have passed in safety but for the fact that the helmsman on one of the barges turned the wheel in the wrong direction, causing it to break away and collide

with a barge of the passing tow, it was held that the violation of rule 9 was not the proximate cause of the collision and that the tugs were not in fault. *The John A. Hughes*, (C. C. A. 1911) 184 Fed. 308, *reversing* (1907) 156 Fed. 879.

Vol. II, p. 180, art. 19.

Rule applied.—A tug on the way from a pier in North river to New Jersey in the evening, with four coal barges in tow on one side and two on the other, was held to be in fault for a collision between another tug on a crossing course and the starboard barge, on the ground that, having the other tug on her right hand, it was her duty to keep out of the way, whereas she allowed herself to drift with the tide across the other's course.

Neither the failure of the other tug to see the lights of the tow, nor of the barge to carry proper lights, was a fault contributing to the collision, since it was the duty of such other tug to keep her course and speed, which she did until in *extremis*. *The Virginia Jackson*, (1904) 130 Fed. 221.

In *The Scandinavia*, (C. C. A. 1907) 158 Fed. 96, it appeared that the steam vessel *New Brunswick* left a slip in Jersey City in

the evening, and proceeded up the river about 500 feet from the New Jersey shore, the river being there 4,000 feet wide. Two minutes later the ferryboat Scandinavia left her slip on the New York side about opposite that of the New Brunswick, and proceeded up and diagonally across the river toward the Hoboken ferry, and when near such ferry the vessels came into collision. It was held that the Scandinavia, starting so near the time of the New Brunswick, and being the faster, was not an overtaking vessel, but that the starboard hand rule governing crossing vessels applied, and required the New Brunswick to keep out of the way and avoid passing ahead of the Scandinavia, and that her failure to observe such rule on proper signal from the Scandinavia rendered her in fault for the collision.

In *The Transfer No. 15*, (C. C. A. 1906) 145 Fed. 503, a tug was held to be solely in fault for a collision between her tow, a car float on her starboard side, and a steamship, where the two approached each other on crossing courses, and the tug, having the steamship on her starboard hand, persisted in crossing ahead without having obtained the consent of the other vessel.

In *Foster v. Merchants', etc., Transp. Co.*, (1905) 134 Fed. 964, it appeared that a tug picked up two barges which had gone adrift in Norfolk harbor in the night, and while taking them back to the docks, having one on each side, one of them came into collision with a ferryboat making its regular trip on a crossing course. The tug had the ferryboat on her starboard hand, and was therefore bound to keep out of the way, but did not change her course or speed, nor did she maintain a lookout or carry proper towing lights, and her side lights were obstructed by the barges, which did not carry side lights, and probably none at all. It was held that such violation of the rules and negligent navigation by the tug, and the absence of the lights required by the inspector's rules from the barges, placed them in fault for the collision, and rendered them solely liable for the damage, in the absence of clear proof of contributory fault on the part of the ferryboat.

Where a steam tug and a steam canal boat approached each other, and the canal boat showed her red light to the tug, which showed her green light to the canal boat, but the tug did nothing to avoid collision, expecting that the canal boat would starboard and pass between the tug and another tug coming down the river, and a collision was caused apparently by the two tugs starboarding their helms and working about 500 feet off in the river, which was not justified by any signals, the canal boat having signaled that she intended to cross the bows of the tugs, as it was her duty to do, it being the duty of the tug to give way in compliance with the starboard hand rule, it was held that the tug was liable for the collision. *The New York Central No. 2*, (1904) 132 Fed. 167. For other cases applying this rule see *The Ocean*, (1902) 115 Fed. 229; *The Joseph M. Clark*, (1902) 119 Fed. 459; *The Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86; *The*

C. J. Reno, (1903) 121 Fed. 149; *The Kaga Maru*, (1903) 123 Fed. 139; *The New Hampshire*, (1905) 136 Fed. 769, 69 C. C. A. 415; *The Cygnus*, (1905) 142 Fed. 85, 73 C. C. A. 309; *The John C. McCullough*, (C. C. A. 1906) 145 Fed. 501; *The C. C. Clarke*, (1906) 146 Fed. 615; *The John Fleming*, (1906) 149 Fed. 904, *affirmed* (C. C. A. 1908) 162 Fed. 1006; *The Pocomoke*, (1906) 150 Fed. 193; *The Bee*, (1909) 173 Fed. 925; *The Kennebec*, (1910) 180 Fed. 914; *The Reliable*, (C. C. A. 1910) 183 Fed. 116, *reversing* (1909) 167 Fed. 571.

Waiver of privilege.—A crossing vessel privileged under the starboard hand rule waives her privilege by assenting to the crossing of the other vessel across her bows. *The Albatross*, (1910) 184 Fed. 363.

Necessity for answering signals for different course.—In *The Montauk*, (1910) 180 Fed. 697, 103 C. C. A. 663, it appeared that the ferryboat Montauk, on her way across the East river to her Brooklyn slip, came into collision with *Transfer Tug 18*, which was coming up with a car float on each side. The Montauk three times blew signals of two whistles, which were not answered. The tug kept her course until immediately before collision, when she changed slightly to port, and the Montauk kept her course. Before collision both vessels reversed full speed astern. It was held that the Montauk was clearly in fault for violation of inspectors' rule 2, which required her, having the tug on her starboard side, to keep out of the way, and for persisting in crossing the bows of the tug without agreement and when manifestly dangerous; that the tug was not in fault, inland rules (Act June 7, 1897, c. 4, art. 21, 30 Stat. 101, 2 Fed. Stat. Annot. 180) requiring her to keep her course and speed, and neither such rules nor the inspectors' rules requiring her to answer the Montauk's signals if she did not assent thereto.

Change by agreement—failure to comply.—A collision in lower New York bay at the lower junction of the swash channel with the main channel, between a steamship and a barge in tow, both passing out, was held to be due solely to the fault of the steamship, in that, after assenting by signal to the passing of the tug and tow across her bows, the wheelsman, instead of starboarding the helm as directed by the pilot, ported it, turning the vessel toward the tow and making it impossible for her to recover and pass under its stern. *The Albatross*, (1910) 184 Fed. 363.

Where a ferryboat, which had stopped and reversed when her second signal of one whistle to a tug on her starboard hand, on a crossing course, was unanswered, afterward received an assenting and then a cross signal from the tug, and assented to the latter, but continued to go backward under reversed engines while the tug was attempting to pass astern of her in accordance with the agreement, she was in fault for the resulting collision, although her navigation up to that time had been careful, and the initial fault was that of the tug in confusing the signals. *In re Brooklyn Ferry Co.*, (1903) 121 Fed. 741, 58 C. C. A. 23, *affirming* (1902) 115 Fed. 564.

Rule superseded by agreement.—In *The Edwin J. Berwind*, (C. C. A. 1906) 144 Fed. 664, a tug passing up North river in the daytime near the New York piers was held solely in fault for a collision with a ferryboat crossing from Hoboken to her New York slip, on evidence that the rule which made the ferryboat the burdened vessel had been superseded by an agreement by signal, initiated by the tug, by which she was to pass under the ferryboat's stern, and which justified the latter in keeping her course and speed.

When rule not applicable.—The starboard hand rule does not apply to a vessel, although having another on her starboard side, where the latter has no definite course. *The Tugboat No. 6*, (1906) 148 Fed. 1007.

Both vessels in fault.—In *The Reliable*, (1909) 167 Fed. 571, it appeared that a collision occurred in the North river, near the ends of the New Jersey piers, between the tug *Reliable*, going up with a tow, and a tow on the side of the tug *Gladwish*, which had just come out of a slip and had given a signal of two whistles, indicating a desire to cross ahead. Instead of going straight ahead, however, she turned up the river, and the *Reliable*, turning toward the shore at the same time to pass under her stern, ran into her tow. The *Reliable* had also given a signal of one whistle, but did not insist on her right to cross ahead, as she should have done. It was held that both tugs were in fault and equally liable for the injury to the tow.

Narrow and winding channels.—The starboard hand rule for vessels on crossing courses has its usual application upon the

open sea or upon a comparatively broad expanse of water, where each vessel is free to manœuvre, and ordinarily cannot be applied to vessels in a narrow and winding channel. *The Captain Bennett*, (1909) 171 Fed. 199.

Duty of privileged vessel.—The privileged one of two crossing steam vessels has a right to rely on the performance by the other of her duty to keep out of the way so long as it is possible for her to do so, at least in the absence of some distinct indication that she is about to fail in such duty; and, so long as such right continues, it is the duty of the privileged vessel to maintain her course and speed, unless in *extremis*. *The Chicago*, (1903) 125 Fed. 712, 60 C. C. A. 480, *reversed* (1900) 102 Fed. 991.

Duty of privileged vessel when changing course.—In *Shortland Bros. Co. v. New York*, (1903) 129 Fed. 973, *affirming* (C. C. A. (1904) 130 Fed. 1021, it appeared that as the tug *Watt* was coming up East river on a flood tide a short distance from the end of the piers on her starboard hand, the *Boody* came out of her slip, but, instead of keeping her course and speed and crossing ahead of the *Watt* in accordance with the ordinary rule, she signaled her intention of passing on the *Watt's* starboard side, but came out at such fast speed that, before she could execute the manœuvre, she was in the course of the tug, and a collision resulted. It was held that if she undertook to change the ordinary course which she was expected to take, it was her duty to navigate cautiously, and that she was solely in fault for the collision.

Vol. II, p. 180, art. 20.

Effect of sudden change of course by sailing vessel.—In *The Pilot Boy*, (C. C. A. 1902) 115 Fed. 873, it appeared that a collision occurred in the night between a steamer and schooner, which met in the narrow channel of a river. The steamer had no lookout, except the pilot, who was acting as helmsman, and was a competent and experienced navigator in those waters. He saw the lights of the schooner when a mile or more distant, and from that time kept close watch of her. According to his testimony, which was corroborated, without conflict, by a number of other persons on the steamer, some of whom were disinterested, when he approached nearer he gave a signal of one whistle, slowed down, and took the starboard side of the channel; the schooner then showing her red light. The signal was afterwards repeated. On coming near the schooner, her red light disappeared, on which he at once reversed. Shortly after, the schooner's green light was shown, and the collision followed almost immediately. This testimony was not effectively contradicted by the witnesses for the schooner. It was held that, upon such facts, the steamer was not chargeable with fault, but that the collision must be attributed to a change of course by the schooner.

Negligence of sailing vessel.—In *The W. S. Tompkins*, (1902) 116 Fed. 59, it ap-

peared that a steam ferryboat, crossing East river, stopped and headed up stream to allow the passage of three schooners which were coming down the river nearly abreast. When about 150 feet distant the outer one of the schooners sheered, and came into collision with the steamer. After the sheer the steamer backed, but was unable to avoid the collision. It was held upon the evidence that the fault was solely that of the schooner, which had been left ample room to pass, but which sheered through negligent navigation, and when so close that the steamer could not have prevented the collision.

Tow and sailing vessel crossing.—In *The Anna W.*, (1910) 121 Fed. 604, a collision between a schooner passing up the main ship channel into lower New York bay, at night, before the wind, but against an ebb tide, at a speed of not more than one and one-half knots, and the tow of a meeting tug on a hawser 1,200 feet long, was held to have been due solely to the fault of the tug in failing to keep further toward the west side of the channel in view of her duty as the burden vessel to keep out of the way and because of the length of her hawser, which by the set of the tide would cause her tow to sag to the eastward of her own course.

In *The John Fleming*, (1905) 136 Fed. 486, a tug returning from the dumping grounds

with two scows in tow on a line, the whole 1,400 feet in length, was held solely in fault for a collision in New York bay between the rear scow and a schooner beating her way in, for failure to exercise the care required, because of the length of the tow, to keep out of the schooner's way; the schooner having properly held her course until danger of collision became imminent.

Sailing vessel becalmed.—A transfer tug, with a car float on each side, which was lying with her engines still off Ward's Island, to permit a schooner coming through Hell Gate to pass, was held in fault for a collision between such schooner and one of the floats, where, although she was rightfully on that side of the channel, and stopped in due time, the schooner was becalmed and helpless, owing to the dying out of the wind, and drifted for a considerable time before striking the float, giving the tug, which saw her condition, time to have moved out of her way. *The Transfer No. 11*, (1904) 130 Fed. 1019.

Sailing vessel at anchor.—Where a collision occurs between a bark lying at anchor and a steamship, it will be presumed that the collision resulted from the fault of the steamship, and such presumption of innocence in favor of the bark can only be overcome by a clear proof of a contributory fault. *The Banan*, (1902) 116 Fed. 900.

Burden of proof.—In case of a collision between a steamer and a schooner, the steamer is presumptively in fault, it being her duty, under the rules, to keep out of the way; and the burden rests upon her, in order to avoid liability, to show that she took the proper precautions, and that they would have proved effective if the schooner had not changed her

course. *The Pilot Boy*, (C. C. A. 1902) 115 Fed. 873.

Rule applied.—In *The Anson M. Bangs*, (C. C. A. 1904) 129 Fed. 103, a tug was held solely in fault for a collision with a schooner on a crossing course for persisting in her course, on the theory that the schooner would not run out her tack which she was privileged to do, with the duty resting on the tug to keep out of her way.

In *The Alene*, (1902) 116 Fed. 57, it appeared that the captain of a steamship ordered her helm hard astarboard for the purpose of passing under the stern of a schooner, which was then, as he testified, three and one-half points on his port bow, and about 3,000 feet distant, on a course crossing that of the steamship at an oblique angle. The steamer then proceeded on a course which would have taken her under the stern of the schooner if the starboard helm had been continued, but for some reason unexplained, apparently through the fault of the helmsman, the course to port was not continued, and when near the schooner the steamship bore directly down on her, sinking her, and drowning a number of her crew. It was held that the steamship was solely in fault, the schooner having no time after the danger became apparent to take any effective measures to avoid the collision.

For other cases applying this rule see *The Triton*, (C. C. A. 1902) 118 Fed. 329; *The Massassagua*, (1903) 124 Fed. 97; *The Dauntless*, (1908) 163 Fed. 431; *The Charles G. Endicott*, (1908) 163 Fed. 797; *The Bulgaria*, (1909) 168 Fed. 457; *The Nanuet*, (1910) 176 Fed. 123; *The Lauretta Speddin*, (C. C. A. 1910) 184 Fed. 283.

Vol. II, p. 180, art. 21.

Change of course by privileged vessel.—In *The Susquehanna*, (1905) 134 Fed. 641, it appeared that the steamship *Nacoochee* and the ferryboats *Princeton* and *Susquehanna* were all passing down the North river in the daytime, on intersecting courses, the *Nacoochee* in the centre and the *Susquehanna* on the west, thus being the privileged vessel. By agreement, understood by all, the *Princeton* crossed ahead of the *Nacoochee*; but, having no agreement with the *Susquehanna*, ported to pass under her stern, when the latter swung to port to pass under the stern of the *Nacoochee*, in accordance with an agreement between them not known to the *Princeton*. This movement was not made until the *Princeton* was within 400 or 500 feet, and to avoid collision she went astern, and was struck by the *Nacoochee*. It was held that the *Susquehanna* was in fault for changing her course in violation of the starboard hand rule without agreement with or notice to the *Princeton*, and that such fault was the proximate cause of the collision, the *Princeton* having no other course open to her after the movement was made than to back as she did; that the *Princeton* was not in fault, such as to relieve the *Susquehanna* from full liability, her fault, if any, in failing to avoid

the *Nacoochee* having been committed when *in extremis*, through the prior fault of the *Susquehanna*.

A collision occurred in New York bay between the steamship *Buena Ventura*, coming up the channel from the sea, and a barge on the side of the tug *Mercedes*, which was on a crossing course, going toward the Brooklyn shore. It was held under the evidence that the tug gave timely and proper signal of her intention to cross under the stern of the steamship, as required by articles 19 and 22 of the inland rules, and followed the same by reducing speed, and changing her course to starboard for that purpose; that the steamship, after answering the signal, instead of keeping her course and speed, as required by article 21, changed her course, or sheered to port, striking and sinking the barge, and that she was solely in fault for the collision. *The Buena Ventura*, (1902) 117 Fed. 988.

A steamship navigating San Francisco bay on a bright moonlight night, after exchanging crossing signals of one whistle with a tug with a tow approaching her course ahead from her port side, being the privileged vessel under article 19 of the Inland Navigation Rules, was required by article 21 to keep her course and speed, and where she continued

porting her helm, and although her master was watching the tug and knew that it did not port in compliance with the signal, and was uncertain as to its intended course, failed to slow down and signal such fact as required by rule 3 of the Pilot Rules, she was chargeable with contributory fault for a collision with the tow, although the initial fault was that of the tug. *The Robert Dollar*, (C. C. A. 1907) 160 Fed. 876.

In *The Steinway*, (1905) 135 Fed. 344, 68 C. C. A. 14, *affirming* (1904) 130 Fed. 397, a steamboat proceeding through Hell Gate toward New York was held to have been solely in fault for a collision with a ferryboat which had just left her slip at Astoria, on the ground that she was proceeding too close inshore as she rounded Hallett's Point, and also for not keeping her course under the starboard hand rule, although the ferryboat gave the proper signal, and her course indicated that she intended to pass under the steamer's stern, as required by the rule.

In *The N. & W. 2*, (1903) 122 Fed. 171, it appeared that a tug was coming down East river light, with a strong ebb tide, at a high speed, probably exceeding twelve miles an hour over the land, as the ferryboat Vermont was starting across from Brooklyn. The Vermont signaled her intention of crossing ahead as the tug was some distance up the river, but, receiving no answer, she stopped, the tug being the privileged vessel. The tug was on a course which would have taken her from 100 to 200 feet to the westward of the Vermont, but, after overtaking and passing two other vessels, she changed her course several points to port, and almost at once came into collision with the Vermont. It was held that the tug was in fault for the collision because of her change of course; that the Vermont was not chargeable with contributory fault either because her lookout was not properly attending to his duties or because she did not stop sooner or reverse, since she stopped well off the tug's course, which was all that could be required of her.

For other cases applying this rule see *The Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86; *The John Fleming*, (1905) 136 Fed. 917, *affirmed* (C. C. A. 1906) 145 Fed. 1022; *The Cygnus*, (C. C. A. 1905) 142 Fed. 86; *The Umbria*, (1907) 153 Fed. 851, 83 C. C. A. 33, *affirming* (1906) 148 Fed. 283; *The John H. Starin*, (C. C. A. 1908) 162 Fed. 146, *affirming* (1906) 145 Fed. 723; *The Edda*, (1909) 173 Fed. 436, 97 C. C. A. 638; *The Columbia*, (1909) 174 Fed. 203; *The Transfer No. 10*, (C. C. A. 1911) 184 Fed. 451.

Contributory fault of privileged vessel must be clearly shown.—A collision occurred at

night, on the Hudson river, about two hundred feet off the New York piers, between the steamship *Augusta*, passing up from the sea, and the ferryboat *Chicago*, crossing from Jersey City. The *Chicago* was clearly and grossly in fault, for failing to see the *Augusta* until the latter was within five hundred feet of the point of collision, and for then attempting to cross ahead in violation of the rules, when she might have kept out of the way by starboarding and reversing. It was held that under the settled rule that in such cases contributory fault on the part of the privileged vessel must be clearly shown, the *Augusta* could not be held in fault for going at a speed of eight miles an hour, which she kept until within five hundred feet of the point of collision, when she stopped her engines, it being her duty, as the privileged vessel, to maintain her speed; nor for not reversing until immediately before collision, which, if an error, was one in *extremis*; nor because of her nearness to the piers, which did not prevent the *Chicago* from keeping out of the way, nor in any way contribute to the collision. *The Chicago*, (C. C. A. 1903) 125 Fed. 712.

Tug stopping to let out hawsers.—In *The Mary E. Morse*, (1908) 179 Fed. 945, it appeared that a tug with a number of tows on hawsers, the total length of the tow being over 2,000 feet, which, while passing down Hampton Roads in the daytime and while an overtaking schooner was approaching the rear barge of the tow on an oblique course, slowed down to half her speed and signaled the tows to let out their hawsers to double their former length, was solely in fault for a collision between the schooner and barge, where the schooner was carefully and properly navigated, and would have passed under the stern of the barge if the latter had maintained her speed, as required by article 21.

Failure of burdened vessel to answer signals.—The privileged one of two crossing steam vessels has a right to rely on the performance by the other of her duty to keep out of the way so long as it is possible for her to do so, and such privileged vessel is not in fault for a collision caused by a failure in such duty, merely because she kept her course and speed notwithstanding the failure of the burdened vessel to answer her signals. *The Deveaux Powell*, (1908) 165 Fed. 634, 92 C. C. A. 54, *reversing* (1903) 120 Fed. 522.

Different agreement by signal.—A vessel which assents by signal that another shall cross her bows cannot urge the attempted manœuvre as a fault, though it results in a collision. *The Arthur M. Palmer*, (1902) 115 Fed. 417.

Vol. II, p. 180, art. 22.

Rule applied.—In *The Marie Palmer*, (1907) 155 Fed. 894, a tug with a schooner in tow on a hawser was held, on the evidence, solely in fault for a collision between her tow and a meeting schooner in Delaware bay at night, on the ground that she held her course directly toward the meeting schooner, until they were so close that there was danger of

collision, and then attempted to cross the schooner's bows with her tow.

For other cases applying this rule see *The Ocean*, (1902) 115 Fed. 229; *The Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86; *The Rebecca*, (C. C. A. 1903) 122 Fed. 619; *The Pocumoke*, (1906) 150 Fed. 193.

Vol. II, p. 180, art. 23.

Duty imperative.—It is the duty of the navigator of a steamer approaching a sailing vessel on a crossing course, under articles 20-23, to act in time to avoid risk of collision, and he has no right to keep his course and speed on the assumption, or in the expectation, that the sailing vessel will change her tack; and the presence of a passing steamer, instead of furnishing an excuse for

violating the rules, renders their observance and the exercise of precautionary care all the more necessary. *Donald v. Guy*, (1905) 135 Fed. 429.

For other cases applying this rule, see *The Ocean*, (1902) 115 Fed. 229; *The Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86; *The Pocumoke*, (1906) 150 Fed. 193.

Vol. II, p. 180, art. 24.

Construction of rule.—This rule requires the overtaking vessel in a stream to give the one ahead such wide berth as to avoid any contingency that might arise from the effect or condition of the currents. *The Ruth*, (1910) 178 Fed. 749.

Overtaking vessel.—A schooner, which ran into the hawser of a tow in Chesapeake bay at night and cut three barges adrift, was held under the evidence an overtaking vessel, bound to keep out of the way and in fault, and liable for the salvage awards and costs paid by the owners of the barges to a rescuing tug. *The Charles C. Lister*, (C. C. A. 1910) 182 Fed. 988.

"Finally past and clear."—Where a schooner, which had left Norfolk and was beating down the channel against a head wind, when she was overtaken and passed by a tug and tows which left Norfolk later, was on the starboard tack, moving toward Old Point Comfort and away from the tug and tows, the latter were "finally past and clear," within the meaning of article 24; and when the schooner came about on the port tack, heading toward the tug and tows, and being more than two points abaft their beam, an entirely new risk of collision arose, as to which she was the overtaking vessel, and bound under such rule to keep out of the way, while the tug and tows were required by article 21 to keep their course and speed. *The Mary E. Morse*, (1908) 179 Fed. 945.

Danger from suction.—In *The Lehigh*, (1910) 180 Fed. 906, it appeared that as the steamship *Denver* was passing through the main ship channel from New York bay to the sea at a speed of twelve and one-half knots or more she slowly overtook the tug *Lehigh*, which was on an almost parallel course and 150 feet on her port side. The tug slowed down intending to pass to the westward under the stern of the *Denver*, when she took a sudden sheer to starboard and struck the steamship about forty feet from the stern. The wheelman of the tug testified that the wheel was not ported. It was held, on the evidence, that the collision was caused by the suction of the *Denver*, and that she was in fault for not appreciating the danger and taking precautions to obviate it by reducing speed or keeping at a greater distance; and that the tug was also in fault for reducing speed which rendered her more subject to the force.

While passing up the Delaware river in the daytime, the steamship *Sif* overtook and attempted to pass the steamship *Murcia* on the latter's port side. After she had passed

about half her length, the *Murcia* began to swing towards her, and, although the engine was stopped and then reversed, and the helm ported, continued to swing until with a sudden plunge her bow struck the *Sif* about one hundred feet forward of her stern. The course of the *Murcia* was not changed until after she commenced to swing. It was held that she was not in fault, and that the fault was solely that of the *Sif* in passing so close that her suction caused the collision; the evidence tending to show that when the vessels began to converge the distance between them was not more than one hundred feet. *The Sif*, (1910) 181 Fed. 412.

Burden of proof.—The burden is on the overtaking vessel to show not only the prudence of her own conduct, but the negligence of the other vessel. *The M. E. Luckenbach*, (1908) 163 Fed. 755; *The Sif*, (1910) 181 Fed. 412.

Change of course by overtaken vessel in violation of agreement.—In *The Wyoming*, (1905) 145 Fed. 735, *affirmed* (C. C. A. 1907) 151 Fed. 1023, it appeared that a collision occurred in the East river between a ferryboat which was proceeding down the river on her trip from Brooklyn to her slip below on the Manhattan side and an overtaking tug which was passing down the river. It was agreed by signal that the tug should pass to the right, and when she was abreast of the ferryboat one of the vessels sheered and the collision occurred. It was held on conflicting evidence that the place of collision was only a short distance above the ferryboat's slip, and that the collision occurred by reason of her changing her course in order to make her slip in violation of the passing agreement.

Fault as cause of collision.—A collision between two steamers passing down the Willamette river from Portland, which occurred when the overtaking vessel was attempting to pass the one ahead, was held to have been due solely to the fault of the overtaking vessel under the rules which required her to keep out of the way of the other and placed on her the burden of proof, it being shown by the evidence that, although there was ample room to pass, she crowded against the overtaken vessel, and then throwing over her wheel turned the overtaken vessel completely around, breaking her shaft and doing her serious injury. *The Charles R. Spencer*, (1910) 178 Fed. 862.

Wilful obstruction of following vessel.—Where the forward of two vessels pursuing

the same course, and therefore having the right of way, is wilfully thrown in the way of the other, she cannot recover for a collision ensuing, although the rear vessel be not without fault. *Gaffner v. Pigott*, (C. C. A. 1902) 116 Fed. 486.

Duty to give warning signals.—It is the duty of an overtaking vessel to see to it that she does not come so near the overtaken vessel as to cause danger of collision; and, if she does come within the line of danger, it is her duty to warn the other vessel by signals, whether she intends to pass or not. Thus in *The Fleetwing*, (1902) 114 Fed. 409, it was held that a steamship which overtook, ran down, and sank a small tug in the Schuylkill river in the daytime, and without giving any signal of her approach, was in fault, and was liable for the damages, in the absence of evidence clearly showing that the collision was caused by some fault of the tug.

Overtaken vessel going astern.—A steam vessel coming up with another from a direction more than two points abaft her beam does not cease to be an overtaking vessel, required by article 24 to keep out of the way, because of the fact that the overtaken vessel is at the time going astern. *The Sicilian Prince*, (1904) 128 Fed. 133.

Overtaken vessel drifting backward in rapids.—In *The Ruth*, (1910) 178 Fed. 749, *affirmed* (C. C. A. 1911) 186 Fed. 87, it appeared that the steamer *Ruth* was following the steamer *Oregona* up the Willamette river, and was close behind when the *Oregona* reached the Clackamas Rapids. The latter was unable to ascend the rapids by her own power, and, after going as near the head as possible, sent men ashore to make fast a steel line for the purpose of pulling her up the remaining distance by means of a capstan. She was unable to hold her position and began to drift down with the current, dragging the line, which libellant, one of her

crew, was directed to pull in and coil on the deck. As soon as she commenced to drift, she gave danger signals to the *Ruth*, which had entered the rapids, pushed against the bank, and was holding herself there by her wheel. The *Ruth* paid no attention to the signals, and her wheel picked up the line as the *Oregona* drifted by, and it caught libellant, severing both his feet. It was held that the *Ruth* was in fault and liable for the injury in failing as an overtaking vessel to drop down and keep out of the way when signaled; there being evident danger of some accident if she did not.

Tug overtaking tow.—In *The Captain Sam*, (1902) 115 Fed. 1000, it appeared that the tug *Captain Sam*, on a clear morning, took a large and heavily laden barge from her slip in Mobile, and started up the river against a strong wind and current. At the time she took the barge out, the tug *Hero* was further down stream, also coming up the river. Both tugs proceeded up stream, the *Hero* for some time gaining, until she had passed the barge, when she, in some manner, was struck by the barge and injured. The weight of evidence showed that the barge was following directly in the course of her tug on a line which had been run out to a length of about 250 feet, and that, after passing, the *Hero* went on a course diagonally crossing that of the tug and tow, although there was plenty of room in the channel to keep away. The *Hero* had no lookout, and did not see the barge until immediately before the collision. It was held that the *Captain Sam* was not in fault, but that the collision resulted from the fault of the *Hero*, whose duty it was to see and watch the tug and tow, and to keep out of their way.

Presumption that overtaking vessel in fault.—*The Sicilian Prince*, (1904) 128 Fed. 133.

Vol. II, p. 180, art. 25.

Rule not inflexible.—This is not an inflexible rule, but is only to be followed "when safe and practicable;" and, where it is manifest that an adherence to it will produce disaster, it is not only the right, but the duty, of the navigator to disregard it. *The Three Brothers*, (1909) 170 Fed. 48, 95 C. C. A. 322, *reversing* (1908) 162 Fed. 388.

Exception to rule.—In *The New Hampshire*, (C. C. A. 1905) 136 Fed. 769, it was held that a tug with two long car floats in tow alongside was not in fault for being on the east side of the channel in East river in passing up to make a landing on the Brooklyn side, where such position was necessary and customary to enable her to round to and land safely in the then state of the tide.

Violation of rule when application practicable.—A tug with a tow of fifteen boats, coming down the Hudson river, was held in fault for a collision which occurred opposite Yonkers and near the docks on the east side of the river in the evening between one of her tows and a tug passing up, for being on the wrong side of the channel, in violation

of article 25, it being shown by her own evidence that the evening was only slightly hazy, which made it safe and practicable for her to keep to the west side of mid-channel, and also that she was proceeding on a course angling across the river, so that her tow occupied a considerable part of the channel and unduly interfered with navigation of ascending vessels. *The Benjamin Franklin*, (C. C. A. 1906) 145 Fed. 13, *affirmed* (1903) 127 Fed. 457.

Collision due to other vessel's fault.—The fact alone that one of two vessels at the time of a collision was on the wrong side of a channel in violation of the narrow channel rule, will not constitute a contributory fault where the collision occurred in the daytime on a clear day through the direct fault in navigation of the other vessel with nothing to obstruct her actions. *The La Bretagne*, (1910) 179 Fed. 286, 102 C. C. A. 651, *reversing* (1906) 148 Fed. 477.

Effect of custom.—The violation of this rule cannot be justified upon the ground that it is customary for vessels to violate them

under certain tidal conditions. *The Transfer No. 10*, (1904) 137 Fed. 666.

Effect of state statute.—The state statute requiring vessels navigating the East river to keep near the middle of the river is not changed or superseded by this rule. *The Hartford*, (1903) 125 Fed. 559; *The Spartan Prince*, (1903) 126 Fed. 885.

Negligent navigation by fog.—A tug entering a harbor in the evening, with four barges in tow, took the left-hand side of the channel, and when opposite a pier detached the first barge, and allowed it to proceed by its momentum toward the shore, across the course of an outgoing steamer, with which it came into collision. The tug gave no signal prior to casting off the barge, but at about that time crossed the signal of one whistle from the approaching steamer. It was held that in attempting such manœuvre without a clear understanding with other vessels she was negligent and in fault for the collision. *The Alabama*, (C. C. A. 1903) 126 Fed. 332, *modifying* (1902) 114 Fed. 214.

Tug with tow navigating channel.—While a tug with a tow has the right of way over an unencumbered vessel, it has no right unduly or unnecessarily to obstruct the pathway of other vessels, and in navigating a channel known to be constantly used by other vessels it is its duty to take all proper and reasonable measures to have its tow under control, and to lessen the danger of collisions. *The Jamestown*, (1902) 114 Fed. 593.

The Hudson river, in the vicinity of Yonkers, where it has a single deep and straight channel for a number of miles, is a "narrow channel" within the meaning of article 25. *The Benjamin Franklin*, (C. C. A. 1906) 145 Fed. 13, *affirming* (1903) 127 Fed. 457.

North river—above Twenty-third street.—"Narrow channels," within the meaning of article 25 of the inland navigation rules, are bodies of water navigated up and down in opposite directions, and do not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. Tested by such rule, the Hudson river above Twenty-third street, New York, and within the city limits, is not a narrow channel. *The No. 4*, (C. C. A. 1908) 161 Fed. 847.

North river—below Twenty-third street.—So much of the North river as extends from Twenty-third street, New York, to the upper bay, along the shores of which on both sides there is a continuous succession of wharves and piers, and which is one of the most crowded parts of the port of New York, cannot be considered a narrow channel, within the meaning of article 25. *The Islander*, (1907) 152 Fed. 385, 81 C. C. A. 511. See also *The Scandania*, (1907) 158 Fed. 96, 85 C. C. A. 564.

Harlem river.—The narrow channel rule is generally applicable to the Harlem river; but when there is an ebb tide setting strongly against the Bronx shore at the bend below Kingsbridge, which makes it dangerous for a hawser tow going up to pass the bridge on that side, it is justifiable for such a tow, as is customary, to keep to the left-hand side of

the river. Nor is a tug required to employ a helper, or divide her tow in order to avoid doing so, which would obstruct and delay navigation and increase the danger of accidents. *The Three Brothers*, (1909) 170 Fed. 48, 95 C. C. A. 322, *reversing* (1908) 162 Fed. 388.

East river.—The narrow channel rule of article 25 does not apply to that part of East river between the Battery and Blackwell's island, which is governed by the local rule requiring vessels to keep in the centre of the channel. *The Bay State*, (1907) 153 Fed. 973.

Around the Battery.—The narrow channel rule is not strictly applicable to the passage around the Battery from the East to the North river, but still should be respected by boats passing around the Battery, especially from the North river, when they would otherwise interfere with vessels coming down the East river rightfully on the west side of the channel. *Pennsylvania R. Co. v. Magee*, (1910) 180 Fed. 277.

Upper New York bay.—While the narrow channel rule does not apply to upper New York bay, considered as a single body of water, it does apply to each of the well-recognized deep water channels which run in a generally parallel direction through the bay, including the main ship channel. *The La Bretagne*, (1910) 179 Fed. 286, 102 C. C. A. 651, *reversing* (1906) 148 Fed. 477, wherein the court, after citing other cases dealing with the waters of other parts of New York harbor, said: "Examination of these opinions will show that while holding that the rule does not apply to the waters of the upper bay or of the lower, considered each as a single body of water, it does apply to the well-recognized channels which are familiar to navigators in those bays. To the Swash, the Main Ship, the East, the Bay Ridge, and the Red Hook Channels we have already indicated that the rule applies. We see no reason for differentiating the main ship channel which runs from the mouths of the two rivers, between Governor's island on the east and Ellis and Liberty islands on the west, across the upper bay to the Narrows. It is a well-known channel, charted and buoyed, and a steam vessel navigating it should follow the rule which requires her 'when it is safe and practicable' to keep to that side of the fairway or mid-channel which lies on her starboard side. The circumstance that there is a great deal of cross travel in the upper bay itself does not seem a sufficient reason for abrogating the wholesome rule that vessels moving up or down some designated channel therein shall keep to the starboard side of it. Rule 25 is not to be construed as prohibiting vessels from crossing such channel at any convenient angle whenever the exigencies of their own navigation make it necessary or desirable for them to proceed from one to the other side of such channel; but when no such exigency exists they should keep to the proper side of the channel." To the same effect see *The Bee*, (C. C. A. 1905) 138 Fed. 303, *affirming* (1903) 127 Fed. 453.

In *The Alfred W. Booth*, (1903) 127 Fed. 453, *affirmed* (C. C. A. 1905) 138 Fed. 303, it was held that article 25 applied to navigation in the upper bay of New York, between Bay Ridge and Tompkinsville, where, owing to the anchorage grounds on either side, the fairway or channel between, safely navigable for tugs with tows, is only about half a mile wide; and that a tug with tows passing down on the left-hand side, when it was safe and practicable to keep to the other side, was in fault for a collision between one of her tows and that of an incoming tug, although her navigation was in other respects without fault.

Lower New York bay.—In *The Sea King*, (1902) 114 Fed. 535, 52 C. C. A. 349, it appeared that the tug *Sea King* was coming up the lower New York bay, having two barges in tow tandem, in all about twelve hundred feet long, when the second barge came in collision with the steamship *Buffalo*, outward bound, and was sunk. The collision occurred from 250 to 300 feet to the westward of the centre of the channel. After signals for passing port and port were exchanged between the *Buffalo* and the *Sea King*, the latter ported her helm two points, and continued on such course until she had passed, and then at once resumed her former course. It was held that the *Sea King* was in fault for failing to take proper measures to counteract the effect of the flood tide, which drifted her and her tow into the westward side of the channel, contrary to rule 25, and also in resuming her course before her tow had passed the *Buffalo*.

The Columbia river, in the vicinity of Westport light, is a narrow channel within this rule. *U. S. v. Portland*, (1908) 161 Fed. 193. Likewise that part of it near Rainier, Ore., is within the rule. *The Cascades*, (1910) 178 Fed. 726.

Applicable to channel 600 feet wide.—*The Aclia*, (1903) 120 Fed. 455, 56 C. C. A. 605, *affirming* (1901) 108 Fed. 975, cited in the original note.

Rule applied.—In *The Dauntless*, (1903) 121 Fed. 420, modified on other grounds in (C. C. A. 1904) 129 Fed. 716, it appeared that a steamer passing down a river met two steam launches made fast together. The steamer gave a signal of two whistles, and, receiving no answer, starboarded her helm, and turned toward the left-hand side of the channel, a collision occurring shortly afterward, in which both launches were sunk and the persons on board drowned. It was held that the steamer was in fault for failing to have a lookout, and for violation of article 25 of the inland navigation rules.

In *The Transfer No. 14*, (C. C. A. 1903) 127 Fed. 305, *reversing* (1902) 118 Fed. 81, a tug, with a car float on each side, passing up East river in the channel between New York and Blackwell's island, in the early morning, was held to have been in fault for a collision with a barge coming down in tow on a hawser, which occurred on the New York side of the channel, on the ground that she was on the wrong side of the channel, and was negligent in failing to give proper attention to the lights and signals of the ap-

proaching vessels, or promptly and decisively to change her course to starboard as soon as they were seen coming nearly head on.

In *The Mahanoy*, (1903) 126 Fed. 587, it appeared that a collision occurred in New York bay in the evening between the tug *Lewis Pulver*, which was going up the channel at a speed of ten miles, and the *Mahanoy*, which was going down, on the westerly side of the channel, at a speed of twelve miles. The *Pulver* was going up the easterly side, but in passing another vessel got a heading to the westward, and at the time of collision was near the east side of the anchorage grounds. She gave a signal of two whistles, and continued her course and speed. The signal was not heard by the *Mahanoy*, which had no lookout, and which gave a signal of one whistle and ported. This signal was crossed by the *Pulver*, and both vessels continued their courses and speed until immediately before collision, when the *Mahanoy* reversed. It was held that both tugs were in fault; the *Pulver* primarily for being on the wrong side of the channel, and the *Mahanoy* for not having a lookout and not hearing the first signal, and both for proceeding at full speed after the cross-signals.

In *The Transfer No. 10*, (1905) 138 Fed. 221, a transfer tug with two car floats in tow alongside was held to have been solely in fault for a collision between one of such floats and a meeting schooner in tow on a hawser, which took place in East river between the Bronx shore and North Brother Island, on the ground that the tug was unnecessarily on the wrong side of the channel, and, although agreeing by signal to pass port to port, did not give the other tug and her tow sufficient room.

In *The Jamestown*, (1902) 114 Fed. 593, it appeared that a large steel barge, laden with freight cars, while passing up the Elizabeth river to Norfolk at about five o'clock in the evening in tow of an ocean tug, came into collision with the steamship *Jamestown*, which was passing down. The barge was on a hawser of 70 to 100 fathoms, the tide was flood, and a gale from the northwest made it difficult to control the tow, so that the two vessels occupied the greater part of the channel. This fact was known, or should have been, to the *Jamestown*, which saw the tug and tow when two and one-half miles away, but kept its speed of fourteen or fifteen miles an hour until opposite the tug, when its effort to avoid a collision by stopping and reversing came too late. It was held that both the steamship and the tug and tow were in fault, the former for approaching at too high a speed and failing to stop before there was danger of collision, and the latter because it was negligence, under the circumstances, to enter the channel, at a time of day when outgoing steamers were known to be coming down, without shortening the hawser, or taking other measures to bring the barge under closer control, she having been to the east of the centre of the channel at the time of collision.

In *The H. A. Baxter*, (1909) 182 Fed. 930,

a collision at night in Providence river, Rhode Island, between a barge in tow of the tug Baxter passing up the river, and the meeting steamship Powhatan, was held to have been due primarily to the fault of the Baxter in keeping to the westward or port side of the channel in violation of article 25 of the inland rules, even after the agreement between the vessels to pass port and port.

In *Rich v. Hamburg-American Packet Co.*, (1902) 117 Fed. 751, it appeared that a steamship passing down the Delaware river after daylight in the morning struck and sunk an anchored barge, laden with coal. The defenses that the barge was anchored in the channel and that there was a fog were not sustained by the proof; it being shown that the barge was within the regular anchorage grounds, and well outside the channel, and that it was sufficiently clear to permit objects to be seen at a distance of a mile. It was held that the steamship was in fault, both for being outside the channel, and for failing to maintain an efficient lookout.

For other cases applying this rule, see *The Emperor*, (1902) 115 Fed. 447; *The Ottawa*, (1903) 124 Fed. 742; *The Sicilian Prince*,

(1904) 128 Fed. 133; *New York v. New York*, etc., *Ferry Co.*, (1904) 130 Fed. 397; *The S. S. Wyckoff*, (1905) 138 Fed. 418; *The City of Birmingham*, (C. C. A. 1905) 138 Fed. 555, *reversing* (1903) 125 Fed. 506; *The Mattie*, (1905) 141 Fed. 701; *The Margaret*, (1906) 146 Fed. 1021; *The Taurus*, (1907) 156 Fed. 838; *Thames Towboat Co. v. Pennsylvania R. Co.*, (1907) 157 Fed. 305, *affirmed* (C. C. A. 1908) 165 Fed. 617; *The Abram F. Skidmore*, (1908) 160 Fed. 265, *affirmed* (C. C. A. 1909) 168 Fed. 1020; *The Winnie*, (C. C. A. 1908) 161 Fed. 101; *The Gerry*, (1908) 161 Fed. 413; *The Frank K. Esherick*, (1908) 163 Fed. 224, 89 C. C. A. 654; *The Little*, (1908) 168 Fed. 393; *The New Orleans*, (1909) 171 Fed. 764; *The Domingo De Larrinaga*, (1909) 172 Fed. 264; *The P. J. T. Co. No. 7*, (1909) 173 Fed. 1016; *The Hortensius*, (1909) 174 Fed. 272; *Portland v. U. S.*, (1910) 176 Fed. 866, 100 C. C. A. 336; *The Georgic*, (1910) 180 Fed. 863; *The Tennessee*, (1910) 181 Fed. 287; *The Volund*, (C. C. A. 1910) 181 Fed. 643; *The Florence*, (C. C. A. 1911) 186 Fed. 57, *reversing* (1909) 171 Fed. 199.

Vol. II, p. 181, art. 26.

Rule applicable to fishing boats with motor power.—Article 26 of the inland navigation rules applies to a fishing boat having motor power, and a schooner is liable for the death of a person caused by her negligently running down a motor boat while at anchor and fishing in a place which left ample fairway. *The Marshall O. Wells*, (C. C. A. 1910) 178 Fed. 918, *affirming* (1909) 172 Fed. 984.

Burden of proof.—Under this rule it was held that a schooner which ran down a fishing boat, either anchored or fishing with trawls, in order to avoid the liability, had the burden of showing that she was without fault. *The Marshall O. Wells*, (1909) 172 Fed. 984, *affirmed* (1910) 178 Fed. 918, 102 C. C. A. 296.

Vol. II, p. 181, art. 27.

Holding course when danger imminent.—The tug *Senff*, with a car float in tow on her side, was passing down about the middle of the East river with an ebb tide at a speed of about nine miles an hour, when the *Gladiator*, also with a float, came out from her slip on the Manhattan side intending to go up the river. Passing signals of two whistles were exchanged, but the *Gladiator* failed to swing to port and continued across the river, until a collision occurred between her tow and the *Senff*. The *Senff* changed her course toward the Brooklyn shore, but kept her speed. It was held that she was chargeable with contributory fault in not stopping and backing; it having been evident for some time before the collision that for some reason the *Gladiator* was not conforming to her agreement. *The Gladiator*, (C. C. A. 1906) 144 Fed. 681.

In *The Gladys*, (C. C. A. 1906) 144 Fed. 653, *reversing* (1905) 135 Fed. 601, it appeared that a tug with three barges in tow, the whole extending to 4,000 feet in length, and a schooner approached each other at night on converging courses, and a collision occurred between the schooner and the second barge. The night was clear and calm, with the moon shining brightly, and the schooner,

which was making about five miles an hour, saw the tow for an hour and a half before the collision, and the tug crossed her course ahead at a distance of at least 800 feet, but she held her course until the first tow had passed her 500 feet before making any change. It was held that while she was the privileged vessel, and the initial fault was that of the tug, it became evident, at least when the tug crossed her course, that a collision was inevitable unless she took action to prevent it, and that she was chargeable with contributory fault for not taking such action promptly.

A sailing vessel was held in fault because the master, although warned by his lookout that a steamer was coming directly toward him, gave her no attention although he might readily have avoided the collision by changing his course after he saw the negligent navigation of the other vessel. *The Massachusagus*, (1903) 124 Fed. 1.

In *Chadwick v. Wiley*, (1904) 131 Fed. 1003, a schooner was held not to be chargeable with contributory fault for a collision with a steamer, brought about by the gross fault of the latter in changing her course so as to cross the schooner's bow when they were approaching nearly head on, on the

ground that she should have luffed, where there was very little time for such manœuvre after the steamer was seen to change her course, and no certainty that it would then have avoided the collision.

Insistence on right of way.—It is not considered to be the law that vessels can persist in insisting upon their own right of way until a collision happens, when the circumstances and situation show plainly that the resulting positions of the vessels will make the actual rule to be applied a matter of doubt. Where, under these conditions, vessels have entire freedom of motion, and an accident results, which without any danger or inconvenience could have been avoided, each vessel failing to take precautions should be held to its share of responsibility in the matter. *Steamtug No. 15*, (1907) 157 Fed. 142. See also *The Sinaloa*, (1909) 173 Fed. 687.

A perverse adherence to the navigation rules is not justifiable, where it is manifest that such course is certain to result in danger of collision. *The Mauch Chunk*, (1907) 154 Fed. 182, 83 C. C. A. 276, *affirmed* (1905) 139 Fed. 747. See also *The John H. Starin*, (1906) 145 Fed. 723, *affirmed* (C. C. A. 1908) 162 Fed. 146; *The Taurus*, (1907) 156 Fed. 838.

Necessity for violation of rules must be great.—Obedience to the rules of navigation is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused. *The Lauretta Speddin*, (C. C. A. 1910) 184 Fed. 283.

Special circumstances.—In the *C. R. Hoyt*, (1905) 136 Fed. 671, it appeared that the tug Hoyt, passing up East river on the Brooklyn side in the daytime, exchanged crossing signals with the ferryboat Fulton, crossing from New York; the Hoyt, as the privileged vessel, being required to keep her course and speed, and the Fulton to cross under her stern. The Fulton, however, held her course, and came so close to the Hoyt that the latter, to avoid collision, when under the Fulton's bows starboarded her helm, throwing her head nearly across the river. During such time the tug No. 9 was coming down the river, and had given three signals to the Hoyt for passing port and port, none of which were answered. After the Hoyt had passed the Fulton, both she and the No. 9 gave alarm signals, ported, and reversed, but were then so near together that a collision occurred. It was held that the danger of the Hoyt from the Fulton, which was within full view of the pilot of the No. 9, was a "special circumstance" within the meaning of the rules.

In *The Horatio Hall*, (1904) 127 Fed. 620, it appeared that a steamer passing down East river overtook and passed another steamer in tow, and while manœuvring to effect a landing at a pier swung around and came into collision with one of the towing tugs. It was held that the rule requiring a vessel having another on her starboard hand to keep out of the way did not apply to the tow, but that the case was one of special circumstances,

falling within article 27 of the rules for harbors and inland waters.

In *Pennsylvania R. Co. v. Magee*, (1910) 180 Fed. 277, it appeared that the ferryboat Long Branch was passing around the Battery from the North river and stopped to permit a lighter to pass on her starboard side. At the time the tug Powhatan, with a tow on her side, was coming down East river to pass around the Battery, being outside of three other tugs with tows which were as close to the New York piers as they could safely go. While so stopped, the ferryboat gave the Powhatan a signal of one whistle, which was answered, and she then started ahead; but, instead of keeping across toward the Brooklyn side so as to pass under the bows of all the tugs, she attempted to go to port to pass between the Powhatan and a tow which was in mid-river and came into collision with the Powhatan, which had stopped when the danger became apparent. It was held that neither the narrow channel rule nor the starboard hand rule for crossing vessels fully governed the situation, but that the ferryboat was solely in fault for not keeping to starboard, which it appeared she could have done, while the tug did not have room to go further to starboard.

In *The Ocean*, (1902) 115 Fed. 229, it appeared that a tug, with two scows in tow, was passing down East river on a course somewhat toward the Brooklyn shore, when she met the steamship Ocean coming up on a crossing course, so that the crossing involved danger of collision. The tug having the Ocean on her starboard side, it became her duty, under articles 19, 22, and 23 of the navigation rules, to keep out of the way, to avoid crossing ahead, and to slacken her speed or stop and reverse. The Ocean gave a signal of one whistle, which the tug answered by a cross signal, and starboarded in an attempt to cross ahead. At a second cross signal the Ocean stopped and reversed, but too late to avoid collision with one of the scows. It was held that the tug was primarily in fault for violation of the rules, but that the Ocean was also in fault because, under the special circumstances of the case, it was made her duty, by articles 27 and 29, to stop and reverse at once, on receiving the first cross signal.

Errors in extremis.—A vessel cannot be held for errors of judgment of her navigating officers while acting in *extremis*. *The Pocomoke*, (1906) 150 Fed. 193; *The Pacific*, (C. C. A. 1907) 154 Fed. 943; *The Luzerne*, (C. C. A. 1907) 157 Fed. 391; *The Monterey*, (1909) 171 Fed. 442; *The Commonwealth*, (1910) 174 Fed. 694; *The Oregon*, (1910) 180 Fed. 299; *The Montauk*, (1910) 180 Fed. 697, 103 C. C. A. 663; *The Fred Richards*, (C. C. A. 1910) 180 Fed. 707.

In *The Everett*, (1910) 182 Fed. 702, a schooner was held not in fault because the master, when the steamer was in full view bearing down on him, gave several blasts on a horn to attract her attention, instead of a single blast to indicate that he was on the starboard tack.

An error in *extremis* cannot be urged in exculpation of a vessel whose prior negligence

has brought about the situation in which a mistake of judgment is excusable. The Protector, (C. C. A. 1902) 113 Fed. 868.

The excuse that mistakes were made while acting in *extremis* will not be accepted where it is shown that the vessel was without a

lookout and was not shown that she would have found herself in *extremis* if she had maintained a proper lookout. The James A. Lawrence, (1902) 117 Fed. 228, 54 C. C. A. 260, affirming (1899) 97 Fed. 351.

Vol. II, p. 181, art. 28.

Effect of pilot rules.—The provision of this rule that "when vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle," is to be construed as it reads, as applying in all cases when vessels are in sight of one another, and is not limited by rule 6 of the pilot rules, adopted by the supervising inspectors, that whistle signals shall be given and answered by vessels "passing or meeting at a distance within half a mile of each other." The *Aurelia*, (1910) 183 Fed. 341.

When meeting sailing vessel.—This rule is applicable although the other vessel is a sailing vessel. The *Triton*, (1902) 118 Fed. 329, 55 C. C. A. 345.

Rule applied.—A steamship which, having met and passed a tug with a barge in tow, in the Elizabeth river, at a distance of 300 feet, immediately stopped and reversed, throwing her stem around across the course of the barge, resulting in a collision, was held solely in fault therefor, not only because the evidence failed to sustain her contention that the movement was justified by a sheering of the barge toward her, rendering it necessary, but also because she failed to give notice by signal, as required by article 18, rule 3 (2 Fed. Stat. Annot. 179), and this section, of the in-

land navigation rules. The *Georgetown*, (1905) 135 Fed. 854.

In The *Aurelia*, (1910) 183 Fed. 341, it appeared that a collision occurred in San Francisco bay about 2,000 feet off the San Francisco piers, in the daytime, between the steamships *Aurelia* and *Umatilla*. The *Umatilla* had just backed from her pier to go out, and when 1,000 feet from the end of the pier gave a passing signal of two whistles to the *Aurelia*, which was in sight inward bound for Oakland. The signal was answered, but the *Umatilla* continued to back for two or three minutes at full speed without giving any signal of such fact. She was in full sight of the *Aurelia*, however, which did not materially change her course until the vessels were too near together to avoid collision. It was held that both vessels were in fault; the *Umatilla* for failing to give the signal required by the rules to indicate that her engine was going full speed astern, and the *Aurelia* for not keeping a proper lookout, which would have enabled her to avoid the collision notwithstanding the fault of the *Umatilla*. For other cases applying this rule, see The *Joseph M. Clark*, (1902) 119 Fed. 459; The *Straits of Dover*, (1903) 120 Fed. 900, 58 C. C. A. 86.

Vol. II, p. 181, art. 29.

Special circumstances.—A collision took place at night on the East river, near the New York side, between a ferryboat passing down and one of three barges in tow alongside of a tug passing up. The tug was at the time rounding to under a port helm to make a landing of one of her barges. The vessels were in sight of each other's lights when a mile apart, but neither saw the other until they were within two hundred feet. It was held that the overtaking rule did not apply, the tug having at the time no definite course, but that the case was one of special circumstances under article 29 of the inland rules, requiring each vessel to watch and be guided by the movements of the other, and that both were in fault for not observing such rule and keeping a vigilant lookout. The *John Englis*, (1910) 176 Fed. 723, 100 C. C. A. 579.

Duty to have lookout.—It is the duty of a steamer to have a trustworthy lookout, properly stationed, other than the officer of the deck or the helmsman; and the absence of such lookout in case of collision is *prima facie* evidence that the collision was caused by the steamer's fault, and casts upon her the burden of showing that the presence of the lookout could not have avoided the collision. The *Pilot Boy*, (C. C. A. 1902) 115 Fed. 873.

A steam vessel which did not have a proper lookout, as required by the rules, cannot be exonerated by the court from fault for a collision, unless it appears that she could not possibly have avoided the accident, even if the lookout had been in his place. The *Arthur M. Palmer*, (1902) 115 Fed. 417.

In The *Dorchester*, (1908) 163 Fed. 779, affirmed (C. C. A. 1908) 167 Fed. 124, it appeared that a collision occurred a short distance within the mouth of the Elizabeth river on a clear and calm night, between a steamship coming out from Norfolk and a small schooner passing in, the schooner being sunk and her cargo lost. The schooner was sailing with all sails set in a light wind and kept her course and speed. She carried proper lights, which were seen by passengers on the steamship when nearly a mile away, but were not seen by the master or lookout until too close to avoid the collision. It was held that the steamship was solely in fault in failing to maintain a proper lookout.

The failure of a steam yacht navigating New York harbor at a speed of sixteen miles an hour to maintain a lookout was a fault and a contributing cause of a collision between the yacht and a submerged scow in tow, where a vigilant lookout might have

seen the scow or noted her position from the hawser with which she was being towed. *The H. S. Beard*, (1904) 134 Fed. 648.

Where a ferryboat navigating the river between Portsmouth and Norfolk, Va., on a dark night, had no lookout, and the master and the man at the wheel, who were the only persons on deck, failed to see the towing lights of a tug with a tow on each side until within a distance of fifty feet, such ferryboat was held to be chargeable with contributory fault for a collision between her and one of the tows, although the tug was primarily in fault. *The City of Portsmouth*, (C. C. A. 1906) 143 Fed. 856.

In *The Wilkesbarre*, (1907) 151 Fed. 501, *affirmed* (C. C. A. 1908) 157 Fed. 1006, it appeared that a tug with a tow, and having no lookout, was approaching a pier, near which she intended to leave her tow, and the master, who was at the wheel, changed her course toward the pier in order to make a turn. Immediately after he suddenly fell in a faint, and the tug, being without guidance, ran into a steamer which was lying at the pier. It was held that while the collision was the result of inevitable accident so far as related to the master, it was proximately due to the failure to keep the lookout required by law, since, if a competent one had been properly stationed and attentive to his duties, he would have noticed the trouble and prevented the collision, either by changing the tug's course or having the engineer stop or reverse.

A tug leaving her slip on the Manhattan side of East river, with a car float on her side, intending to turn up the river, which movement was delayed by the necessity of clearing a ferryboat coming down, which she did not see in time to remain at her slip, was held in fault for a collision between her tow and another tug, also coming down on the Brooklyn side, on the ground that she should have kept a more efficient lookout, her view up the river being obscured by her tow, which would have enabled her sooner to see the ferryboat, and that after passing the same and agreeing with the other tug to pass starboard and starboard, she failed to promptly reverse or change her course up the river. *The Gladiator*, (1904) 132 Fed. 876.

In the following cases vessels were held to be in fault for a collision because of failure to maintain a proper and efficient lookout. *The Colorado*, (1902) 117 Fed. 796; *The Komuk*, (1903) 120 Fed. 841; *The Dauntless*, (1903) 121 Fed. 420; *In re Rapid Transit Ferry Co.*, (1903) 124 Fed. 736; *Welch v. Philadelphia, etc., R. Co.*, (1903) 125 Fed. 419, *affirmed* (C. C. A. 1906) 143 Fed. 468; *The Genesta*, (1903) 125 Fed. 423; *The Wallace B. Flint*, (1903) 125 Fed. 426, *affirmed* (C. C. A. 1904) 130 Fed. 338; *The Hartford*, (1903) 125 Fed. 559; *The Mahanoy*, (1903) 126 Fed. 587; *The Spartan Prince*, (1903) 126 Fed. 885; *The New York Central No. 19*, (1903) 127 Fed. 473; *The Sylvia*, (1904) 127 Fed. 615; *The Sicilian Prince*, (1904) 128 Fed. 133; *The Bergen*, (1904) 128 Fed. 920, 63 C. C. A. 646; *The Idlewild*, (1904) 129 Fed. 846; *New York v. New York, etc., Ferry Co.*, (1904) 130 Fed. 397; *The Robert Bur-*

nett, (1904) 134 Fed. 700; *The Cypromene*, (1905) 135 Fed. 558; *The Northman*, (1905) 139 Fed. 692; *The Violetta*, (1905) 141 Fed. 690; *The Transit*, (1906) 148 Fed. 138; *The Tug Boat No. 6*, (1906) 148 Fed. 1007; *The Lake Shore*, (1907) 149 Fed. 855; *The Dreamland*, (1906) 149 Fed. 910; *Carter v. Seaboard Air Line R. Co.*, (1907) 151 Fed. 531; *The Mauch Chunk*, (1907) 154 Fed. 182, 83 C. C. A. 276, *affirmed* (1905) 139 Fed. 747; *The Pencoyd*, (1907) 157 Fed. 134; *U. S. v. Portland*, (1908) 161 Fed. 193; *The H. B. Rawson*, (1908) 162 Fed. 312, 89 C. C. A. 20, *reversing* (1907) 152 Fed. 1001; *The Dictator*, (1909) 169 Fed. 789, 95 C. C. A. 255; *The Marshall O. Wells*, (1909) 172 Fed. 984; *The Hortensius*, (1909) 174 Fed. 272; *The Charles C. Lister*, (1909) 174 Fed. 288; *The Nanuet*, (1910) 176 Fed. 123; *The Everett*, (1910) 182 Fed. 702; *The Ciudad de Reus*, (C. C. A. 1911) 185 Fed. 391, *reversing* (1909) 171 Fed. 470; *The Transfer No. 18*, (C. C. A. 1911) 188 Fed. 210.

Absence of lookout not affecting situation.

—The absence of a lookout stationed where he should be on a vessel will not render such vessel in fault for a collision, where she was navigated exactly as she should have been had there been a lookout reporting the situation. *The Pilot Boy*, (C. C. A. 1902) 115 Fed. 873; *The Dauntless*, (1902) 116 Fed. 543; *The N. & W. 2*, (1903) 122 Fed. 171; *The Edgar F. Luckenbach*, (1903) 124 Fed. 947; *The Anson M. Bangs*, (C. C. A. 1904) 129 Fed. 103; *The Roma*, (1905) 138 Fed. 218; *Muller v. New York, etc., R. Co.*, (1906) 144 Fed. 241; *The Anna W.*, (1910) 181 Fed. 604.

The absence of a lookout on a tug while entering a slip was held not a fault contributing to her injury by striking a hawser stretched across the slip by another vessel, and which, owing to the darkness, could not have been seen by the lookout if he had been in his proper place. *Erie R. Co. v. Oceanic Steam Nav. Co.*, (1903) 121 Fed. 440.

Sufficiency of lookout.—Where the attention of a lookout on a vessel is necessarily absorbed in a special direction, it is the duty of the vessel to detail another man for the general duty. *New York, etc., Steamship Co. v. New York, etc., R. Co.*, (1906) 143 Fed. 991.

Station of lookout.—While no specific location on a vessel is prescribed for the lookout, he is required by good navigation to be placed at the point best suited for the purpose alike of hearing and observing the approach of objects likely to be brought into collision with the vessel; having regard to the circumstances of the case and condition of the weather. *The Vedamore*, (C. C. A. 1905) 137 Fed. 844, *affirming* (1904) 131 Fed. 154.

Elevated positions on a steamer, such as the hurricane deck, are not as favorable situations for the lookout as those on the forward deck near the stem. *The Pilot Boy*, (C. C. A. 1902) 115 Fed. 873.

Where a large ocean-going steamship, with decks considerably above the water, was navigating Chesapeake bay in the night in foggy weather, a lookout stationed in the crow's-

nest, sixty feet above the deck, and one hundred feet from the stem, was not properly located to see and hear objects in front of the vessel, and especially small vessels of the character that usually navigate the bay, frequently loaded down to their water mark; and the ship was in fault for a collision with a schooner, whose fog signal, regularly sounded, was not heard by the lookout until immediately before collision. *The Vedamore*, (C. C. A. 1905) 137 Fed. 844, *affirming* (1904) 131 Fed. 154.

Where a collision occurred between a car float on the side of a tug and a steamship, which was being docked and was at the time stationary, the defense of inevitable accident was not made out by the tug by evidence that she and her tow were forced against the steamship by a large body of floating ice, which was not seen until within fifty feet, and when too late to avoid it, where it appeared that there was no lookout on the tug, and that the pilot's view was obstructed by the cars on the float; that the attention of the lookout stationed on the float was directed entirely to the piers, and that a lookout properly stationed and attentive to his duties would have seen the ice in time to have avoided it. *New York, etc., Steamship Co. v. New York, etc., R. Co.*, (1906) 143 Fed. 991.

A ferryboat, navigating Boston harbor on a clear night, but when the water was dark, with the only lookout in the pilot house, was held to have contributed to a collision with a mud scow, low in the water and adrift. *Eastern Dredging Co. v. Winnisimmet Co.*, (1908) 162 Fed. 860, 89 C. C. A. 550.

Lookout on vessel landing at dock. — It is the imperative duty of a steamship, when making a landing at a dock in a river where other vessels are constantly passing, to maintain an efficient lookout, and the absence of such lookout cannot be excused on the ground that all the crew were otherwise engaged. *The Northland*, (1903) 125 Fed. 58.

Stern lookout when backing. — *The Deutschland*, a large steamship 687 feet long, after having been passed by the health officer at the quarantine station, Staten Island, where she had been at anchor, headed downstream on account of the flood tide, undertook to swing around with her head to the eastward, and in doing so backed, and her propeller hood came into collision with the *Snow*, a small schooner which had also just been released from quarantine, and had started northward at a distance of some 130 feet astern of the steamship before the latter backed. She made an effort to get out of the way, but could not do so in time. *The Deutschland* had no lookout astern, and, according to the weight of the evidence, gave no backing signal. It was held that for such reasons she was solely in fault for the collision. *The Deutschland*, (1904) 129 Fed. 964, *affirmed* (C. C. A. 1905) 137 Fed. 1018.

In *The Northland*, (1903) 125 Fed. 58, it appeared that a large lake steamship was

making her berth in Buffalo river where it was about 250 feet wide. A steam canal boat, with two other boats in tow on a line, passing down the river, meeting a tug when about opposite, after giving the proper signals, went to starboard and passed within a few feet of the steamship, which was apparently stationary at her berth. The steamship had no lookout, and no watch astern, and paid no attention to the passing vessels or their signals. When one of the tows was opposite the stern of the steamship, the latter started one of her propellers at high speed, creating a suction which drew the canal boat from her course and caused a collision, resulting in the sinking of the canal boat soon after, from injury inflicted by the ship's propeller. Had a proper watch been maintained, and attention giving to the passing tows, the injury might readily have been avoided. It was held that the ship was in fault, and that the canal boat was not in fault or negligent, having the right to assume that the ship would perform her duty and avoid subjecting the passing boats to danger of collision by operating her propeller.

Proper person for lookout. — When acting as the officer of the deck, and having charge of the navigation, the master of a steamer is not a proper lookout. *The Pilot Boy*, (C. C. A. 1902) 115 Fed. 873.

Lookout unable to speak English. — In *The Fred Richards*, (C. C. A. 1910) 180 Fed. 707, it was held that the fact that the lookout on a yacht was a Central American Indian, incapable of speaking English, did not impair his efficiency as a lookout, nor in itself constitute a contributing fault on the part of the yacht for a collision brought about by improper navigation by the other vessel.

Duty toward sailing vessels. — The duty of a steamship to see that her lookout maintains constant observation and the utmost diligence is especially imperative in favor of a sailing vessel, which under the rules has the right of way. *The Dorchester*, (1908) 163 Fed. 779, *affirmed* (C. C. A. 1908) 167 Fed. 124.

Duty of vessel moored at end of wharf in navigable stream. — Rule 29 applies to a vessel lying moored at the end of a wharf, in a dark night, in the navigable part of a narrow stream, constantly traversed by different kinds of craft, and having neither lights nor a lookout, there being special circumstances in such case which require her, in the exercise of common prudence, to carry a light, whether or not it is expressly required by the rules; and she cannot recover for an injury by collision with a passing vessel in tow, which could have been avoided had she been properly lighted. *The Millville*, (1905) 137 Fed. 974.

Evidence to show negligent navigation. — *The Lakme*, (1902) 113 Fed. 772; *The Protector*, (C. C. A. 1902) 113 Fed. 868; *The Kennebec*, (1910) 180 Fed. 914; *The H. A. Baxter*, (1908) 182 Fed. 930.

Vol. II, p. 181, art. 30.

Rule not applicable to high seas. — *Watts v. U. S.*, (1903) 123 Fed. 105.

Vol. II, p. 181, sec. 2.

Inspectors' rules.—Inspectors have no right to make rules which would deprive a vessel of a right given her by the statutory navigation rules. *The Transfer* No. 15, (C. C. A. 1906) 145 Fed. 503; *The John H. Starin*, (C. C. A. 1908) 162 Fed. 146, *affirming* (1906) 145 Fed. 723; *The Aurelia*, (1910) 183 Fed. 341.

In *The Pawnee*, (1909) 168 Fed. 371, it appeared that a tug bound from Jersey City to Atlantic avenue, Brooklyn, was struck on her port side by a steamer bound to sea from her pier on the Manhattan side of the East river. The vessels were on crossing courses, the tug being the privileged and the steamer the burdened vessel. The steamer sought to excuse herself because she had a right to expect that the tug would turn into the East river, and because she was entitled, under inspectors' rule 9, to adopt a two-whistle course and pass ahead. Both contentions were rejected, because the rule was invalid as being repugnant to the starboard hand rule.

Vol. II, p. 182, sec. 4.

Action for penalty.—Penalties incurred by a vessel for violation of the inland navigation rules are recoverable by action brought by the United States under this section, al-

Effect of failing to post rules.—The failure to post rules as required by this act does not render the owner of the boat privy to the collision and deprive him of the right to a limitation of liability on account thereof, where the collision did not result from the want of knowledge of the rules by the pilot, but from his failure to observe rules of which he had knowledge. *In re Rapid Transit Ferry Co.*, (1903) 124 Fed. 786.

Lights on scows.—Under rule 11 of the supervising inspectors of steam vessels, adopted pursuant to section 2 of the inland rules, the lights thereby required to be carried by a scow in tow are not solely to prevent collision with herself, but also to assist in indicating to approaching vessels the number and length of the tow and positions of the vessels; and she may be charged with contributory fault for a collision with another vessel of the tow because of her failure to comply with such rules. *The Eugene F. Moran*, (1909) 170 Fed. 928, 96 C. C. A. 144.

Vol. II, p. 183, sec. 2.

Object of this statute.—This legislation was for the purpose of delimiting the inland waters of the United States, in order to inform navigators where the inland rules of navigation, as distinguished from the inter-

though the offense may have been committed on waters within a district having jurisdiction to prescribe local rules. *The Stella B.*, (1910) 183 Fed. 507.

national rules, become applicable. It does not purport to change the boundaries of any federal district, nor enlarge the jurisdiction of any particular federal court. *U. S. v. Newark Meadows Imp. Co.*, (1909) 173 Fed. 426.

Vol. II, p. 183, sec. 4233.

"Mercantile marine."—It has been held that the term "mercantile marine," as used in this section, means the merchant service or business of commerce at sea, and that the

section does not apply to steam vessels engaged in towing on the inland waters of the United States. *Beck v. Johnson*, (1909) 169 Fed. 154.

Vol. II, p. 185, rule four.

Liability of tug for lights on tow.—Where the navigation of a fleet consisting of a tug and two barges in tow, one alongside having her own master and crew and the other on a line, is in charge of a pilot employed by the owners of the barges, who is on the first barge and directs all movements, the tug is not responsible for the position of the fleet in the channel, nor for the failure of the barges to carry proper lights, and cannot be held

liable for a collision between the leading barge and a meeting steamer, resulting from a violation of the rules in either of such respects. *The Echo*, (1904) 131 Fed. 622.

Small inland waters.—It has been held that this rule is not applicable to steamboats on small inland waters like Green river, in Kentucky. *Beck v. Johnson*, (1909) 169 Fed. 154.

Vol. II, p. 189, rule fifteen, cl. (D).

Equivalent signal.—The noise made by the use of patent rowlocks on a skiff is not equivalent to the fog horn required by the

navigation rules. *Quinette v. Bisso*, (C. C. A. 1905) 136 Fed. 825.

Vol. II, p. 191, rule nineteen.

Rule applied to gasoline launch. — *The Nimrod*, (1909) 173 Fed. 520.

Vol. II, p. 192, rule twenty.

Evidence sufficient to charge steamer with fault. — *The Ardanrose*, (1902) 115 Fed. 1010.

Burden of proof. — In case of collision between a sailing vessel and a steamer, the presumption of law is that the steamer was in

fault, and she has the burden of proof to establish the misconduct of the sailing vessel and her own proper navigation, or that the collision resulted from inevitable accident. *The Ardanrose*, (1902) 115 Fed. 1010.

Vol. II, p. 195, rule twenty-one.

Moderate speed. — "Moderate speed," required of a steam vessel in a fog, is purely a relative term; and what constitutes such speed in a given case is to be determined with reference to the time, place, and circumstances, rather than from the actual speed. *Quinette v. Bisso*, (1905) 136 Fed. 825, 69 C. C. A. 503.

Excessive speed. — Where a tug was going up the Mississippi river in the early morning at a time and place where people were likely

to be crossing the river in small boats, and in a fog so dense along the water as to render it impossible to see such boats more than a few feet, a speed of seven and a half to nine miles an hour was immoderate, and gave a right of action against the owners under the Louisiana statute, to recover for the death of a person who was run down by the tug while crossing in a skiff. *Quinette v. Bisso*, (1905) 136 Fed. 825, 69 C. C. A. 503.

Vol. II, p. 196, rule twenty-two.

Violation of rule. — See *The Joseph Vaccaro*, (1910) 180 Fed. 272.

Vol. II, p. 198, rule twenty-three.

Care required with respect to small craft. — The right of a steamer to maintain her course or speed, even against small craft like a skiff or yawl, is relative, and not absolute. She has no right to maintain a speed which is dangerous to a smaller craft which can be seen ahead, and, where she is navigating in a fog so dense that such craft cannot be seen

at any considerable distance, and in a locality where numbers of them are likely to be encountered, she is required to exercise extraordinary care and watchfulness, and is not justified in relying solely on fog signals as a warning to other vessels. *Quinette v. Bisso*, (1905) 136 Fed. 825, 69 C. C. A. 503.

Vol. II, p. 201, rule twenty-six.

Master as lookout. — A steamer passing down the Mississippi in front of New Orleans in the evening, where other vessels are liable to be encountered, should have a lookout other

than the master, who has also other duties. *The Echo*, (1904) 131 Fed. 622.

In fault for changing signals. — See *The Esparta*, (1908) 160 Fed. 289, 87 C. C. A. 413.

Vol. II, p. 201, sec. 4412.

Construction of section. — This section applies only to regulations to be observed by passing steam vessels. *Beck v. Johnson*, (1909) 169 Fed. 154.

Vol. II, p. 202, sec. 4413.

Construction of section. — This section only authorizes a recovery of damages by passengers against pilots, engineers, mates, and

masters, as distinguished from the owners of vessels. *Beck v. Johnson*, (1909) 169 Fed. 154.

Vol. II, p. 202, sec. 1.

Presumption. — A presumption of fault arises where there is an unexplained failure to stand by. *The Williamsport*, (1909) 167 Fed. 184; *The Kennebec*, (1908) 167 Fed. 847; *The Lizzie Crawford*, (1909) 170 Fed.

837; *The Fred Richards*, (C. C. A. 1910) 180 Fed. 707.

But this presumption is not conclusive; it may be rebutted by sufficient proof to the contrary, although it shifts the burden to

the offender, and in a doubtful case is sufficient to determine the controversy. *The Williamsport*, (1909) 167 Fed. 184; *The Kennebec*, (1908) 167 Fed. 847.

When rule not applicable.—The failure of the captain of one of two vessels, both of which were seriously injured in a collision, to stand by after the other had been beached, or to take off her passengers, was not a violation of this section, which rendered his vessel liable for the collision, where it was calm and there was little danger to the passengers, and the extent of the injury to his own vessel

was unknown, and where, after proceeding to port, only four miles distant, he at once gave notice and himself returned with a tug, and all the passengers and crew were safely taken off. *The Trader*, (1904) 129 Fed. 462.

In a suit to recover the value of the cargo of a barge, sunk in collision while in tow, against the vessel through whose fault the collision occurred, it is no defense to such vessel that the tug was negligent in permitting her tow to sink after the collision. *The Dauntless*, (1902) 116 Fed. 543.

COMMERCE AND LABOR.

Vol. X, p. 58, sec. 1.

The primary purpose of this Act was legislative, to enable Congress by information secured through the work of officers charged with the execution of this law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose. *U. S. v. Armour* (1906) 142 Fed. 808.

Vol. X, p. 59, sec. 4.

The general line of cleavage established by the Act creating this department between it and the treasury department leaves "navigation" with the department of commerce and labor, and little with the treasury department which does not concern the collection, keeping, minting, and disbursing of the public treasure. Accounts relating to "navigation" are accounts relating to "business within the jurisdiction" of the department of commerce and labor. (1903) 25 Op. Atty-Gen. 29.

Consolidation of bureaus.—The secretary of commerce and labor was not authorized by this Act to consolidate the bureau of manufactures and the bureau of statistics into one bureau to be called the bureau of foreign and domestic commerce. (1909) 27 Op. Atty-Gen. 542.

Regulations governing steamboats at yacht races.—The making of rules and regulations under the Act of May 19, 1896, 29 Stat. L. 122, to insure the safety of passengers on excursion steamers, etc., at regattas or yacht races, and their subsequent enforcement by revenue cutters, is "business within the jurisdiction" of the department of commerce and labor; and when revenue vessels are detailed for that purpose they are subject to the di-

Duty of transmitting blank forms of certificates of registry.—The duty imposed upon the secretary of the treasury by section 4158, Rev. Stat., 7 Fed. Stat. Annot. 29, of transmitting to collectors of customs blank forms of certificates of registry of vessels, was by this act transferred to the secretary of commerce and labor. (1903) 25 Op. Atty-Gen. 49.

rection and control of the secretary of that department in all matters relating to such business. (1903) 25 Op. Atty-Gen. 27.

Remission of penalties for violation of New York Harbor Act.—Prior to the taking effect of this Act the secretary of the treasury had no authority to remit a fine or penalty imposed for a violation of the New York Harbor Act of June 29, 1888, 25 Stat. L. 209, 6 Fed. Stat. Annot. 196, nor to discontinue a suit instituted by the government to recover a penalty under that Act, and therefore the secretary of commerce and labor has no authority to direct the discontinuance of such a suit. (1904) 25 Op. Atty-Gen. 220.

The census office is an integral part of the department of commerce and labor, and as such is subject to the direction of the secretary of that department. (1903) 25 Op. Atty-Gen. 11.

Blank certificates of registry.—The duty imposed upon the secretary of the treasury by section 4158, Rev. Stat., 7 Fed. Stat. Annot. 29, of transmitting to collectors of customs blank forms of certificates of registry of vessels, was by this section transferred to the secretary of commerce and labor. (1903) 25 Op. Atty-Gen. 49.

Vol. X, p. 59, sec. 5.

Correspondence with collectors of customs.—The secretary of commerce and labor is not required, in the execution of the duties

imposed upon him by this Act, to correspond with collectors of customs through the secretary of the treasury. Collectors of customs

continue to be officers of the treasury department, but the secretary of the treasury should not interfere in matters expressly transferred

to the department of commerce and labor by the Act creating that department. (1903) 25 Op. Atty.-Gen. 3.

Vol. X, p. 61, sec. 6. [*Powers and duties of commissioner.*]

Right of congressional committee to ask for information.—The commissioner of corporations is not permitted by this section to disclose the data and information collected by him or his predecessors under that section, unless by the special direction of the President, and this notwithstanding the request is made by a subcommittee of the Senate. He should, however, immediately present such a

request to the President, submit to him, if practicable, all the documents containing relevant information upon the subject referred to, and obtain his instructions as to what part, if any, of such data is suitable for publication by direction of the committee preferring the request. (1909) 27 Op. Atty.-Gen. 150.

[*Investigations.*]

Immunity.—This section requires the commissioner of corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, except common carriers, and provides that "all the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An Act in relation to testimony before the Interstate Commerce Commission' . . . shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." That Act (Act Feb. 11, 1893, ch. 83, 27 Stat. L. 443, 3 Fed. Stat. Annot. 885, which is supplementary to the Interstate Commerce Act, provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission or in obedience of its subpoena . . . or in any such case or proceeding." The Act Feb. 25, 1903, ch. 755, 32 Stat. L. 904, 10 Fed. Stat. Annot. 173, making provision for the enforcement of the interstate commerce and anti-trust laws, contains a similar immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said acts. By a resolution of the House of Representatives of March 7, 1904, the commissioner of corporations was directed to investigate the so-called "Beef Trust," and while proceeding thereunder certain persons by his request, but without being subpoenaed or sworn, furnished testimony and documentary evidence on which he based his report. It was held that the immunity provisions of the statute set out and applicable to such investigation, to be

valid, must be construed as being as broad as the privilege given by the Fifth Constitutional Amendment, and that the persons so furnishing evidence could not be prosecuted for violation of the anti-trust law on account of the transactions, matters, or things to which such evidence related. *U. S. v. Armour*, (1906) 142 Fed. 808.

In *U. S. v. Swift*, (1911) 186 Fed. 1002, it appeared that the defendants were indicted in 1905 for conspiracy to monopolize interstate commerce in fresh meats, in violation of the Sherman Anti-trust Act (Act July 2, 1890, ch. 647, sec. 1, 26 Stat. L. 209, 7 Fed. Stat. Annot. 336), but an acquittal was directed, on the ground of immunity from prosecution because of testimony given and evidence furnished by them before the commissioner of corporations in relation to the transactions which formed the basis for the indictments. It was held that such immunity did not extend to a subsequent prosecution for continuing the same conspiracy thereafter; nor did it obliterate the facts testified to, which, if legally competent and relevant, might be shown in the subsequent prosecution.

This section contemplates that the commissioner of corporations shall proceed by private hearings and that a person who appears before him on his demand or by his request, and gives testimony or produces documents, although not sworn, is entitled to the same privileges and immunities as though his attendance were compelled by subpoena and his testimony given under oath. *U. S. v. Armour*, (1906) 142 Fed. 809.

Corporations.—The immunity granted by this section and the acts therein referred to does not extend to corporations. *U. S. v. Armour*, (1906) 142 Fed. 808.

Vol. X, p. 62, sec. 7.

Authority for detaining aliens.—Under this section placing jurisdiction of the deportation of aliens in the department of commerce and labor, a return to the writ of habeas corpus by an alleged Chinese alien, showing that defendant was an officer of immigration under control of the commissioner general in charge of the port where the

alien attempted to enter, by designation of the secretary of commerce and labor, and that he held such Chinese person as such officer, sufficiently showed authority for the detention. *In re Moy Quong Shing*, (1903) 125 Fed. 641.

Rules.—The department of commerce and labor has authority to prescribe rules of evi-

dence relating to presumptions and burden of proof in the determination of an alien's right to admission. *In re Moy Quong Shing*, (1903) 125 Fed. 641.

Jurisdiction of executive officers in deportation proceedings.—Under this section the executive officers of the department of commerce and labor have authority to determine whether or not a Chinese person seeking admission had been born in the United States, and was therefore a citizen entitled to enter. *In re Moy Quong Shing*, (1903) 125 Fed. 641.

Lease of islands in Alaska.—This Act transferred to the secretary of commerce and labor the same authority over the islands of St. Paul and St. George, Alaska, that was theretofore possessed by the secretary of the treasury, and he may therefore lease those

islands for the propagation of blue foxes. The secretary of commerce and labor has authority to lease, for the purpose of propagating foxes, such other islands in the waters of Alaska as had been so leased by the secretary of the treasury prior to May 14, 1898. (1905) 25 Op. Atty.-Gen. 497.

Regulation of killing of fur-bearing seals.—The secretary of commerce and labor has no authority to regulate the killing of fur-bearing animals in Alaska, other than fur-bearing seals. (1905) 25 Op. Atty.-Gen. 497.

Revenue cutter service.—This Act giving the department of commerce and labor jurisdiction and control of the seal fisheries does not transfer to that department the revenue-cutter service or any of its vessels or officers. (1903) 25 Op. Atty.-Gen. 4.

Vol. X, p. 63, sec. 10. [*Authority of Secretary of Treasury over shipping, etc., transferred.*]

Designation of river and harbor lines.—The power and authority to designate lines dividing the high seas from rivers, harbors, and inland waters, conferred upon the secretary of the treasury by section 2 of the Act of Feb. 19, 1895, 28 Stat. L. 672, 2 Fed. Stat. Annot. 180, was by this section transferred to the secretary of commerce and labor. (1904) 25 Op. Atty.-Gen. 149.

Boarding vessels.—The execution of the Act of March 31, 1900, 31 Stat. L. 58, entitled "An Act concerning the boarding of vessels," has been transferred by this section from the secretary of the treasury to the secretary of commerce and labor. (1903) 25 Op. Atty.-Gen. 51.

CONGRESS.

Vol. II, p. 210, sec. 16.

State legislation superseded.—The laws of Congress embodied in this section and those immediately preceding and following it, prescribing the time, place, and manner of hold-

ing elections for United States senators, supersede any state legislation on the subject. *State v. Frear*, (1910) 142 Wis. 320, 125 N. W. 961.

CONSPIRACY.

Vol. II, p. 247, sec. 5440.

Construction.—This section must be strictly construed. *U. S. v. Robbins*, (1907) 157 Fed. 999.

The offense defined by this section is an infamous crime.—To the same effect as the original note, see *U. S. v. Wells*, (1908) 163 Fed. 313.

Continuing offense.—The offense defined by this section is a continuing one so long as it is in process of execution, as manifested by overt acts in pursuance thereof. *U. S. v. Brace*, (1907) 149 Fed. 874.

Venue.—Persons accused of conspiring to violate a law in a particular place may be tried there if they participate in overt acts

there, though the unlawful agreement was made elsewhere, since participation may be proved by evidence of their conduct elsewhere. *U. S. v. Campbell*, (1910) 179 Fed. 762.

Where a conspiracy to defraud the United States of public lands was originally formed in one federal district but was carried out by means of false and fraudulent entries of such lands in another district, made with the knowledge and consent of all the conspirators, it was held that each of such overt acts constituted a renewal of the conspiracy in the latter district, and that the offense might be prosecuted in either district. *Arnold v. Weil*, (1907) 157 Fed. 429.

Where conspirators had been doing business together in the judicial district in which they were tried, prior to and at the time of the crime, and there was no evidence that they had been together outside of the district, it was held that the jury was justified in finding the conspiracy to have been in that district. *Marrash v. U. S.*, (C. C. A. 1909) 168 Fed. 225.

Limitation.—While under this section the gravamen of the offense is the conspiracy, there also must be an overt act to make the offense complete, and so the period of limitation within which it may be prosecuted must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof. *U. S. v. Francis*, (1906) 144 Fed. 520, *modified* (C. C. A. 1907) 152 Fed. 155; *U. S. v. Bradford*, (1905) 148 Fed. 413, *affirmed* (C. C. A. 1907) 152 Fed. 616; *U. S. v. Brace*, (1907) 149 Fed. 874; *Jones v. U. S.*, (1908) 162 Fed. 417, 89 C. C. A. 303; *U. S. v. Raley*, (1909) 173 Fed. 159; *U. S. v. Breese*, (1909) 173 Fed. 402; *Lonabaugh v. U. S.*, (C. C. A. 1910) 179 Fed. 476; *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142. See also *U. S. v. Black*, (1908) 160 Fed. 431, 87 C. C. A. 383. Compare *U. S. v. Biggs*, (1907) 147 Fed. 264, *affirmed* (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.

A prosecution may be instituted within three years after the commission of any overt act, although more than that length of time may have elapsed since the conspiracy was first formed or the first of such acts was committed thereunder. *U. S. v. Bradford*, (1905) 148 Fed. 413, *affirmed* (C. C. A. 1907) 152 Fed. 616.

A conspiracy to restrain or monopolize trade, in violation of the Sherman Act of July 2, 1890 (26 Stat. L. 209, ch. 647, 7 Fed. Stat. Annot. 336), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, as long as any further action is taken in furtherance of the conspiracy. *U. S. v. Kissel*, (1910) 218 U. S. 601, 31 S. Ct. 124, 54 U. S. (L. ed.) 1168.

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations. When in such a case subsequent overt acts are committed under the old conspiracy within the three years, the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of a prosecution for the conspiracy. But if these facts are established by competent evidence such a prosecution may be sustained. *Ware v. U. S.*, (C. C. A. 1907) 154 Fed. 577.

Conspirator withdrawing.—As to a con-

spirator withdrawing from the scheme, the statute runs from time of his withdrawal. *U. S. v. Raley*, (1909) 173 Fed. 159.

Limitation of Bankruptcy Act.—The limitation of one year imposed by Bankruptcy Act July 1, 1898, ch. 541, sec. 29d, 30 Stat. L. 554, 1 Fed. Stat. Annot. 606, for the finding of an indictment for a violation of such section, does not apply to an indictment under this section for a conspiracy to commit an offense thereunder. *U. S. v. Comstock*, (1906) 162 Fed. 416.

Commencement of period.—Where an alleged conspiracy to defraud the United States out of public lands was formed in September, 1902, and the necessary affidavits to consummate the fraud were filed on the 7th and 8th of October, 1902, the filing of such affidavits constituted an overt act which started limitations against a prosecution for conspiracy, which was barred on Oct. 8, 1905, under Rev. Stat., sec. 1044, 2 Fed. Stat. Annot. 358. limiting prosecutions for federal offenses to three years after the offense shall have been committed: *Ex p. Black*, (1906) 147 Fed. 832.

Conspiracy generally.—A conspiracy consists of a combination between two or more persons to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means, including, as an essential element, a corrupt motive. *U. S. v. Moore*, (1909) 173 Fed. 122.

This section applies with equal force to rights of the United States created subsequent to its passage, as well as those previously existing. *Curley v. U. S.*, (1904) 130 Fed. 1, 64 C. C. A. 369, *affirming* (1903) 122 Fed. 738.

Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not sufficient to involve him in the conspiracy; nor is mere suspicion that he was a party to the conspiracy. *Marrash v. U. S.*, (C. C. A. 1909) 168 Fed. 225.

Under this section it is sufficient that it be the conspirator's purpose to commit a wilful fraud on the law, or some statutory requirement pertinent to be observed, in view of the present controlling conditions; and it is not necessary that there should be a conspiracy to do an act that is an offense or crime by some statute of the general government, or to deprive the United States of its property or some property right. *U. S. v. Raley*, (1909) 173 Fed. 159.

To the same effect as the fourth paragraph of the original note, see *U. S. v. Black*, (1908) 160 Fed. 431, 87 C. C. A. 383.

Elements of offense.—The elements of a criminal conspiracy under this section are: (1) An object to be accomplished, which must be either the commission of an offense against the United States or to defraud the United States; (2) a plan or scheme embodying means to accomplish the object; (3) an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means; and (4) an overt act by one or more of the conspira-

tors to effect the object of the conspiracy. *U. S. v. Munday*, (1911) 186 Fed. 376.

Conspiracy to commit offense against the United States.—The phrase "offenses against the United States," as used in this section, has the same meaning as the words "offenses against the laws of the United States" in the original Act of March 2, 1867, 14 Stat. L. 484, ch. 169, the change being merely one of phraseology made by the revision commission, and such section denounces conspiracies to commit offenses created by any of the statutes of the United States. *Thomas v. U. S.*, (1907) 156 Fed. 897, 84 C. C. A. 477.

This section must be construed as standing alone, and covers all conspiracies to commit an act which is made a criminal offense by the laws of the United States; and the fact that the overt act charged to have been committed may constitute a substantive offense on the part of one or more of the accused under the statute which they conspired to violate does not relieve them from liability to prosecution for the conspiracy, at least where such offense is also a misdemeanor. *U. S. v. Thomas*, (1906) 145 Fed. 74.

Conspiring to commit an offense against the United States—To violate Interstate Commerce Act.—A conspiracy to induce the giving or receiving of rebates in violation of the Elkins Act (Act Feb. 19, 1903, ch. 708, 32 Stat. L. 847, 10 Fed. Stat. Annot. 170) is punishable under this section, where the persons charged are not limited to the giver and receiver of the rebate alone. *Thomas v. U. S.*, (1907) 156 Fed. 897, 84 C. C. A. 477.

Under the Elkins Act, *supra*, abolishing imprisonment as a punishment for offenses committed against the acts regulating interstate commerce, an indictment alleging that the agents of a shipper and the agents of a railroad company engaged in interstate commerce stipulated to give and receive rebates on the transportation of sugar from New York to Detroit, and thereafter gave and received such rebates in pursuance of such fraudulent conspiracy, merely alleged a violation of the Interstate Commerce Act as amended by the Elkins Act, and was therefore not sustainable as alleging a conspiracy to commit an offense against the United States. *U. S. v. New York Cent., etc., R. Co.*, (1906) 146 Fed. 298, *affirmed* (1909) 212 U. S. 481, 500, 29 S. Ct. 304, 309, 53 U. S. (L. ed.) 613, 624.

The Hepburn Act (Act of June 29, 1906, ch. 3591, sec. 1, 34 Stat. L. 584, 1909 Supp. Fed. Stat. Annot. 255), which makes it a criminal offense for a common carrier to issue any interstate free transportation, except to certain classes of persons, and for any person not belonging to one of such classes to use such free transportation, does not subject to punishment the officer or agent who issues such transportation, nor a person to whom it is issued, unless he uses the same; and hence an indictment will lie, under Rev. Stat., sec. 5440, for conspiracy to commit an offense under said act, against an agent of a railroad company and others, to whom by agreement he issues interstate free passes on

behalf of said company, and who pursuant to such agreement sell the same for use by others not within the excepted classes. *U. S. v. Clark*, (1908) 164 Fed. 75.

To violate immigration law.—Assisting the importation of alien contract laborers is an "offense against the United States," within the meaning of Rev. Stat., sec. 5440, since Congress, in making it a misdemeanor, by the Act of Feb. 20, 1907, 34 Stat. L. 898, ch. 1134, sec. 4, 1909 Supp. Fed. Stat. Annot. 164, to assist the immigration of such persons, has made such action a crime, indictable as such, although, by section 5 of that Act, it has provided a remedy in the nature of a civil action for the recovery of a penalty for a violation of the Act. *U. S. v. Stevenson*, (1909) 215 U. S. 200, 30 S. Ct. 37, 54 U. S. (L. ed.) 157; *U. S. v. Tsokas*, (1908) 163 Fed. 129.

To violate bankruptcy law.—An indictment will lie under this section for conspiracy to conceal from the trustee of one of the defendants in bankruptcy, property belonging to his estate in bankruptcy, in violation of Bankr. Act of July 1, 1898, ch. 541, sec. 29b, 30 Stat. L. 554, 1 Fed. Stat. Annot. 605, which makes it a criminal offense for any person "while a bankrupt" to conceal property of his estate from his trustee; and such indictment is not demurrable because the date of the conspiracy and concealment is laid prior to the bankruptcy proceedings where it is charged as a part of the conspiracy that a plan was formed to bring about such proceedings pursuant to which the property was removed and concealed, purposely omitted from the bankrupt's schedules, and kept concealed from the trustee after his appointment. *U. S. v. Cohn*, (1906) 142 Fed. 983, *affirmed* (1907) 157 Fed. 651, 85 C. C. A. 113. But an indictment against a bankrupt and others, charging a conspiracy to conceal property of the bankrupt from his trustee in violation of the Bankruptcy Act does not charge an offense under Rev. Stat., sec. 5440, where it shows that the conspiracy was formed and the property removed and concealed by defendants prior to the bankruptcy, but does not aver that it was in contemplation of bankruptcy, or that any overt act was committed after the bankruptcy, although it charges a further conspiracy thereafter to continue the concealment. *U. S. v. Grodson*, (1908) 164 Fed. 157.

A conspiracy by bankrupts to conceal their property from their trustee formed within thirty days of the filing of the petition in bankruptcy, and followed by actual concealment of the property, is an offense which continues to the date of the refusal to turn over the property to the trustee on his election, and an indictment for conspiracy under this section properly charges the commission of the offense as of such date. *U. S. v. Stern*, (1911) 186 Fed. 854.

An indictment will not lie under this section for a conspiracy to effect the concealment by a bankrupt of property from his trustee, in violation of Bankr. Act 1898, sec. 29b, ch. 541, 30 Stat. L. 554, 1 Fed. Stat. Annot. 605, where the trustee himself is

charged as one of the conspirators, and the averments of the indictment show that there was, in fact, no concealment of property from him, and no purpose that there should be such concealment. *Johnson v. U. S.*, (C. C. A. 1907) 158 Fed. 69.

A bankrupt corporation may commit the criminal offense of knowingly or fraudulently concealing its property from its trustee, and individuals who conspire to cause a corporation to commit such offense are indictable for the conspiracy under section 5440, and it is immaterial that the corporation is not or cannot be indicted as one of the conspirators. *Cohen v. U. S.*, (1907) 157 Fed. 651, 85 C. C. A. 113. See also *U. S. v. Young, etc., Co.*, (1909) 170 Fed. 110.

To violate internal revenue law.—An indictment will lie, under this section, for conspiracy to remove distilled spirits on which the tax had not been paid, in violation of Rev. Stat. sec. 3296, 3 Fed. Stat. Annot. 671, although it is charged that the purpose of the conspiracy was accomplished. *Scott v. U. S.*, (C. C. A. 1908) 165 Fed. 172.

To violate National Banking Act.—A conspiracy to violate Rev. Stat. sec. 5209, 5 Fed. Stat. Annot. 145, by causing false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit "an offense against the United States," within the meaning of section 5440. *Scott v. U. S.*, (C. C. A. 1904) 130 Fed. 429.

A conspiracy to violate the "bucket shop" law (Act March 1, 1909, ch. 233, 35 Stat. L. 670) of the District of Columbia is an offense against the United States, within section 5440. *U. S. v. Campbell*, (1910) 179 Fed. 762.

To suborn perjury.—A conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is punishable under the criminal laws of the United States, even though it be conceded that an attempt by one person to suborn another to commit perjury may not be so punishable, since under section 5440 it is clearly criminal for two or more persons to conspire to commit any offense against the United States, provided only that one or more of the parties to the conspiracy do not act towards effecting the object of the conspiracy. *Williamson v. U. S.*, (1908) 207 U. S. 426, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

The precise persons to be suborned, or the time and place of such suborning, need not be agreed upon in the minds of the conspirators, in order to constitute the crime of conspiracy to suborn perjury. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

To obstruct the administration of justice.—A conspiracy to corruptly obstruct and impede the due administration of justice in a court of the United States in a civil action between private parties, in violation of Rev. Stat. sec. 5399, 5 Fed. Stat. Annot. 388, is a conspiracy to commit an offense against the United States within the meaning of section

5440. *Wilder v. U. S.*, (C. C. A. 1906) 143 Fed. 433.

Misconduct in office.—Assuming that the common law as it existed in Maryland when the District of Columbia was ceded exists in the district, and that it makes misconduct in office a criminal offense, it is not an offense against the United States as a distinct sovereign in such sense that an indictment will lie under section 5440 for conspiracy to commit such offense in the district, especially against a person who is not a resident thereof. *U. S. v. Haas*, (1906) 167 Fed. 211.

Merger.—A conspiracy to commit an offense against the United States, made in itself a criminal offense by Rev. Stat. sec. 5440, 2 Fed. Stat. Annot. 247, is not merged in the completed offense, where the two offenses are of the same grade and the punishment is substantially the same. *U. S. v. Scott*, (1905) 139 Fed. 697, *affirmed* (C. C. A. 1908) 165 Fed. 172.

Defenses.—An agent of a railroad company, having authority to issue passes, indicted with others for a conspiracy to issue interstate free passes, to be, and which were, used in violation of the Hepburn Act (Act of June 29, 1906, ch. 3951, sec. 1, 34 Stat. L. 584, Fed. Stat. Supp. 255), cannot defend on the ground that his principal had no knowledge of the fact, and therefore committed no offense under the Act. *U. S. v. Clark*, (1906) 164 Fed. 75.

It is not a defense to a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or wilfully misappropriate its funds by means of excessive loans or overdrafts for their benefit, that the comptroller of the currency did not do all he might have done to compel a correction of such irregularities. *U. S. v. Breeze*, (1909) 173 Fed. 402.

It is no defense to an indictment under section 5440, for conspiracy by defendants, who were importers, and an officer of the customs revenue service, to defraud the United States by effecting the entry of goods by payment of less than the legal duty, by means of false invoices to be approved by such officer, that if the practice prescribed by the statute had been followed the object of the alleged conspiracy could not have been accomplished, because such officer was not authorized to pass on the correctness of the invoices, where the indictment avers that he was charged with such duty by the practice prevailing at the port, and that defendants, by taking advantage of such practice, in fact accomplished the purpose of the conspiracy. In such case it is immaterial whether the practice was legal or illegal. *U. S. v. Rosenthal*, (1903) 126 Fed. 766.

Conspiracy to defraud.—*Construction.*—This section should be construed as declaring not only against conspiracies to commit offenses, but also to conspiracies to defraud the United States, and to punish such conspiracies when supplemented by an overt act, though the wrong has not become effectual in its purpose. *Curley v. U. S.*, (1904) 130 Fed. 1, 64 C. C. A. 369, *affirming* (1903) 123 Fed. 738.

Intent.—Instructions with respect to the intent necessary to be found to warrant a conviction of defendants on a charge of conspiracy to defraud the United States, which charged, in effect, that if defendants intended the consequences which naturally and in fact resulted from their acts, and such result was to defraud the government, they could not be acquitted because they may not have thought the government would be defrauded, were held to be correct. *McGregor v. U. S.*, (1904) 134 Fed. 187, 69 C. C. A. 477.

Where an indictment charged that defendants conspired to defraud the United States by unlawfully and fraudulently procuring the issuance of, and converting to their own use, certain land scrip, and that to effect the objects of their conspiracy they "unlawfully, knowingly, falsely, and fraudulently" applied for and procured the appointment of a pretended administrator of the succession of a person to whom a private land claim had been confirmed, on whose application the scrip was issued, it was held not to be necessary that the government should prove that defendants had actual knowledge of the true facts in relation to the succession, or that the allegations made in their petition for the appointment of the administrator were false; but that it was sufficient if defendants had no knowledge of their truth, or reason to believe them to be true, and they were in fact false, and that this was true although the indictment averred actual knowledge, such an averment being surplusage, and one which need not be proved. *U. S. v. Bradford*, (1905) 148 Fed. 413.

Elements of offense.—To constitute the offense of conspiring "to defraud the United States" under this section it is not essential that the conspiracy should have been to commit an act in violation of a criminal statute. *U. S. v. Stone*, (1905) 135 Fed. 392.

In a prosecution for conspiracy to defraud the United States by the execution of straw bail, it was not necessary that the government should prove that the accused did not appear on the day required, since the government was defrauded when the accused were released on the strength of a recognizance, apparently good, but worthless in fact. *Radford v. U. S.*, (1904) 129 Fed. 49, 63 C. C. A. 491.

Not limited to property rights.—The term "defraud," as used in this section, should not be construed as limited to frauds respecting property rights, but includes the deprivation of any right by deception or artifice; the act being intended to secure the wholesome administration of the laws and affairs of the United States in the interests of the government. *Curley v. U. S.*, (1904) 130 Fed. 1, 64 C. C. A. 369; *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187; *U. S. v. Stone*, (1905) 135 Fed. 392; *U. S. v. Bradford*, (1905) 148 Fed. 413, *affirmed* (C. C. A. 1907) 152 Fed. 616; *Haas v. Henkel*, (1909) 166 Fed. 621, *affirmed* (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569; *U. S. v. Moore*, (1909) 173 Fed. 122.

Thus an indictment is good thereunder which avers facts sufficiently showing that

defendants conspired to deceive inspectors of the United States in the exercise of their official functions by fraudulently inducing them to approve life preservers which did not in fact comply with the requirements of the federal law, and that they committed overt acts pursuant to such conspiracy. *U. S. v. Stone*, (1905) 135 Fed. 392.

To corruptly administer the laws.—A conspiracy to defraud the United States by corruptly administering an Act of Congress, contrary to the true intent and policy thereof, constitutes an indictable offense under this section. *U. S. v. Moore*, (1909) 173 Fed. 122.

Furnishing advance information of government reports.—An agreement between a clerk in the department of agriculture and others pursuant to which such clerk furnished to the others advance information of the contents of a report to be afterward made public by the department regarding the condition of the cotton crop, based on which information the outsiders speculated in the market for the benefit of all parties to the agreement, does not constitute a conspiracy to defraud the United States within the meaning of section 5440. *U. S. v. Haas*, (1908) 167 Fed. 211. *Compare U. S. v. Haas*, (1908) 163 Fed. 908.

Obtaining advance information of government reports.—A conspiracy to obtain advance information of government agricultural reports and statistics before official publication does not constitute a "conspiracy to defraud" the United States. *Haas v. Henkel*, (1909) 166 Fed. 621, *affirmed* (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569.

To publish incorrect government reports.—A conspiracy to cause the publication of incorrect monthly agricultural reports concerning the cotton crop of the current year constituted a "conspiracy to defraud" the United States, prohibited by this section. *Haas v. Henkel*, (1909) 166 Fed. 621, *affirmed* (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569.

False information about national banks.—An indictment alleging the conspiracy to defraud the United States in the exercise of its governmental and fiscal functions, by deliberately giving false information regarding the financial condition of a national bank, the fraud resulting in lessening the power of the federal government by failure to maintain in efficient condition one portion of the national fiscal system, stated an offense against the United States; it being possible to have a conspiracy to defraud by merely deceiving a governmental officer, though neither the government nor the officer was deprived thereby of money or money value. *U. S. v. Morse*, (1908) 161 Fed. 429.

Impersonation of another on civil service examination.—In *Curley v. U. S.*, (1904) 130 Fed. 1, 64 C. C. A. 369, it appeared that the defendant H., desiring to procure appointment as a letter carrier, a position in the classified civil service of the United States, unlawfully agreed with defendant C. that the latter should falsely impersonate H. at a civil service examination, and do all acts required by the examiners, and sign H.'s name

to the examination papers to be delivered to C. for examination while he should impersonate H.; C., in pursuance of such conspiracy, gained entrance to the examination, and falsely signed H.'s name to a declaration sheet which was required to be in the handwriting and on the honor of the applicant. It was held that such facts constituted a conspiracy to defraud the United States, prohibited by section 5440.

To defraud individuals.—A conspiracy to defraud an individual, even though the mails be made use of for the purpose, does not fall within the terms of section 5440. What is there provided for is a conspiracy of two or more either to commit an offense against the United States or to defraud it. *U. S. v. Clark*, (1903) 121 Fed. 190.

To violate postal laws.—A scheme whereby the publishers of a newspaper attempted to procure the special rate to publishers of one cent a pound, instead of the transient rate of four cents a pound, by deceiving the post-office employees as to the circulation of the paper, was held not to constitute a conspiracy to defraud the United States where the paper was entitled under the law to the one cent a pound rate for its entire issue. *U. S. v. Atlanta Journal Co.*, (1911) 185 Fed. 656.

Where one was tried for conspiring to use the mails to carry out a scheme to defraud, it was held to be sufficient for the government to show that written or printed matter about the scheme charged was mailed to one of the three persons named in the indictment as the persons defendant planned to defraud, and that copies of the same printed matter were sent through the mails to a mailing list throughout the United States. *U. S. v. Martin*, (1908) 159 Fed. 767, *affirmed* (1909) 167 Fed. 951, 93 C. C. A. 351.

Where the accused and others conspired to further a scheme to defraud through the post office department, it was held that each overt act of mailing a letter pursuant to such scheme or withdrawing a letter from the post office warranted a charge of conspiracy to commit such offense, so that an indictment therefor would not shield from a subsequent indictment for another conspiracy of the same person to commit another and additional offense, though of the same kind. *Francis v. U. S.*, (C. C. A. 1907) 152 Fed. 155.

To violate homestead land laws.—A conspiracy to defraud the United States of the possession of public lands by means of fraudulent homestead entries is within this section, although there is no purpose to carry the preliminary entries to final entry and patent. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 900.

In *Jones v. U. S.*, (1908) 162 Fed. 417, 89 C. C. A. 303, it was held that to obtain land of the government open to entry under its homestead laws by means of false proof in respect to the entryman's residence or improvements thereon, or for the use or benefit or another, is not only a fraud in fact, but a fraud on the homestead law, a conspiracy to commit which constitutes a violation of section 5440.

To violate coal-land laws.—A conspiracy to obtain title to coal lands of the United States, in clear violation of the prohibition of the coal-land laws against making more than one entry, is embraced by the provision of this section making criminal conspiracies "to defraud the United States in any manner or for any purpose." *U. S. v. Keitel*, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

In *U. S. v. Robbins*, (1907) 157 Fed. 999, it appeared that the defendant entered into a conspiracy to defraud the United States of title to and the possession of large tracts of coal land by procuring others to enter the land in separate parcels as cash purchasers; defendants furnishing the money, and the entrymen holding the land in secret trust for defendants. It was held that the gist of the conspiracy being the intent to give such entries a false appearance for the purpose of misleading the United States, it constituted a conspiracy to defraud the United States, prohibited by this section, though defendants did not stand in such a position to the government as to require a disclosure of the true facts.

In *Pereles v. Weil*, (1907) 157 Fed. 419, it was held that an indictment which charges defendants with conspiracy to defraud the United States, by obtaining for a certain corporation coal lands of the United States, in excess of the quantity which it could lawfully acquire under the coal-land purchase laws, by means of entries to be made by certain of the defendants as individuals thereby securing patents to themselves, paying for the lands with money furnished by the corporation, and thereupon conveying such lands to the corporation, and which charges as overt acts the making of applications for such entries, the acquiring of patents, and the making of such conveyances, does not state an offense under this section, where it does not aver that such defendants were employed or procured by the corporation to make applications for the entries in its behalf, that there was any fraudulent intention in fact in making the entries, or that the patents issued thereon were void; there being nothing in the statute to prevent the corporation from lawfully acquiring by purchase any quantity of coal lands, the title to which or the preference right to purchase which had been lawfully acquired by others.

To violate school land laws.—In *Hyde v. Shine*, (1905) 199 U. S. 62, 25 S. Ct. 760, 50 U. S. (L. ed.) 90, *affirming* (1904) 132 Fed. 545, it was held that a conspiracy to obtain school lands from the states of California and Oregon in the names of fictitious or disqualified persons by the use of forged affidavits, assignments, and other documents, and to relinquish them to the United States under the Act of June 4, 1897, ch. 2, sec. 1, 30 Stat. L. 36, 7 Fed. Stat. Annot. 314, in exchange for other public lands, cannot escape condemnation under this section forbidding conspiracies to defraud the United States, on the theory that the United States, having received the school lands in lieu of other lands patented, has not been defrauded—

even assuming that the United States stands in the position of a *bona fide* purchaser in respect to the school lands. *Compare In re Benson*, (1904) 131 Fed. 988.

To violate Timber and Stone Act.—A conspiracy to induce entrymen who have made application under the Timber and Stone Act of June 3, 1878, as amended by the Act of Aug. 4, 1892, 7 Fed. Stat. Annot. 300, to agree to convey after patent, is not one to defraud the United States "in any manner or for any purpose," within the meaning of section 5440, since the former statute not only does not expressly prohibit an entryman from making such an agreement, but impliedly sanctions it. *U. S. v. Biggs*, (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305; *U. S. v. Sullenberger*, (1909) 211 U. S. 522, 29 S. Ct. 186, 53 U. S. (L. ed.) 311.

To constitute a violation of this section by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act, it is not essential that a patent for the lands be issued and delivered; a violation of the section not depending upon the success of the conspiracy, and becoming complete when the final step has been taken by the conspirators in inducing fraudulent entries and the issuance of certificates of purchase. *U. S. v. Black*, (1908) 160 Fed. 431, 87 C. C. A. 383.

Completion of offense.—Where a conspiracy is formed to defraud the United States in any manner, in violation of this section, the offense is complete when the conspiracy is formed, and the conspirators are subject to prosecution whenever one or more of them has done any act in the furtherance of the unlawful scheme devised and agreed on; it being, therefore, sufficient that the conspiracy, when formed, was attended with corrupt motives and was for a corrupt purpose. *U. S. v. Moore*, (1909) 173 Fed. 122.

Joinder of offenses.—In *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187, it was held that charges against the same defendants for conspiracy to defraud the United States, based on this section, and for receiving money from their alleged co-conspirator for aiding to procure a contract from the government, and for services rendered in relation to the same, based on sections 1781, 1782 (1 Fed. Stat. Annot. 712, 6 Fed. Stat. Annot. 606), defendants being clerks in a department, and such charges all relating to the same transaction, might properly be joined in different counts in the same indictment under Rev. Stat. sec. 1024, 2 Fed. Stat. Annot. 337.

Evidence—Generally.—Upon the trial of a charge of conspiracy, where the prosecution depends upon inferences to be drawn from facts to prove the conspiracy, great latitude of proof must be allowed, and the jury should have before them, and are entitled to consider, every fact which has a bearing upon and a tendency to prove the ultimate fact in issue. *U. S. v. Greene*, (1906) 146 Fed. 803, *affirmed* (C. C. A. 1907) 154 Fed. 401.

Rules of evidence.—The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly

with others consented or agreed to the existence of a former conspiracy within the three years, and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue. *Ware v. U. S.*, (1907) 154 Fed. 577, 84 C. C. A. 503.

Competency.—In a prosecution for conspiracy to defraud the United States of public lands by fraudulently acquiring state lands, and having them included within a national forest reservation, thus acquiring the right to select in exchange public lands of the United States of greater value, where one of the defendants was at the time of the transactions commissioner of the General Land Office, evidence that the reservation was established on his recommendation, that news of the fact was given out in advance of the official announcement, and that his resignation was afterward requested by his superiors because of his conduct in relation to forest reservations, was held to be competent on the trial of a codefendant. *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142.

Sufficiency.—Evidence that employees of the owner of a distillery joined and participated with him in removing from such distillery to a place other than a bonded warehouse spirits on which the internal revenue tax had not been paid, in violation of Rev. Stat. sec. 3296, 3 Fed. Stat. Annot. 671, under circumstances from which they must have known the illegal nature of the transactions, was held to be sufficient to sustain an indictment, under this section, of both employer and employees, for conspiracy to commit an offense against the United States. *U. S. v. Scott*, (1905) 139 Fed. 697, *affirmed* (C. C. A. 1908) 165 Fed. 172.

A charge of conspiracy for the concealment of property by a bankrupt, in violation of Bankr. Act July 1, 1898, ch. 541, sec. 29b (1, 30 Stat. L. 554, 1 Fed. Stat. Annot. 605, may be supported by evidence that the property was sold under a chattel mortgage given by the bankrupt prior to the bankruptcy, where it is shown that such mortgage and sale were merely colorable, and that the property, in fact, remained that of the bankrupt. *Cohen v. U. S.*, (1907) 157 Fed. 651, 85 C. C. A. 113.

Sufficiency.—A charge under Rev. Stat., sec. 5440, of conspiracy between officers of a national bank to embezzle, abstract, or willfully misapply its funds in violation of section 5209, 5 Fed. Stat. Annot. 145, was held to be supported by evidence that, acting together with a common understanding, defendants largely overdrew their respective accounts with the bank, to such an extent that they were wholly unable to meet the same, as they must have known, and that, to cover up such overdrafts, by a common understanding they placed worthless notes in the bank with the intent and result of injuring and defrauding the bank and impairing its capital. *U. S. v. Breese*, (1909) 173 Fed. 402.

For other cases on sufficiency of evidence to prove conspiracy, see *Lehman v. U. S.*, (1903) 127 Fed. 41, 61 C. C. A. 577; *Jones v. U. S.*, (C. C. A. 1910) 179 Fed. 584.

Circumstantial evidence.—Conspiracy to defraud the United States under this section is not necessarily established by direct evidence. Circumstantial evidence may suffice. A formal agreement need not be proved. It is sufficient to show that the parties were acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common unlawful design, apart from and unknown to others. *Marrash v. U. S.*, (C. C. A. 1909) 168 Fed. 225. See also *U. S. v. Breese*, (1909) 173 Fed. 402.

Of acts and declarations.—To the same effect as the first paragraph of the original note, *U. S. v. Francis*, (1906) 144 Fed. 520, modified (C. C. A. 1907) 152 Fed. 155.

Declarations made by one conspirator while the conspiracy was in progress, and relating to its object, although not in furtherance thereof, are admissible as part of the *res gestæ* against each conspirator. *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142.

On the trial of defendants charged with having conspired with a person named and with others to the grand jurors unknown to induce a partnership to accept rebates from railroad companies on shipments in violation of the interstate commerce law, where there was evidence tending to establish the conspiracy, and that the arrangement for the illegal rebates was made between defendants and one member of such partnership, entries in a private memorandum book kept by such partner, showing sums received as "freight commissions" and distributed between the partners individually, which transactions did not appear on the books of the firm, were held to be admissible in evidence. *Thomas v. U. S.*, (1907) 156 Fed. 897, 84 C. C. A. 477. But an overt act committed by one of the alleged coconspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, was held to be incompetent to establish its existence and his participation therein within the three years. *Ware v. U. S.*, (1907) 154 Fed. 577, 84 C. C. A. 503.

On the trial of an indictment for conspiracy, the admission in evidence of declarations made by one of the alleged conspirators before proof of the conspiracy was held to be a matter of order of proof within the discretion of the court, and not prejudicial where such proof was subsequently made by evidence other than the declarations. *Cohen v. U. S.*, (1907) 157 Fed. 651, 85 C. C. A. 113.

On a trial for criminal conspiracy, in determining whether a conspiracy was formed and whether acts were done to effect the same, it was held that the acts and conduct of a defendant not on trial might be considered in connection with those of the defendant or defendants on trial. *U. S. v. Breese*, (1909) 173 Fed. 402.

On the prosecution of defendant for conspiring to defraud the United States of public

lands by fraudulently acquiring state lands of little or no value, procuring their inclusion in a national forest reservation, and obtaining in lieu lands of greater value from the government in exchange therefor, evidence of such fraudulent acquiring of state lands within the boundaries of the reservation subsequently established, more than three years before the finding of the indictment, and the sale of which by the state had afterward been validated by an act of the legislature, was held to be admissible as tending to prove the intent and design of the conspiracy. *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142.

Subsequent acts.—In a prosecution for conspiracy to defraud the United States by suborning certain named persons to commit perjury in making entries under Timber and Stone Act June 3, 1878, ch. 151, 20 Stat. L. 89, 7 Fed. Stat. Annot. 300, it was held that evidence of acts of the alleged perjurers committed long after they had sworn to and filed their statements, and that subsequent to such filing they had agreed with defendant D. for a money consideration to file a relinquishment of their application at such a time as he could manage to take it up with scrip, together with a relinquishment so filed, was inadmissible to show motive. *Dwinnell v. U. S.*, (C. C. A. 1911) 186 Fed. 754.

Prior fraudulent intent of one coconspirator.—Facts which show that one of several alleged conspirators had conceived a fraudulent intent before he entered into the conspiracy do not constitute competent evidence that his alleged coconspirators, who had no knowledge of those facts, had such an intent before or at the time the conspiracy was formed. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

Intimacy between parties charged.—Previous intimacy between persons charged with conspiracy is competent and important proof, and proof of close intimacy is especially important if the duties of the parties respectively were intended to be in opposition, and should the occasion arise might forbid such intimacy, as where the conspiracy charged was to defraud the government in respect to contracts for public work, and the alleged conspirators were respectively contractors for such work and the government engineer officer in charge of the same. *U. S. v. Greene*, (1906) 146 Fed. 803, affirmed (C. C. A. 1907) 154 Fed. 401.

Written admissions.—On the trial of defendants charged with conspiracy to defraud the United States of certain lands, a special agent for the land department testified that he asked one of the defendants for a statement in respect to the transaction, and in reply received a letter from him stating: "I send herewith the statement of Mr. Williams, covering, as I believe, all the points you suggested," and inclosing an affidavit of said Williams to which were attached copies of contracts of different dates between the defendants relating to the acquisition of the lands in question. It was held that it was error to permit the prosecution to detach the copy of one of the contracts from the affidavit and

to introduce the same, together with the letter in evidence, as a declaration or admission of defendant, and at the same time to exclude the affidavit and copies of the other contracts which formed an integral part of the statement. *Perrin v. U. S.*, (1909) 169 Fed. 17, 94 C. C. A. 385.

Other offenses.—On the trial of a defendant for conspiracy to defraud the United States of public lands, evidence that he had previously been engaged in the illegal acquisition of public lands elsewhere by a different method was admissible as bearing upon the questions of intent, purpose, and design. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278; *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142.

Where an indictment for conspiracy to defraud the United States of government land by fraudulent homestead entries charged defendants with conspiracy to defraud the government of lands embraced in certain homestead claims filed by certain named persons, it was held that the government was properly permitted, for the purpose of proving defendants' intent and guilty knowledge, to show that various other persons had also filed on and made final proof on various other tracts of land under the homestead laws, in pursuance of an agreement with the defendants and for their benefit. *Jones v. U. S.*, (1908) 162 Fed. 417, 89 C. C. A. 303. See also *Olson v. U. S.*, (1904) 133 Fed. 849, 67 C. C. A. 21.

Letters between coconspirators.—On the trial of a defendant, under this section, for conspiracy to commit an offense against the United States, a letter passing between others of the alleged conspirators was held to be competent against the defendant as tending to prove the conspiracy, in the absence of specific objection to the part of it referring to defendant. *Stirlen v. U. S.*, (C. C. A. 1910) 183 Fed. 302.

Motive or intent.—Evidence as to how the entrymen of timber and stone lands understood their arrangement with one of the defendants charged with a conspiracy to suborn perjury, and of their purpose in applying for the land, was held to be admissible where no formal contracts were executed between the alleged conspirators and the proposed entrymen, the alleged understandings being of an ambiguous nature, and proof of the conspiracy depending upon a variety of circumstances tending to show motive or intent. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

Proof of conspiracy barred by statute of limitations.—Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence *aliunde* of the existence of the conspiracy and of the defendant's conscious participation in it within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. *Ware v. U. S.*, (1907) 154 Fed. 577, 84 C. C. A. 503.

To prove criminal intent.—Where, in a prosecution against officers of a national bank and alleged aiders and abettors for misapplying the bank's funds, it was claimed that such application was made partly through overdrafts by defendant K. for the benefit of a hosiery company, and that defendant K. had conspired with certain of the officers of the bank to defraud it of its funds, evidence that many other customers of the bank had made overdrafts on it, the details of which were exhibited on certain pages of the bank's individual ledger offered in evidence, was held to be admissible as bearing on defendant's criminal intent. *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

Of probable cause.—On an application to remove persons to another federal district where they were charged with violating section 5440 by conspiring to defraud the United States of public lands, certified copies of general land office records showing that all the entries of public lands mentioned in the indictment were perfected and issued therefor prior to all the alleged overt acts under the alleged conspiracy, and more than three years before the indictment was filed, were admissible on the question of probable cause of the charge. *U. S. v. Black*, (1908) 160 Fed. 431, 87 C. C. A. 383.

Unlawful use of mails.—In a trial for conspiring to use the mails in carrying out a scheme to defraud, the cashbook, checks, and entries of cash in defendant's deposit book in a trust company, made during the continuance of the scheme, were held to be properly admitted to show the conspiracy. *U. S. v. Marrin*, (1908) 159 Fed. 767, *affirmed* (C. C. A. 1909) 167 Fed. 951.

So all mail connected with the scheme, shown to have passed through the post office to any person, whether named in the indictment or not, was held to be evidence upon the question of the existence of the scheme. *U. S. v. Marrin*, *supra*.

Burden of proof.—Where an indictment for conspiracy wilfully to misapply the funds of a national bank charged that the conspiracy had been formed between certain officers of the bank and defendant K., to wilfully misapply the funds of the bank to the use of a hosiery company, and that such conspiracy was accomplished by an act of defendant K. in drawing and accepting a draft in behalf of the hosiery company, and in depositing the draft in the bank, and obtaining credit therefor in the hosiery company's account, to effect the object of the conspiracy, it was held that the burden was on the government to prove that the conspiracy as alleged was entered into, that defendant K. was a party to it, and that the acts referred to were done by him to effect the object of the conspiracy in order to sustain a conviction. *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

Questions for jury.—The questions whether a conspiracy existed, as charged in an indictment, and whether an act was done by one or more of the defendants to effect the object of the conspiracy, are questions of fact for the jury. *Marrash v. U. S.*, (C. C. A. 1909) 168 Fed. 225.

Overt acts.—While no overt act was required to constitute a conspiracy at common law, a conspiracy to defraud the United States, denounced by this section, is not effected until an overt act is committed by one or more of the conspirators. *Jones v. U. S.*, (C. C. A. 1908) 162 Fed. 417.

It is not enough under this section that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of another object; it must be directed to the attainment of the object which brings the conspiracy within the class made criminal; and when that object is attained "the object of the conspiracy," in the sense of the statute, is effected, and there cannot be a further overt act. *Lonabaugh v. U. S.*, (C. C. A. 1910) 179 Fed. 476.

Where the overt act alleged as a part of a conspiracy to defraud the United States took place after the conspiracy had been consummated, it was held to be ineffective as an overt act to constitute such offense. *Ex p. Black*, (1906) 147 Fed. 832; *U. S. v. Ehrigott*, (1910) 182 Fed. 267.

Whether an act charged in an indictment for conspiracy as an overt act to effect the object of such conspiracy was such overt act may be determined by the court, where it is clear from the face of the indictment that it could not by any possibility have tended to effect the object of the conspiracy. *U. S. v. Biggs*, (1907) 157 Fed. 264, *affirmed* (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.

In an indictment under this section for conspiracy to commit an offense against the United States by bringing Chinamen into the country from Mexico in violation of the statute, by means of a certain vessel, it was held that the provisioning of such vessel for the outward voyage and the sailing of such vessel from an American port to Mexico for the purpose of accomplishing the purpose of the conspiracy might be averred as overt acts. *Daly v. U. S.*, (C. C. A. 1909) 170 Fed. 321.

Where defendants conspired to obtain reservation lands by procuring false applications to purchase, it was held that defendant's act in procuring some person to make an application to purchase, and a false oath accompanying it, would constitute a sufficient overt act. *U. S. v. Raley*, (1909) 173 Fed. 159.

Where a conspiracy contemplated fraudulent entries on definite tracts of public land under the Stone and Timber Act, and in order to accomplish the same the co-operation of sixteen persons to act as entrymen was required, and one of the conspirators obtained such persons, an alleged overt act charged to consist of the payment of \$200 to defendant, who was one of the sixteen, in order to induce him to make a fraudulent entry and transfer of the lands to the conspirators, was an act which pertained to the conspiracy itself, and was therefore insufficient. *Ex p. Black*, (1906) 147 Fed. 832.

Indictment — Generally.—An indictment under this section for conspiracy to defraud the United States of public lands is not one charging a conspiracy to do an act not unlawful in itself, because there is no separate statute making it a crime to defraud the United States so that it is necessary to set out criminal or unlawful means to charge an offense, but the statute itself makes a conspiracy to defraud the United States a distinct crime, and no further offense need be averred or proved. *Mays v. U. S.*, (C. C. A. 1910) 179 Fed. 610.

An indictment for a conspiracy to defraud the United States, which charges a corrupt agreement by which an officer of the United States is, in substance, to have a secret interest in a public contract as to the fulfilling of which by the contractor that officer is to be the judge, is sufficient without averring that the interest was given him or the money paid to him to influence his official conduct upon the very contract in question, or alleging which of the various ways of defrauding the government was in the minds of the conspirators, or that they all were. *Crawford v. U. S.*, (1909) 212 U. S. 183, 29 S. Ct. 260, 53 U. S. (L. ed.) 465.

An indictment under this section for conspiracy to defraud the United States, which avers that defendant and an officer of the United States "unlawfully did conspire, combine, confederate, and agree together . . . knowingly to defraud the said United States in the manner following, that is to say," followed by an averment that defendant promised and agreed with said officer to pay him a commission on the price of each and every one of certain articles which should be purchased by the United States by procurement of such officer, fairly imports an assent or agreement on the part of the officer, and is sufficient in such respect to charge conspiracy, although the officer's assent is not directly averred. *U. S. v. Green*, (1905) 136 Fed. 618.

Construction.—While a charge of conspiracy to defraud the United States, which wholly omits some essential element of the offense, cannot be aided by the statement of acts done to effect its object, this does not prevent reference to such statement for the purpose of ascertaining the sense in which terms are used in charging the conspiracy. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 900.

Limitations.—Where an indictment for conspiracy to defraud the United States in violation of this section alleged the formation of the conspiracy on Sept. 1, 1901, and that on April 10, 1905, within the period of limitation, defendants, in furtherance of the conspiracy and to carry out and effect its object, performed certain overt acts specified, each being alleged to have taken place within three years prior to the indictment, the indictment sufficiently charged that the original conspiracy was continuously in existence, and was not defective as indicating that the overt acts only, and not the conspiracy, had been committed within three years, though it did not in terms allege a new or renewed con-

spiracy. *U. S. v. Barber*, (1907) 157 Fed. 889.

Averment of date.—An indictment under this section need not aver with exact accuracy the date of the formation or beginning of the conspiracy, nor, if the date is alleged, need it be proved as laid, but it is sufficient if the conspiracy is proved to have existed prior to the commission of the overt act charged, and that it continued to exist at that time. *Bradford v. U. S.*, (C. C. A. 1907) 152 Fed. 617.

Intent.—An indictment charging a defendant with a conspiracy to "commit an offense against the United States" must state an agreement to do acts which, if done, would constitute a specific offense; and where an intent is an essential part of such offense, as defined by the statute, such intent must be averred. *U. S. v. Green*, (1905) 136 Fed. 618, affirmed 199 U. S. 601, 26 S. Ct. 748, 50 U. S. (L. ed.) 328. Compare *U. S. v. Stone*, (1905) 135 Fed. 392.

Failure to negative exception in statute.—An indictment based on this section, charging a conspiracy to defraud the United States by causing the violation of another statute subsequently enacted, need not negative an exception found in the later statute, which, being entirely separable from the section upon which the indictment is founded, is a matter of defense. *U. S. v. Stone*, (1905) 135 Fed. 392.

Defrauding persons unknown.—It is not a valid objection to an indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown to the grand jury, that it shows on its face that the defendants were also guilty of the offense—with which they are not charged in the indictment—of conspiring to defraud persons known to the grand jury. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

Overt act.—An overt act must be alleged in an indictment for conspiracy as an essential element of that offense. *Ex p. Black*, (1906) 147 Fed. 832. Compare *U. S. v. Burkett*, (1907) 150 Fed. 208.

An indictment, under this section, against two defendants, charging them with a conspiracy to commit an offense against the United States by making certain false entries in the books of a national bank, of which one of the defendants was an officer, in violation of Rev. Stat. sec. 5209, 5 Fed. Stat. Annot. 145, was not bad because, in stating the details of the overt act committed by defendants, it was averred that the entries which were made in the books of the bank were made by the hand of the defendant who was not an officer thereof; it being averred that both defendants were present and participated in the carrying out of the plan formed between them to make such entries. *Scott v. U. S.*, (1904) 130 Fed. 429, 64 C. C. A. 631.

An indictment under this section, which charges that defendants knowingly, unlawfully, wickedly, and corruptly conspired to defraud the United States out of its title to certain public lands by means of false, fraudulent, and fictitious entries of the same under the land laws, and that in pursuance

of, and to effect the object of, such conspiracy, certain acts set forth were committed by one or more of the defendants, was held not insufficient because it did not expressly aver that such acts were done with knowledge of the fraudulent and illegal character of the entries. The essence of the offense is the conspiracy, and while an overt act is an essential element under the statute, the use of the word "knowingly" in charging the conspiracy must fairly be held to apply to and characterize the acts specifically charged to have been done in furtherance of such conspiracy, and for the purpose of carrying it into effect. *U. S. v. Mitchell*, (1905) 141 Fed. 666.

While the conspiracy denounced by this section is not punishable until the commission of some overt act in pursuance thereof, the offense consists of the conspiracy alone, so that the validity of an indictment under such section must be tested by averments concerning the conspiracy unaided by those in respect to the overt acts committed thereunder. *Dwinnell v. U. S.*, (C. C. A. 1911) 186 Fed. 754.

Objections to indictment—how taken.—The objection that an indictment for conspiracy to defraud the United States of certain public lands does not make it altogether clear to what lands the conspiracy related cannot be taken by a motion in arrest of judgment. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 900.

Joinder of causes.—Under R. S. sec. 1024, 2 Fed. Stat. Annot. 337, counts for using the mails to defraud, in violation of section 5480, 5 Fed. Stat. Annot. 973, and for conspiracy to commit such offense, under section 5440, where based upon the same transaction, may be joined in one indictment. *U. S. v. Clark*, (1903) 125 Fed. 92.

Motive.—Where it is alleged that certain persons confederated to do a lawful act by criminal means, the indictment must charge that the means employed were attended by a corrupt motive. *U. S. v. Moore*, (1909) 173 Fed. 122.

An indictment for conspiracy, alleging that defendants conspired to procure the maladministration of an Act of Congress appropriating money for the survey of public lands in a specified order, by procuring the use of such funds for the survey of lands which were non-agricultural and the subject of fictitious entries, sufficiently charged the conspirators' corrupt purpose, and was therefore not objectionable for failure to allege that defendants had guilty knowledge of the falsity of the entries. *U. S. v. Moore*, (1909) 173 Fed. 122.

Certainty.—An indictment under this section making it an offense to conspire either to commit any offense against the United States or to defraud the United States, must charge the act constituting the offense with reasonable certainty, and not by mere inference. *U. S. v. Atlanta Journal Co.*, (1911) 185 Fed. 656.

An indictment charging that the defendants conspired together to defraud the government of the title to a portion of the public

domain, to wit, etc., and in pursuance of the conspiracy performed the overt acts of obtaining and using before the register and receiver of the local land office false and bogus affidavits represented by defendants to be genuine in making proof of a timber culture entry theretofore regularly made on the land by H., since deceased, under an agreement with his widow that they were to succeed by conveyance from her to all the rights of the government secured by virtue of a patent issued by the government based on such proofs, was not defective for uncertainty. *U. S. v. Burkett*, (1907) 150 Fed. 208.

Particularity.—In an indictment for conspiracy to defraud the United States, it is sufficient that the means be set out with such particularity as will put defendant on notice of what he is to meet at the trial. *U. S. v. Raley*, (1909) 173 Fed. 159.

An indictment for conspiracy to defraud the United States by a false invoice is not vitiated by the particularity with which the overt act is set forth, if the conspiracy of itself be sufficient. *U. S. v. Stamatopoulos*, (1908) 164 Fed. 524.

Where an indictment for conspiracy to defraud the United States alleged that defendant conspired to obtain Umatilla reservation lands by procuring persons to make false affidavits for the purchase of the lands on defendant's account, and by procuring persons to make contracts prior to such purchase whereby the title was to inure to defendant's benefit, and by procuring them to make false proofs of residence and cultivation of the lands, all of which acts were forbidden and unlawful, it sufficiently charged the means by which the conspiracy was to be effectuated. *U. S. v. Raley*, (1909) 173 Fed. 159.

Where an indictment charged a conspiracy to induce a shipper to receive rebates from railroad companies in violation of the federal statute, it was not essential to aver the names of such railroad companies which were not known to the grand jury. *Thomas v. U. S.*, (1907) 156 Fed. 897, 84 C. C. A. 477.

In an indictment for conspiracy to defraud the United States by making a false oath or affidavit in connection with the purchase of reservation lands, it was held not to be necessary to set out the details of the administration of the oath, by whom administered, or that the person officiating was an officer duly qualified to do so. *U. S. v. Raley*, (1909) 173 Fed. 159.

Variance.—Where an indictment charged a conspiracy to defraud the United States of moneys thereafter to become due from a certain mercantile firm as customs duties, proof that the merchandise in question was consigned to a firm of custom brokers, who paid the duties thereon, was not a variance; the goods being owned by the mercantile firm, and so consigned only for convenience of entry. *Grunberg v. U. S.*, (C. C. A. 1906) 145 Fed. 81.

Under an indictment against a number of defendants for conspiracy to defraud the government out of certain public lands, charged to have been illegally entered for the benefit

of the defendants, it is not a fatal variance that the proof shows that some of them only shared in the benefit; the offense being complete if the conspiracy is established and an overt act committed in pursuance thereof. *Olson v. U. S.*, (1904) 133 Fed. 849, 67 C. C. A. 21.

While in an indictment under this section for a conspiracy to make use of the mails pursuant to a scheme to defraud, a fraudulent purpose must be averred and proved, and where a purpose to defraud two jointly is charged it must be proved as laid, yet where the sending of individual letters to parties named is charged in the indictment in different counts, an averment in general terms of an intent to defraud these parties does not necessarily import that the conspiracy contemplated a joint defrauding of the whole number named; the parties not being in business together or jointly interested in the property which it was the aim of the conspiracy to secure. *Marrin v. U. S.*, (1909) 167 Fed. 951, 93 C. C. A. 351.

There was not a fatal variance between indictment and proof in a prosecution for conspiracy under this section, because the indictment charged that the defendants conspired with each other and with others to the grand jurors unknown, while the evidence showed that the name of another conspirator was in fact known, where the indictment fully sets out his connection with the conspiracy, and designated him by name, so as to clearly advise the defendants of the charge against them. *Jones v. U. S.*, (1910) 179 Fed. 584, 103 C. C. A. 142.

Curing defect.—Where an indictment for conspiracy to knowingly and wilfully obstruct the passage of the mails, in violation of this section and section 3995, 5 Fed. Stat. Annot. 911, was defective for failure to charge that defendants conspired to "knowingly and wilfully" obstruct the mails, the defect was not cured by the allegation that they did "knowingly, unlawfully, and feloniously combine, conspire," etc., to obstruct the mails, or that the part of the indictment charging the overt act alleged that such act was "knowingly and wilfully" committed. *Conrad v. U. S.*, (1904) 127 Fed. 798, 62 C. C. A. 478.

Specific means agreed upon.—To the same effect as the first part of the original note. *Perrin v. U. S.*, (1909) 169 Fed. 17, 94 C. C. A. 385. See *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 900.

To violate customs laws.—An indictment for conspiracy to defraud the United States by means of a false invoice, is sufficient which sets forth such a conspiracy, notwithstanding that it does not set forth the consummation of the fraud nor include an allegation that the fraud could have been accomplished, if not detected. *U. S. v. Stamatopoulos*, (1908) 164 Fed. 524.

To violate postal laws.—Under Act Cong. March 3, 1879, ch. 180, secs. 10, 11, 14, 20 Stat. L. 359, 5 Fed. Stat. Annot. 829, defining second-class mail matter, and fixing the rate of postage on publications of the second class, when sent from the office of publication, including sample copies, or when

sent from a news agency to actual subscribers thereto, at two cents per pound or fraction thereof, provided that nothing in the statute shall be construed so as to admit to the second-class rate regular publications designed primarily for advertising purposes, for free circulation, or for circulation at nominal rates. Act Cong. March 3, 1885, ch. 342, 23 Stat. L. 387, 5 Fed. Stat. Annot. 854, changing the rate to one cent per pound, and Act Cong. June 9, 1884, ch. 73, 23 Stat. L. 40, 5 Fed. Stat. Annot. 856, fixing the rate on periodicals of the second class when sent by others than the publishers or news agents at one cent for each four ounces or fractional part thereof, an indictment for conspiracy to defraud the United States by securing for papers sent out in addition to the regular circulation the one cent a pound instead of the one cent for four ounces rate is insufficient, where it does not allege that the papers were designed primarily for advertising purposes or for free circulation or for circulation at nominal rates. *U. S. v. Atlanta Journal Co.*, (1911) 185 Fed. 656.

An indictment under this section for conspiracy to commit an offense under R. S. sec. 5480, 5 Fed. Stat. Annot. 973, by devising a scheme to defraud intended to be carried out by the use of the mails, must charge a conspiracy to commit acts which, if committed, would constitute an offense under the latter section; but it need not charge separately that defendants specifically conspired to commit each element of the offense. *McConkey v. U. S.*, (C. C. A. 1909) 171 Fed. 829.

An indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown to the grand jury is not vulnerable because the names of these persons are not stated in the indictment, if it contains a true averment that these persons are not known to the grand jury. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

Facts which clearly show a conspiracy to devise a scheme or artifice to defraud, an intention to defraud, an intention to use the post-office establishment as a part of the scheme for the purpose of executing it, the use of that establishment for that purpose, and the scheme or artifice itself, are essential to a valid indictment under this section 5440, to commit the offense described by section 5480, R. S., 5 Fed. Stat. Annot. 973, and must be alleged in the pleading. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

An indictment for conspiracy to defraud by the use of the mails, in violation of R. S. sec. 5480, 5 Fed. Stat. Annot. 973, as amended, was not bad for repugnancy because it charged in the same count that defendant conspired to defraud "by dealing and pretending to deal" in what is commonly called "green articles" and "spurious treasury notes." *Lehman v. U. S.*, (1903) 127 Fed. 41, 61 C. C. A. 577.

To obstruct the mail.—In *Conrad v. U. S.*, (C. C. A. 1904) 127 Fed. 798, it appeared that section 3995, R. S., 5 Fed. Stat. Annot. 911, declares that, if any person shall "knowingly and wilfully" obstruct or retard the

passage of the mails, he shall for every such offense be punished, etc. It was held that an indictment for conspiracy to commit the offense described in section 3995, which failed to allege that defendants conspired to "knowingly and wilfully" obstruct or retard the passage of the mails, in the manner set out, was fatally defective.

To violate public land laws.—Averments in an indictment for conspiracy that defendants conspired to fraudulently obtain the issuance by the United States of land scrip in satisfaction of a confirmed private land claim, which scrip when issued could be located on public lands of the United States, and that such conspiracy was carried out by fraudulently procuring the appointment of an administrator of the succession of the true claimant, on whose application the scrip was issued, and by whom it was sold, and the proceeds converted by defendants to their own use, were held to be sufficient to sustain the charge that the conspiracy was one to defraud the United States. *U. S. v. Bradford*, (1905) 148 Fed. 413, *affirmed* (C. C. A. 1907) 152 Fed. 616.

In *U. S. v. Brace*, (1907) 149 Fed. 874, it was held that an indictment alleging that defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands in the manner and by the means agreed on between them on May 25, 1902, was not equivalent to a charge that defendants subsequent to that date entered into a new conspiracy to accomplish their unlawful design, but was merely an allegation that the conspiracy formed on that day was never abandoned, but was in continuous operation thereafter until the date of the last overt act charged.

Where the facts alleged in an indictment for conspiracy to commit an offense against the United States by subornation of perjury in proceedings to acquire public lands, necessarily import wilfulness on the part of the persons giving such testimony, the failure of the indictment to use the word itself is not fatal. *Van Gesner v. U. S.*, (C. C. A. 1907) 153 Fed. 46.

An indictment for conspiracy to defraud the United States of public lands by fraudulently obtaining the title to worthless state lands, securing the establishment of a forest reserve including such lands and then exchanging the same for public lands of the United States under the law authorizing such exchange, is not bad because it does not describe the state lands to be so acquired, further than to state the counties in which they are situated, where they had not been obtained and no further description was possible. *Mays v. U. S.*, (C. C. A. 1910) 179 Fed. 610. See also *U. S. v. Raley*, (1909) 173 Fed. 159.

To violate homestead land laws.—An indictment charged that the defendants, with others, conspired to obtain from the government certain specified tracts of land open to homestead entry by procuring certain named persons to enter the same by means of false

proof in respect to their residence on and improvement of the land, and with respect to the intent with which and the purpose for which the entries were made, and in pursuance of such conspiracy and to effect the object thereof defendants caused and procured C. to make the homestead proof in respect to the land entered by him and the final affidavit required by homestead claimants, including a statement that his family consisted of himself and wife, and that they had resided continuously on the land since first establishing residence thereon, which proof was subscribed by C. and certified by defendant W., and that each of the defendants knew that the proof was false, etc. It was held that the indictment was sufficient. *Jones v. U. S.*, (1908) 162 Fed. 417, 89 C. C. A. 303.

An indictment under this section which charges a conspiracy to defraud the United States of certain of its lands by means of false, forged, and fraudulent entries thereof under the homestead law, and avers that such lands were "in the district of lands subject to entry under the homestead laws of the United States" at a certain land office, and also in stating the acts done pursuant to such conspiracy charges the filing of applications for homestead entry of certain described "public lands of the United States subject to homestead entry," is not fatally defective because in charging the conspiracy it does not expressly aver that the lands of which it was the purpose to defraud the United States were public lands subject to homestead entry. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 900.

In an indictment for conspiracy to defraud the United States by means of a false and fraudulent entry of public lands under the homestead law, the word "entry" may properly be used and construed as applying to any or all of the steps necessary to acquire title under such law. *Bradford v. U. S.*, (C. C. A. 1907) 152 Fed. 617.

To violate school land law.—An indictment under this section, charging a conspiracy to defraud the United States by fraudulently obtaining title to and possession of certain described lands, then public lands of the United States, is not insufficient because it further charges that the purpose of the conspiracy was to be accomplished through the state by securing the selection of the lands by the state in lieu of school lands included in a government forest reservation and their fraudulent transfer from the state to defendants, nor because the state was entitled to select such lands under the law. *Perrin v. U. S.*, (1909) 169 Fed. 17, 94 C. C. A. 385.

To violate coal land laws.—An indictment under this section for conspiracy to defraud the United States charges an offense where it avers the purpose of the conspiracy to be to acquire coal lands of the United States by means of false, fictitious, and fraudulent entries and applications, and to induce and hire others to make like entries, at the cost and for the benefit of defendants to whom such entrymen were to convey the lands so entered,

and where it fully sets out such means and overt acts committed for the purpose of effecting the object of such conspiracy. *Arnold v. Weil*, (1907) 157 Fed. 429. See also *Pereles v. Weil*, (1907) 157 Fed. 419.

An indictment averring that defendants conspired to defraud the United States of coal lands in Alaska by inducing persons to locate and acquire title to claims thereon under the statute, to be later transferred to a corporation, so as to enable it to thereby acquire a greater quantity of coal land than allowed by law, and that defendants, pursuant to such conspiracy, aided such claimants in making proof and payment for their lands, was held to be insufficient to charge the crime of conspiracy to defraud the United States under this section where it did not show that the claimants were dummies, but averred that they were qualified to make the entries, and did not charge that they did not fully comply with the law to entitle them to make proof and obtain patents. *U. S. v. Munday*, (1911) 186 Fed. 375.

But an indictment charging a conspiracy by defendants to defraud the United States by obtaining title to upwards of 5,000 acres of coal lands in Alaska of the value of \$2,000,000 by means of thirty-nine false, fraudulent, and fictitious entries made by as many different persons, ostensibly for their own benefit, but in fact for the benefit of the defendants, whereby the defendants would be enabled to receive and enjoy the benefit of a greater number of coal entries and locations and a greater quantity of coal lands than was permissible under the law, was held to charge a crime. *U. S. v. Doughten*, (1911) 186 Fed. 226.

To violate Timber and Stone Act.—In *Dwinnell v. U. S.*, (C. C. A. 1911) 186 Fed. 754, it appeared that an indictment charged that defendants wilfully, etc., conspired at a particular time and place within the district to suborn certain named persons at a stated time, before one alleged to be the duly appointed, qualified, and acting register of the land office at R., by applying pursuant to Timber and Stone Act, June 3, 1878, ch. 151, 20 Stat. L. 89, 7 Fed. Stat. Annot. 300, for certain of the public lands of the United States by swearing to and filing with such land officer a statement required by the Act and regulations of the land department alleging that the applicant did not apply to purchase for speculation but in good faith and to appropriate to his own exclusive use and benefit, etc.; whereas in truth the statement was wilfully false and intended to be so by each of them, in that it was intended that each should have a distinct agreement with the defendants that the land should be for defendants' benefit. It was held that the indictment was not fatally defective for failure to show that the precise piece or pieces of land to be acquired had been agreed on by the alleged conspirators at the time the conspiracy was formed or for failure to allege the persons to be suborned or the particular time and place of such subornation, but that the indictment sufficiently stated the offense of conspiracy to

defraud the United States denounced by R. S. sec. 5440.

To violate steamboat inspection laws.—An indictment for conspiracy to defraud the United States, which charged that defendants secretly inserted a piece of iron weighing half a pound in the centre of each of a large number of cork blocks made by them, intending that such blocks should be used in making life preservers for the equipment of steamers navigating the ocean and lakes, bays, and sounds, of the United States, was held to sufficiently show that life preservers so made would not fulfil the law and regulations of the United States, which require that every such life preserver shall be made of good, sound cork blocks, and shall contain at least six pounds of good cork, which shall have a buoyancy of at least four pounds to each pound of cork. *U. S. v. Stone*, (1905) 135 Fed. 392.

To suborn perjury.—The object of the conspiracy is sufficiently charged in an indictment for conspiracy to suborn perjury, where its allegations plainly import that the unlawful agreement contemplates a future solicitation of unnamed individuals to enter public lands under the Timber and Stone Act, who in so doing will necessarily knowingly state and subscribe under oath, before a named person, stated to be a United States commissioner of the district of Oregon, material false statements as to their purpose in respect to entering the land, known to be such by the conspirators. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

To obstruct the administration of justice.—An indictment under this section for conspiring to commit an offense against the United States by obstructing the due administration of justice in a court of the United States, in violation of R. S. sec. 5399, 5 Fed. Stat. Annot. 388, was held to be good. *Wilder v. U. S.*, (C. C. A. 1906) 143 Fed. 433.

To corruptly administer the laws.—An indictment charging that defendants did conspire, combine, confederate, and agree together to defraud the United States, by corruptly and for their own gains administering and procuring the administration of an Act of Congress, appropriating money to survey public lands, in a manner contrary to the true intent and purpose thereof, and wasteful of the money so appropriated and apportioned, prejudicial to the welfare and inter-

est of the United States and the public service thereof, did not charge a conspiracy to defraud the government of its money or property, but charged a conspiracy to defraud the United States by corruptly administering an Act of Congress. *U. S. v. Moore*, (1909) 173 Fed. 122.

Number of prosecutions.—There can be but one prosecution for conspiracy in violation of this section, regardless of the number of overt acts committed in pursuance thereof. *U. S. v. Brace*, (1907) 149 Fed. 875.

Plea of guilty by one conspirator in presence of jury.—The taking of a plea of guilty from one of a number of defendants jointly indicted for conspiracy, in open court, and in the presence of the jury panel, is a matter within the discretion of the trial court, and does not constitute error for which a judgment of conviction against the other defendants will be reversed. *Grunberg v. U. S.*, (C. C. A. 1906) 145 Fed. 81.

Punishment.—When statutes prescribe particular modes of punishment, a court cannot inflict another, and hence under this section authorizing imprisonment for conspiracy to commit a federal offense, imprisonment "at hard labor" is unauthorized. *Ex p. Harlan*, (1909) 180 Fed. 119, *affirmed* (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

A defendant may be prosecuted under this section for a conspiracy to violate a criminal or penal statute of the United States, notwithstanding the fact that the punishment prescribed for the offense created by such statute is less than that prescribed for conspiracy; the conspiracy in itself being a distinct and substantive offense. *U. S. v. Stevenson*, (1909) 215 U. S. 200, 30 S. Ct. 37, 54 U. S. (L. ed.) 157; *Thomas v. U. S.*, (1907) 156 Fed. 897, 84 C. C. A. 477.

In *Ex p. Peeke*, (1906) 144 Fed. 1016, *affirmed* (C. C. A. 1907) 153 Fed. 166, it appeared that the petitioner was found guilty on five counts of an indictment under this section, each charging a separate conspiracy to commit an offense against the United States, and was given a single sentence of confinement in a penitentiary for a term of five years. It was held that the judgment must be construed as a single sentence for five years, and not as one for cumulative sentences on the five counts, no one exceeding two years, and that as so construed it was void as to the excess above two years.

COPYRIGHT.

Vol. II, p. 256, sec. 4952.

Construction of statute.—The Copyright Act should be liberally construed, with a view to protect the just rights of authors and to encourage literature and art. *Werckmeister v. American Lith. Co.*, (1905) 142 Fed. 827; *Ford v. Charles E. Blaney Amusement Co.*, (1906) 148 Fed. 642.

Common law and statutory copyright.—The common law gives the author of a painting the exclusive right to reproduce the same so long as he does not make publication, but on publication such right is lost, and he can only acquire the right to further protection by a statutory copyright. *Caliga v. Inter Ocean Newspaper Co.*, (C. C. A. 1907) 157 Fed. 186, *affirmed* in (1909) 215 U. S. 182, 30 S. Ct. 38, 54 U. S. (L. ed.) 150.

Effect on common-law rights.—Where one takes the benefit of the copyright law to protect his rights in literary property, he cannot rely upon his common-law right. *Savage v. Hoffmann*, (1908) 159 Fed. 584.

Restrictions on sales by purchasers.—The sole right to vend a copyrighted book, secured by this section to the owner of the copyright, does not include the right to impose, by a notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. *Bobbs-Merrill Co. v. Straus*, (1908) 210 U. S. 339, 28 S. Ct. 722, 52 U. S. (L. ed.) 1086, *affirming* (1906) 147 Fed. 15, 77 C. C. A. 607; *Bobbs-Merrill Co. v. Snellenburg*, (1904) 131 Fed. 530; *Mines v. Scribner*, (1906) 147 Fed. 927.

Double copyrighting.—Only a single valid copyright can be obtained upon the same subject-matter; therefore an artist by depositing the name and description of a painting in the prescribed office does not acquire a copyright thereon, where he has previously deposited a photograph of the same painting under a different name and description for the purpose of obtaining a copyright, unless it is shown by proof that such prior deposit was inoperative. *Caliga v. Inter Ocean Newspaper Co.*, (C. C. A. 1907) 157 Fed. 186, *affirmed* in (1909) 215 U. S. 182, 30 S. Ct. 38, 54 U. S. (L. ed.) 150.

Subsequent editions of book—addition of new matter.—Under the copyright statutes as they stood prior to Act March 4, 1909, ch. 320. 35 Stat. L. 1075, 1909 Supp. Fed. Stat. Annot. 81, as well as by the express provision of section 6 of such Act, the addition of new matter to a copyrighted book in a second or subsequent edition makes it a "new book," subject to copyright as an original work. *West Pub. Co. v. Edward Thompson*

Co., (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

The copyrighting of the volumes of a particular edition of an author's works, which had been previously published some with and some without copyright, protects only what is original in the new edition, and does not enlarge the rights of the owner of the copyright as to any matter previously published. *Kipling v. Putnam*, (C. C. A. 1903) 120 Fed. 631.

Aggregation of prior publications.—The mere aggregation of weekly law reporters, which have been singly copyrighted, into volumes, does not constitute a new work requiring a new copyright. *West Pub. Co. v. Edward Thompson Co.*, (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

Compilation and rearrangement of copyrighted matter.—The compilation and rearrangement and reclassification of syllabi in digests into new and larger digests constitute new works entitled to copyright, which need only notice of their own entry for copyright. *West Pub. Co. v. Edward Thompson Co.*, (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

Right of dramatization.—Under this section providing that "authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States," it is not necessary that an author should himself have taken out a copyright of his book in order to preserve the right of dramatizing it, but it is sufficient if a copyright has been secured by any one having the right to obtain it, and the author may reserve the right of dramatization while selling the right to publish the book to another, who, as proprietor, may copyright it in his own name. *Ford v. Charles E. Blaney Amusement Co.*, (1906) 148 Fed. 642.

There may be several dramatizations of the same story, each capable of being copyrighted. *Harper v. Kalem Co.*, (C. C. A. 1909) 169 Fed. 61, *affirmed* (1911) 222 U. S. 55, 32 S. Ct. 20.

Who may copyright—Assigns.—An artist may, before publication of his painting, assign, independently of the ownership of the painting itself, the right or privilege of taking out the copyright. *American Tobacco Co. v. Werckmeister*, (1907) 207 U. S. 284, 28 S. Ct. 72, 52 U. S. (L. ed.) 208, *affirming* (1906) 146 Fed. 375, 76 C. C. A. 647.

Transfer of right.—In *American Tobacco Co. v. Werckmeister*, (1907) 207 U. S. 284, 28 S. Ct. 72, 52 U. S. (L. ed.) 208, *affirming* (1906) 146 Fed. 375, 76 C. C. A. 647, it was held that a

complete transfer of the property right of copyright existing in an original painting, and not a mere license or personal privilege, must be deemed intended by an instrument executed by the artist, reciting that for a named consideration he transfers the copyright in his painting, where there is no evidence of any intention on his part to retain any further interest in this copyright, and he offers the painting for sale with the copyright reserved.

A sale by the author of a story to a magazine publishing company and delivery of the manuscript, and the acceptance of a sum of money "in full payment for story," without any further agreement, is in legal effect an absolute sale without reservation, carrying with it as an incident of ownership the exclusive right to dramatize the story when copyrighted under this section, which provides that "authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." *Dam v. Kirk La Shelle Co.*, (C. C. A. 1910) 175 Fed. 902, *affirming* (1908) 166 Fed. 589.

In whose name copyright may be taken out.—See *Harper v. Donohue*, (1905) 144 Fed. 491.

What may be copyrighted.—A colored photograph or picture of natural scenery may be the subject of a copyright. *Cleland v. Thayer*, (C. C. A. 1903) 121 Fed. 71.

Moving picture film.—A series of separate pictures printed on a positive film from a number of negatives taken by a camera, and designed for use in a moving picture machine, and which taken together tell a connected story, constitute a photograph within the meaning of this section and may be the subject of a copyright, although in taking the negatives the camera was placed in different locations. *American Mutoscope, etc., Co. v. Edison Mfg. Co.*, (1905) 137 Fed. 262; *Harper v. Kalem Co.*, (C. C. A. 1909) 169 Fed. 61, *affirmed* (1911) 222 U. S. 55, 32 S. Ct. 20.

Photographs of sculpture.—A photograph of a copyrighted piece of sculpture is a "copy" thereof, within the meaning of this section, and, if made without authority from the proprietor of the copyright, is an infringement thereof. *Bracken v. Rosenthal*, (1907) 151 Fed. 136.

Cartoons.—Where certain cartoons were copyrighted, and later formed the basis of a farce comedy, the court refused to hold on demurrer that there was no dramatic right in such cartoons which could be made the subject of copyright. *Empire City Amusement Co. v. Wilton*, (1903) 134 Fed. 133.

Painting.—In *De Jonge v. Breaker, etc., Co.*, (1910) 182 Fed. 150, it appeared that the plaintiff was the owner of a small painting in water colors, described as "Holly, Mistletoe, and Spruce." It consisted of a representation of small branches or sprigs of the flowers of holly, mistletoe, and spruce arranged in the form of an open cluster, having substantially the outline of a square. The painting was artistic in thought and execution; the intention being to multiply the

design for fancy paper to cover boxes and other articles for the holiday season. It was held that a reproduction would not be a "label," and though it might be a "print," and be properly regarded as designed to be used for an article of manufacture, it could with equal propriety be described as a pictorial illustration or work connected with the fine arts, and was, therefore, subject either to be copyrighted or to be patented, at the owner's election, under Rev. Stat., sec. 4929, 5 Fed. Stat. Annot. 600; but that the owner could not have both copyright and patent.

Pictorial illustrations are none the less within the protection of the copyright law because they are drawn from real life. *Bleistein v. Donaldson Lithographing Co.*, (1903) 188 U. S. 239, 23 S. Ct. 298, 47 U. S. (L. ed.) 460.

Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, were held to be proper subjects of copyright under this section. *Bleistein v. Donaldson Lithographing Co.*, (1903) 188 U. S. 239, 23 S. Ct. 298, 47 U. S. (L. ed.) 460.

What cannot be copyrighted.—Title of book.—The copyright of a book does not prevent others from taking the same title for another book, though the copyright has not expired. *Glaser v. St. Elmo Co.*, (1909) 175 Fed. 276.

Monogram.—In *Royal Sales Co. v. Gaynor*, (1908) 164 Fed. 207, it appeared that the defendant copyrighted a book describing a monogram used on a campaign badge, which was sold pinned to the book, and assigned the copyright, which was subsequently acquired by complainant. It was held that the copyright did not cover the monogram, which was not a subject of copyright.

Spectacular stage performance.—A stage performance consisting of the singing of well-known songs by a woman dressed to personate other singers, prefaced by a short and commonplace dialogue having no reference to such performance, and with a kinetoscope exhibition during the intervals when the performer is changing costume, in which she is shown making such changes by means of moving pictures previously taken photographically on a film, is not a subject of copyright, the dialogue not being a dramatic composition, within the meaning of the statute, and neither the dialogue, performance, nor exhibition being such as to "promote the progress of science" or "useful arts," within the meaning of the constitutional provision conferring upon Congress power to enact copyright laws and by which such power is limited. *Barnes v. Miner*, (1903) 122 Fed. 480.

Telegraphic ticker quotations.—The matter gathered and transmitted by a telegraph company, and printed on a tape by tickers in the office of its customers, consisting merely of a notation of current events, such as market quotations or the result of a race or game, and having only a transient value, due solely to its quick transmission and distribution, is not copyrightable as literary prop-

erty, under the Constitution and statutes of the United States, but is essentially a commercial product. *National Tel. News Co. v. Western Union Tel. Co.*, (C. C. A. 1902) 119 Fed. 294.

Plan of organizing an association.—The copyright of a pamphlet containing articles of association and by-laws of a mutual burial association was held not to protect the system, considered merely as a system, so as to confer on the person owning the copyright or his transferees the exclusive right to organize associations under the plan described. *Burk v. Johnson*, (C. C. A. 1906) 146 Fed. 209.

Extent of rights acquired by copyright of

magazine.—The filing of the title of a magazine for copyright by the publisher and the insertion of the proper notice is sufficient to secure a copyright of a story published therein and protect the right to dramatize the same where the publisher is the owner of both the story and the dramatic rights. *Dam v. Kirk La Shelle Co.*, (C. C. A. 1910) 175 Fed. 902, *affirming* (1908) 166 Fed. 589.

Suit by assignee.—An assignee of the "exclusive right to dramatize" is a mere licensee and so cannot sue in his own name. *Black v. Henry G. Allen Co.*, (1890) 42 Fed. 618, 621; *Empire City Amusement Co. v. Wilton*, (1903) 134 Fed. 132.

Vol. II, p. 260, sec. 4953.

On the expiration of the copyright of a novel, any person may use the plot for a play, copy or publish it, or make any other use of it he sees fit. *Glaser v. St. Elmo Co.*, (1909) 175 Fed. 276.

Abandonment.—In a suit for infringement of a copyright it appeared that the author had type set up, plates taken therefrom, and sheets to the amount of 2,000 impressions

struck off, and some of these were bound, distributed, and sold. A judgment was rendered against him, execution issued, and the plates were levied on and sold to a third person. It was held that the author, as against a purchaser of the plates from the third person, had not abandoned his copyright of the book. *Patterson v. J. S. Ogilvie Pub. Co.*, (1902) 119 Fed. 451.

Vol. II, p. 261, sec. 4955.

Grant of dramatic rights.—In *Saake v. Lederer*, (C. C. A. 1909) 174 Fed. 135, it was held that a contract by which a foreign author of a dramatic composition granted the stage rights in the United States to another, and agreed to copyright the play in this country, did not convey the author's right of copyright, and that an attempted copyright by the grantee in his own name was invalid and would not support an action by him for infringement.

Sale of different dramatizations.—The owner of a copyrighted story, having assigned or sold the right of performing a particular copyrighted drama therefrom, can lawfully give to another the sole right of performing a different dramatic composition of the story, without the first dramatic assignee having the right to make another dramatization. *Harper v. Kalem Co.*, (C. C. A. 1909) 169 Fed. 61, *affirmed* (1911) 222 U. S. 55, 32 S. Ct. 20.

Vol. II, p. 261, sec. 4956.

Compliance with statute.—The law of copyright in the United States is entirely statutory, and all the conditions prescribed are essential and must be observed to give a valid copyright. *Freeman v. Trade Register*, (1909) 173 Fed. 419; *Saake v. Lederer*, (C. C. A. 1909) 174 Fed. 135.

Magazine article.—The proprietor of a magazine, who is also the owner of an article published in it, secures a valid copyright of such article by duly copyrighting the number of the magazine in which it is printed. *Ford v. Charles E. Blaney Amusement Co.*, (1906) 148 Fed. 642.

Entry in author's name of prior publication in copyrighted magazine.—Any copyright protection for a work secured by entering for copyright in the name of the publishers the issues of a magazine which contain instalments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name. *Miffin v. R. H. White Co.*, (1903) 190 U. S. 260, 23 S. Ct. 769, 47 U. S. (L. ed.) 1040.

Dramatic compositions.—*Dramatic compositions*, being twice enumerated in the body of this section separately from books, and not being specified in the proviso, are not included therein, and such composition, although printed in book form, need not be printed from type set or plates made in the United States to be entitled to copyright. *Hervieu v. J. S. Ogilvie Pub. Co.*, (1909) 169 Fed. 978.

Depositing title.—In *Freeman v. Trade Register*, (1909) 173 Fed. 419, it was held that the fact that the January number of a monthly periodical called the "Pacific Fisherman," which contained a review of the fishing industry for the preceding year, bore on the cover the words "Pacific Fisherman Annual," did not necessarily make such words the title of the publication within the meaning of the copyright law, and the depositing instead of the regular title of "Pacific Fisherman," cut from an inner page of the number, was a compliance with this section.

In *Patterson v. J. S. Ogilvie Pub. Co.*, (1902) 119 Fed. 451, it appeared that the

copy of the title of a book filed to obtain a copyright was "The Captain of the Rajah. By Howard Patterson. Illustrated by Warren Sheppard. A thrilling and realistic sea story from a noted sailor's pen, and lavishly illustrated by the pencil of America's greatest marine artist." The title of the book published was "The Captain of the Rajah. A Story of the Sea, by Howard Patterson. Illustrated by Warren Sheppard." It was held that the author did not lose his copyright by reason of publishing the book with the shorter title.

"Prints."—It has been held that pictures printed in successive colors from metal plates, from which part of the metal has been cut so as to leave portions thereof in relief, were entitled to copyright as "prints," within the general enumeration of this section, and were not within the proviso because not printed from "drawings on stone." *Hills v. Austrich*, (1903) 120 Fed. 862; *Hills v. Hoover*, (1905) 136 Fed. 701.

Evidence.—In *Patterson v. J. S. Ogilvie Pub. Co.*, (1902) 119 Fed. 451, the evidence in a suit for an infringement of a copyright was held to be sufficient to show that the author had mailed two copies of the book addressed to the Librarian of Congress, notwithstanding the register of copyrights certified that he could not find any copies on file.

Publication.—The deposit of two copies

of a copyrighted song in the Library of Congress, when coupled with an unrestricted sale of a single copy, without any effort to push the work commercially, constitutes a sufficient publication to sustain the copyright. *Stern v. Remick*, (1910) 175 Fed. 282.

Entering an original painting with the copyright reserved at an exhibition of the Royal Academy, whose by-laws prohibit copying, is not such a publication as defeats the right to take out a copyright in such painting. *American Tobacco Co. v. Werckmeister*, (1907) 207 U. S. 284, 28 S. Ct. 72, 52 U. S. (L. ed.) 208, *affirming* (1906) 146 Fed. 375, 76 C. C. A. 647.

Abandonment of rights.—See *Savage v. Hoffmann*, (1908) 159 Fed. 584.

Imports.—The second paragraph of this section was not intended to do more than prohibit the producing abroad of copyrighted books designed for sale in the United States, and has no application to the reproduction in the United States of a book copyrighted in Great Britain which contained no notice of copyright in the United States of a similar book intended for publication in the United States. *G. & C. Merriam Co. v. United Dictionary Co.*, (C. C. A. 1906) 146 Fed. 354, *affirmed* (1908) 208 U. S. 260, 28 S. Ct. 290, 52 U. S. (L. ed.) 478. *Compare Harper v. Donohue*, (1905) 144 Fed. 491.

Vol. II, p. 266, sec. 4963.

Different books.—Where the title in the first three and last thirty-four pages of the copyrighted English edition of a dictionary was different from the copyrighted domestic edition, the publisher of the English edition was prohibited by this section from inserting therein a notice of the domestic copyright. *G. & C. Merriam Co. v. United Dictionary Co.*, (C. C. A. 1906) 146 Fed. 354.

Affixing untruthful notice in foreign coun-

try.—The act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States is not within the provision of this section, imposing a penalty for untruthfully impressing notice of copyright upon an article which was the subject of copyright in the United States. *McLoughlin v. Tuck, etc., Co.*, (1903) 191 U. S. 267, 24 S. Ct. 105, *affirming* (1902) 115 Fed. 85, 53 C. C. A. 508.

Vol. II, p. 267, sec. 4964.

Damages recoverable.—See under this title, vol. 2, p. 271, sec. 4970.

Vol. II, p. 268, sec. 4965.

Strict construction and proof are required in an action under this section to recover the penalty thereby authorized for infringement of a copyright. *Caliga v. Inter Ocean Newspaper Co.*, (C. C. A. 1907) 157 Fed. 186, *affirmed* in (1909) 215 U. S. 182, 30 S. Ct. 38, 54 U. S. (L. ed.) 150.

Exclusiveness of statutory remedy.—The remedies of forfeiture and penalty and of injunction, given by sections 4965 and 4970 to the owner of a copyrighted map in case of infringement, are exclusive, and preclude any resort to an action at law to recover the damages sustained by reason of the infringement. *Globe Newspaper Co. v. Walker*, (1908) 210 U. S. 356, 28 S. Ct. 728, 52 U. S. (L. ed.) 1090, *reversing* (1905) 140 Fed. 305, 72 C.

C. A. 77; *Ohman v. New York*, (1909) 168 Fed. 953.

The words "found in his possession."—This section, as amended, was not changed by the proviso added by the amendment, that in case of infringement of copyright of a photograph the recovery shall not be less than \$100 nor more than \$5,000, so far as the rule set out in the second paragraph of the original note is concerned. *Boston Traveler Co. v. Purdy*, (C. C. A. 1905) 137 Fed. 717.

The infringing copies of a copyrighted painting need not be found in the infringer's possession in order to render him liable for the penalty of ten dollars imposed by this section, "for every copy of the same in his possession, or by him sold or exposed for

sale." *American Lith. Co. v. Werckmeister*, (1911) 221 U. S. 603, 31 S. Ct. 676, 55 U. S. (L. ed.) 873.

Replevin.—In *Hills v. Hoover*, (1906) 142 Fed. 904, it was held that replevin could not be availed of to seize lithographs alleged to infringe the complainant's copyrights, to which lithographs the complainant had neither title nor right to possession, which were desired only for the purpose of a suit in assumpsit to recover penalties under this section, providing that in case of infringement of a copyright, etc., the defendant shall forfeit one dollar for every sheet of the same found in his possession.

The common-law action of replevin, as it is practiced in Pennsylvania, is not an appropriate remedy by which to enforce the forfeiture provided by this section. *Rinehart v. Smith*, (1903) 121 Fed. 148; *Gustin v. Record Pub. Co.*, (1904) 127 Fed. 603.

Seizure of infringing copies.—A Circuit Court has authority under R. S. sec. 716, 4 Fed. Stat. Annot. 498, to issue a writ for the seizure of infringing copies of a copyright publication alleged to be in the possession of the infringer as preliminary to an action under section 4965, to recover the penalty prescribed therein for each copy found in the possession of the defendant, such writ being one necessary for the exercise of the court's jurisdiction, since under the ruling of the Supreme Court such copies must be "found" before the cause of action to re-

cover the penalty accrues. *Stern v. Remick*, (1908) 164 Fed. 781.

Successive suits.—A separate action to recover the penalty prescribed by this section for every infringing copy of a copyrighted painting found in the infringer's possession or sold by him cannot be maintained after judgment of forfeiture of the infringing copies provided for by this section has already been recovered, since the section contemplates but a single action in the nature of replevin, in which may be had both a forfeiture and a recovery of penalties. *Werckmeister v. American Tobacco Co.*, (1907) 207 U. S. 375, 28 S. Ct. 124, 52 U. S. (L. ed.) 254, *affirming* (1906) 144 Fed. 1023, 74 C. C. A. 682.

In *Hills & Co. v. Hoover*, (1911) 220 U. S. 329, 31 S. Ct. 402, it was held that the institution by the owner of a copyright in certain engravings of an action of replevin not prosecuted to judgment, to enforce the forfeiture of the infringing copies, prescribed by this section, precludes him from subsequently bringing and maintaining an action of assumpsit to recover the penalty provided for by that section, measured by the number of copies found in the infringer's possession, even where the state practice affords no form of action in which the double remedy may be enforced, since, under the broad powers conferred by R. S. sec. 716, 4 Fed. Stat. Annot. 498, the federal court may so frame its process and writs as to give full relief in one action.

Vol. II, p. 269, sec. 4966.

Mimicking song and actions of another actress.—In *Bloom v. Nixon*, (1903) 125 Fed. 977, it appeared that the plaintiffs were the owners and producers of a copyrighted song, which was rendered during the performance of an extravaganza by an actress who was required during the action to step to one of the boxes, single out a particular person, and sing the song to him alone, accompanied by certain gestures, postures, and other artistical effects; she being assisted in the chorus by a number of other actresses. It was held that an imitation of the actress while singing such song, by another actress, in which she, in good faith, attempted to mimic the postures and gestures of the original actress, etc., and used the chorus of the song only as a vehicle for the imitation, was not forbidden by this

section prohibiting any person from publicly performing or representing any dramatic or musical composition for which a copyright had been obtained, without the consent of the proprietor.

The singing of a single verse and chorus of a copyrighted song, without musical accompaniment, in imitation of the voice, postures, and mannerisms of another, is not an "infringement," against which a temporary injunction will issue. *Green v. Minzensheimer*, (1909) 177 Fed. 286. But in *Green v. Luby*, (1909) 177 Fed. 287, it was held that where one sings an entire copyrighted song with musical accompaniment, she is guilty of infringement, though she purports merely to mimic another.

Vol. II, p. 271, sec. 4970.

Use of part.—An infringement of a copyright may result in the wrongful use of a part as well as the whole of a copyrighted publication. *G. & C. Merriam Co. v. United Dictionary Co.*, (C. C. A. 1906) 146 Fed. 354.

Dramatization of novel.—A playwright who appropriates the theme or plot of another's story, protected by copyright, as the basis of a play, cannot escape a charge of infringement by adding to or slightly varying the incidents, or by adding to the number and changing the names of the characters. *Dam*

v. Kirk La Shelle Co., (C. C. A. 1910) 175 Fed. 902, *affirming* (1908) 166 Fed. 589.

Where a copyrighted play had been made, based on the plot and incidents of a novel the copyright of which had expired, it was held that another author, though entitled to use the plot and incidents of the novel for a different play, could not make use of the first play in constructing the second. *Glaser v. St. Elmo Co.*, (1909) 175 Fed. 276. But where a copyrighted play was taken from a novel the copyright of which had expired, it

was held that the owners of the play were not entitled to restrain the defendants from using the name of the novel for an entirely different play constructed on the plot and incidents of the novel, on the theory that the name was protected by the copyright of the play. *Glaser v. St. Elmo Co.*, (1909) 175 Fed. 276.

Pictures of dramatization of novel.—Since pictures of the dramatization of a novel only represent the artist's idea of what the author has expressed in words, they do not, as a photograph, infringe the copyrighted book or drama. *Harper v. Kalem Co.*, (C. C. A. 1909) 169 Fed. 61, *affirmed* (1911) 222 U. S. 55, 32 S. Ct. 20.

Use of directory.—The compiler and publisher of a directory, while he may not copy and reprint matter from a prior copyrighted directory as his own, may use the same for checking up his own canvass, independently made, and where discrepancies are found, after an honest and personal investigation of the same, may publish the result as so verified as his own. *Hartford Printing Co. v. Hartford Directory, etc., Co.*, (1906) 146 Fed. 332. *Contra*, *Sampson, etc., Co. v. Seaver-Radford Co.*, (C. C. A. 1905) 140 Fed. 539.

Use of citations from law books.—Where the author of a law book collects all the citations available on his subject, including those found in a previous copyrighted work on the same subject, and after examining the reports of the cases cited, cites such authorities as he considers applicable in support of his own text—such text being original and in no part copied from the earlier work—such use of the earlier work is a fair use and does not infringe its copyright. *Edward Thompson Co. v. American Law Book Co.*, (C. C. A. 1903) 122 Fed. 922.

Use of law digest.—A writer of a law text-book may use a copyrighted digest of decisions, and may copy lists of cases therefrom to assist him in running down the cases, and such use is a fair one and within the purpose for which the digest is sold; but extensive copying or paraphrasing of the language of the syllabi in the digest is an unfair use and constitutes an infringement of the copyright. *West Pub. Co. v. Edward Thompson Co.*, (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

Moving picture exhibition of copyrighted drama.—In *Harper v. Kalem Co.*, (C. C. A. 1909) 169 Fed. 61, *affirmed* (1911) 222 U. S. 55, 32 S. Ct. 20, it was held that a series of films, constituting a picture of an artist's conception of the copyrighted story *Ben Hur*, when placed on an exhibiting machine which reproduced the action of the actors and animals, was a dramatization of the story, which, when sold and offered for sale by defendant for public exhibitions at which an entrance fee was charged, constituted a contributory infringement, subject to injunction.

Pirated matter.—In *Edward Thompson Co. v. American Law Book Co.*, (C. C. A. 1903) 122 Fed. 922, it was held that the complainant, the publisher of a law encyclopedia, which furnished the authors of its articles with paragraphs cut from copy-

righted digests of other publishers, its authors using such paragraphs in the compilation of their articles, in some instances copying the language of such paragraphs without the consent of the owners of the copyrights, had no standing in a court of equity to charge another with infringement of its own copyright.

Lists of society people.—See *Social Register Assoc. v. Murphy*, (1904) 128 Fed. 116.

Perforated music rolls which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions, which, under R. S. sec. 4952, 2 Fed. Stat. Annot. 256, secures to the composer the sole liberty of printing and reprinting, publishing, completing, copying, executing, finishing, and vending the same. *White-Smith Music Pub. Co. v. Apollo Co.*, (1908) 209 U. S. 1, 28 S. Ct. 319, 52 U. S. (L. ed.) 655, *affirming* (1906) 147 Fed. 226, 77 C. C. A. 368.

Infringements of mercantile reports.—In *Dun v. International Mercantile Agency*, (1903) 127 Fed. 173, it was held that the defendant's use of plaintiff's credit book for the purpose of discovering names of individuals, firms, and corporations engaged in business, to be inserted in defendant's publication which it was preparing, was not such an unfair use of complainant's book as to entitle the complainant to an injunction *pendente lite*.

For other cases see *Champney v. Haag*, (1903) 121 Fed. 944; *Barnes v. Miner*, (1903) 122 Fed. 480; *Eisfeldt v. Campbell*, (1909) 171 Fed. 594.

Right of purchaser of unbound sheets to bind and resell.—One who has purchased unbound copyrighted volumes from the owner of the copyright or his licensee has the right, so far as the copyright statute is concerned, to bind and resell the same. *Kipling v. Putnam*, (C. C. A. 1903) 120 Fed. 631.

Intent.—Where the defendant published a copyrighted song with knowledge of the copyright in fact, it was held that his intent was not material to his liability for infringement. *Stern v. Remick*, (1910) 175 Fed. 282.

Jurisdiction.—A suit, the primary and controlling purpose of which is to enforce a right secured by the copyright laws which is being infringed by the defendants, is a suit under those laws, and within the jurisdiction of the federal Circuit Courts, although it incidentally draws in question the validity, interpretation, and effect of a contract through which the complainant derives title. *Wooster v. Crane*, (C. C. A. 1906) 147 Fed. 515.

District of suit.—The provision of section 1 of the federal Judiciary Act of March 3, 1887, 24 Stat. L. 552, ch. 373, 4 Fed. Stat. Annot. 265, that no suit shall be brought in any other district than that whereof the defendant is an inhabitant, does not apply to suits arising under the copyright laws, as to which section 11 of the Judiciary Act of September 24, 1789, 1 Stat. L. 78, ch. 20, is still in force, and such a suit may be brought in any district in which the defend-

ant can be found and served with process. *Lederer v. Ferris*, (1906) 149 Fed. 250. See also Act of March 4, 1909, ch. 320, sec. 35, 1909 Supp. Fed. Stat. Annot. 91.

Preliminary injunction.—On an application for an injunction *pendente lite*, the court should consider the effect on both parties of the granting or refusal of the order, and, where it appears that in either case great or irreparable injury will result to one or the other, the court will take the course which seems most conducive to justice to both parties. *Sampson, etc., Co. v. Seaver-Radford Co.*, (1904) 129 Fed. 761.

A preliminary injunction restraining infringement of a copyright should not be granted, where on the showing made and the facts appearing the question of infringement is in serious doubt. *Savage v. Hoffmann*, (1908) 159 Fed. 584; *Nixon v. Doran*, (1909) 168 Fed. 575; *Benton v. Van Dyke*, (1909) 170 Fed. 203. A preliminary injunction against the alleged infringement of a copyright, the effect of which will be to interfere with defendant's business, will not be granted where complainant's right is doubtful on the showing made; but the defendant may be required to give a bond for complainant's protection in case he is successful on a full hearing. *Sampson, etc., Co. v. Seaver-Radford Co.*, (1904) 129 Fed. 761; *De Jonge v. Breuker, etc., Co.*, (1906) 147 Fed. 763.

In *Ricordi v. Hammerstein*, (1907) 150 Fed. 450, a preliminary injunction to restrain the defendant from producing a copyrighted opera was denied, on evidence tending to show that defendant had orally been given or promised a license for the production at a stated royalty by complainant's authorized agent, and further evidence showing without contradiction that there had been negotiations for such license, and that both complainant and its agent had full knowledge that defendant was engaging singers and expending large sums of money in preparing for the production, and did not make any objection or suggest any obstacle to the granting of a license until a considerable time after defendant's public announcement of the production, although in the meantime, while defendant's preparations were going on, an exclusive license had been granted to another manager.

Where, in a suit to restrain the defendant from using complainant's credit publication, the complainant insisted that defendant had appropriated complainant's ratings as well as the names of persons appearing in complainant's book, but on such issue the affidavits were conflicting, it was held that an injunction *pendente lite* restraining defendant's use of complainant's book would be refused. *Dun v. International Mercantile Agency*, (1903) 127 Fed. 173.

In *American Mutoscope, etc., Co. v. Edison Mfg. Co.*, (1905) 137 Fed. 262, it was held that a preliminary injunction against the infringement of a copyrighted photograph would not be granted where the proofs left it in doubt whether defendant had in fact used or sold any copies of complainant's photograph, or had merely borrowed com-

plainant's idea, and made other similar, but not identical, photographs of its own, so that an injunction following the allegations of the bill would have no operative effect.

Under the rule that, to warrant the granting of a preliminary injunction, the facts must be clear, and the equities growing out of them in no doubt, it has been held that such an injunction would not be granted in favor of one or two rival publishers of information respecting real estate transfers in a city to restrain the sale of a publication by the other, on the ground that it contained pirated copyrighted matter, where the piracy was denied, as well as the right of complainant to copyright the matter, and a counter charge of piracy was also made in the same connection, and where, moreover, the alleged infringing publication was a year old. *Sweet v. Bromley*, (1907) 154 Fed. 754.

A preliminary injunction will not be granted to restrain infringement of the copyright of future numbers of a periodical publication which have not yet been published or copyrighted. *Sweet v. Bromley*, (1907) 154 Fed. 754.

For other cases see *Hubges v. Belasco*, (1904) 130 Fed. 388; *Littleton v. Fischer*, (1905) 137 Fed. 684.

Review.—The granting of a preliminary injunction in a suit for infringement of a copyright being within the discretion of the trial court, an order granting the same will not be set aside on appeal unless it is clearly shown that the court abused its discretion or was mistaken in its view of the situation. *Werner Co. v. Encyclopædia Britannica Co.*, (C. C. A. 1905) 134 Fed. 831, *affirming* (1904) 130 Fed. 460.

Objections on appeal.—Where, on an application for a preliminary injunction in a suit for infringement of a copyright, the defendant did not object or introduce proof to show that the complainants' articles, alleged to have been infringed, were not derived from original sources, it was held that such objection could not be considered on appeal from an order granting such injunction. *Werner Co. v. Encyclopædia Britannica Co.*, (C. C. A. 1905) 134 Fed. 831, *affirming* (1904) 130 Fed. 460.

Laches.—Where, in a suit for infringement of copyright, it appeared that the complainants and their predecessors in title had no knowledge of the alleged infringing articles until less than a year and a half before the suit was brought, and that the complainants prior to that time were not charged with notice thereof, and the infringing articles did not appear in defendant's publication at first, it was held that the complainants were not barred by laches. *Werner Co. v. Encyclopædia Britannica Co.*, (C. C. A. 1905) 134 Fed. 831, *affirming* (1904) 130 Fed. 460.

Failure to institute suit for infringement until the defendants had been proceeding openly therewith for about a year was held not to constitute laches, barring a right to relief in equity, when during that time the complainant was actively engaged in the defense of a suit to cancel his title prosecuted

by one of the defendants. *Wooster v. Crane*, (C. C. A. 1906) 147 Fed. 515.

The fact that a complainant, with knowledge that its copyrights were being infringed by the defendant, delayed bringing suit until defendants after sixteen years of labor and at large expense had practically completed the publication of its work, was held to constitute such laches as warranted the denial of an injunction or an accounting of profits; but it was also held that in such a suit, although equitable relief would be denied, the court had power to award the complainant damages as compensation for the violation of its rights. *West Pub. Co. v. Edward Thompson Co.*, (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

Pleading.—There is such an analogy between actions under the patent laws and actions under copyright laws that like rules of practice should be applied in both classes of cases. *Scribner v. Straus*, (1904) 130 Fed. 389.

Bill or complaint.—In an action for infringement of a copyright, it is not sufficient to allege generally in the bill or complaint that all conditions and requisites required by the laws of the United States to obtain a copyright have been complied with, but the specific acts done and necessary to constitute such compliance with the law must be affirmatively alleged, and the complaint must also show that the person in whose name the copyright was obtained was the person who owned the right and was entitled to it. *Ford v. Charles E. Blaney Amusement Co.*, (1906) 148 Fed. 642.

In *Bracken v. Rosenthal*, (1907) 151 Fed. 136, it was held that a bill for infringement of copyrights of different pieces of sculpture would not be held demurrable for multifariousness where the parties and the general method of alleged infringement were the same, and especially where it appeared from the bill that all of the acts of infringement were committed pursuant to a common purpose by the defendants.

Copyright notice in foreign publications.—In *Haggard v. Waverly Pub. Co.*, (1895) 144 Fed. 490, a bill for infringement of the copyright of a book was held good on demurrer, although it failed to allege that the copyright notice required by section 4962 had been printed in all editions of the book published in foreign countries; the question of the effect of such omission on the rights of complainant being reserved for determination after full hearing on the facts.

Demurder.—Where it was admitted that a bill to enjoin infringement of certain copyrights stated a cause of action arising from the alleged infringement of two dramatic compositions, and a demurrer failed to point out specifically what sentences or paragraphs of the bill were demurred to, it was held that it could not be sustained. *Empire City Amusement Co. v. Wilton*, (1903) 134 Fed. 132.

In a suit for infringement of a copyright, where the bill makes profert of the copyrighted publication, it may be considered a part of the bill and examined on demurrer.

American Mutoscope, etc., Co. v. Edison Mfg. Co., (1905) 137 Fed. 262.

Supplemental bill.—In a suit for infringement of copyrights of a number of books the complainant may properly be allowed by a supplemental bill to set up further infringements of other books of the same series, occurring subsequent to the filing of the original bill, the parties being the same, and the subject-matter of the same general character, which may appropriately be determined in the same suit. *Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co.*, (1905) 139 Fed. 701.

Where a bill for infringement of copyright sufficiently alleged title in the complainant to the cause of action by assignment, a supplemental bill otherwise good was held not to be invalid because it alleged a further assignment in the nature of a confirmation or ratification of the complainant's title. *Banks Law Pub. Co. v. Lawyers Co-operative Pub. Co.*, (1905) 139 Fed. 701.

Joinder of actions.—Where it was convenient for the court that two causes of action for infringement of copyright, one with reference to certain cartoons and the other with reference to a play based thereon, should be joined in the same bill, it was held to be within the discretion of the court to permit such joinder. *Empire City Amusement Co. v. Wilton*, (1903) 134 Fed. 132.

Evidence—Similarity of mistakes.—Where the defendant published a digest of the laws of Pennsylvania for the years 1895-1903, inclusive, in one volume, edited and compiled by the same person who compiled the complainant's copyrighted digest of the laws of Pennsylvania, with supplements for the years 1895-1897, and it appeared that the compiler made eleven errors, consisting of incorrect citations in complainant's work, which appeared verbatim in defendant's compilation, it was held that such errors justified an inference of infringement of complainant's copyright entitling complainant to a preliminary injunction; the only explanation offered therefor being that the similarity of mistake was accidental. *George T. Bisel Co. v. Welsh*, (1904) 131 Fed. 564.

Where, on a comparison of a copyrighted directory and an alleged infringing publication, it appeared that a large proportion of the errors in the former were also found in the latter, it was held that such evidence was sufficient to refute the testimony of defendant's witnesses that the accuracy of all items in its directory was personally verified, and to show that direct copying had been done. *Hartford Printing Co. v. Hartford Directory, etc., Co.*, (1906) 146 Fed. 332.

Motion for preliminary injunction.—On a motion to temporarily enjoin a vaudeville performer from singing a song from an opera which complainant claimed the exclusive right to produce, it was held that the court might consider the fact that the songs and pianoforte score of the opera had been published, as showing an abandonment of the words of the songs, though there was no proof that the publication was authorized by the composer and the authors of the opera,

as would be necessary on final hearing. *Savage v. Hoffmann*, (1908) 159 Fed. 584.

In a suit for infringement of a copyright for a directory, proof that defendant had in its office three pages concededly taken from complainant's book, cut, pasted, and edited, apparently for the purpose of being used as copy for defendant's book, was held to be sufficient to entitle complainant to a preliminary injunction, unless a denial of the intention to use such pages as copy is supported by a clear showing of the methods used by defendant, and the source from which its copy was obtained. *Chicago Directory Co. v. U. S. Directory Co.*, (1902) 122 Fed. 189.

A showing that a dozen erroneous names and addresses appearing in the complainant's book have been duplicated in defendant's is sufficient to entitle the complainant to a preliminary injunction, and to affect defendant's whole book, in the absence of a clear showing to overcome such *prima facie* case. *Trow Directory Printing, etc., Co. v. U. S. Directory Co.*, (1903) 122 Fed. 191.

Residence or citizenship of author.—In a suit for infringement of a copyright, on the issue of whether the author was a citizen or resident of the United States at the time he applied for the copyright, the certificate from the librarian described him as of New York, and the author testified that he was at the time of the trial a resident of New York, and that he had mailed the two copies in New York to the Librarian of Congress more than ten years before. It was held that this was sufficient proof of the author's residence, in the absence of any evidence to the contrary. *Patterson v. J. S. Ogilvie Pub. Co.*, (1902) 119 Fed. 451.

For other cases dealing with evidence, see *Suderman v. Saake*, (1909) 166 Fed. 815; *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156.

Burden of proof.—In a suit for infringement of a copyright, the librarian's certificate does not *per se* establish the copyright; but the burden rests on the plaintiff to show compliance with the statutory requirements as conditions precedent. *Saake v. Lederer*, (C. C. A. 1909) 174 Fed. 135; *Bosselman v. Richardson*, (C. C. A. 1909) 174 Fed. 622.

Scope of injunction.—An injunction against an infringing publication will be extended to all portions in which infringing and non-infringing matter has been so blended that its separation is impracticable, but not to such distinct parts as do not infringe, and defendant may properly be given leave to apply for its modification when he shall have expunged all infringing matter. *Edison v. Lubin*, (1903) 122 Fed. 240, 58 C. C. A. 604, *reversing* 119 Fed. 993; *Social Register Assoc. v. Murphy*, (1904) 128 Fed. 116; *Sampson, etc., Co. v. Seaver-Radford Co.*, (C. C. A. 1906) 140 Fed. 539; *Park, etc., Co. v. Kellerstrass*, (1910) 181 Fed. 431.

It seems that an injunction simply in terms restraining the defendants from making any unlawful use of the complainants' publication would be open to the objection that it was argumentative and not specific; the defendants being entitled to be informed with

reasonable certainty of what they are forbidden to do. *Sweet v. Bromley*, (1907) 154 Fed. 754.

Defenses.—That a complainant is a member of an illegal combination, in violation of the anti-trust laws, state or federal, is no defense to a suit for infringement of a copyright. *Scribner v. Straus*, (1904) 130 Fed. 389.

It is no defense to a suit to enjoin infringement of a copyright of a musical composition that defendant did not knowingly copy complainant's composition, but without knowledge of it independently produced substantially the same thing. *Hein v. Harris*, (C. C. A. 1910) 183 Fed. 107, *affirming* 175 Fed. 875.

Suit by equitable owner for infringement.—The owner of the equitable title to a copyright may in equity in his own name sue for infringement, where the holder of the legal title is one of the infringers and occupies a position hostile to him. *Wooster v. Crane*, (C. C. A. 1906) 147 Fed. 515.

Damages recoverable.—In a suit in equity for infringement of copyright there can be no recovery in the way of damages beyond the gains and profits which the defendant is shown to have realized from the infringement. *Social Register Assoc. v. Murphy*, (1904) 129 Fed. 148.

Where the infringing parts of a book are intermingled with other parts about which there is no evidence, and the defendant makes no effort to separate them, it must account for all profits made on the entire sales, which is the only effective relief that can be granted when complainant's book has been superseded by a later publication. *Hartford Printing Co. v. Hartford Directory, etc., Co.*, (1906) 146 Fed. 332.

On an accounting by a defendant for profits realized from the sale of a directory which infringed the complainant's copyright, it was held that the amounts received from advertisers were to be included in the gross receipts, to be accounted for, less the necessary cost of producing and disposing of the copies sold. *Hartford Printing Co. v. Hartford Directory, etc., Co.*, (1906) 148 Fed. 470.

In computing the profits realized by an infringer of a copyright for which he is accountable to the owner, where a greater number of copies of the infringing publication were printed than were sold, it was held that he was entitled to have deducted from the gross receipts all of such items of cost as would have been the same had no more copies been printed than were sold, such as providing the copy and composition. *Hartford Printing Co. v. Hartford Directory, etc., Co.*, (1906) 148 Fed. 470.

The owner of the copyright of a story which has been infringed by another by appropriating the story as the basis of a play is entitled to recover as damages all of the profits made by the infringer from the production of such play. *Dam v. Kirk La Shelle Co.*, (C. C. A. 1910) 175 Fed. 902, *affirming* (1908) 166 Fed. 589.

Costs.—Where, in a suit for infringement of copyright, it appeared that the complain-

ants had lost their right to protection either by insufficient notices or by republication of the matter under notices of copyright by others, but that the infringement was established, it was held that the defendant would not be allowed costs, but that each party would be required to pay one-half the costs. *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156.

Estoppel.—See *Patterson v. J. S. Ogilvie Pub. Co.*, (1902) 119 Fed. 451.

Exclusiveness of remedies.—See under this title, vol. 2, p. 268, sec. 4965.

Permanent injunction refused.—Where the complainant sued for infringement of an alleged copyright on a publication of information concerning transfers of New York city real estate, it was held that three instances of copying with reference to three different descriptions were insufficient to justify an injunction against defendants' work, but that the complainant would be left to its remedy

at law. *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156.

In *Dun v. Lumbermen's Credit Assoc.*, (1908) 209 U. S. 20, 28 S. Ct. 336, 14 Ann. Cas. 501, 52 U. S. (L. ed.) 663, *affirming* (1906) 144 Fed. 83, 75 C. C. A. 241, it was held that injunctive relief would not be granted to the proprietor of a mercantile agency publishing at intervals a copyrighted book giving information as to the business, capital, and credit rating of merchants, manufacturers, and traders, because of the improper use of such work with respect to a few names by a corporation publishing a similar book limited to those engaged in lumber and kindred trades, where the latter book contained about 60,000 names, twenty-five per cent. more than the former, and the subjects of information given by it concerning the persons named were six times as many as were given by the other work.

Vol. II, p. 272, sec. 1.

"Title page."—In *Freeman v. Trade Register*, (1909) 173 Fed. 419, it was held that a preliminary page in a periodical which followed advertisements and preceded general reading matter, containing in display type the name of the publication and also the volume, number, and date of the issue, and a copy of which was deposited as the title to obtain copyright protection, must be considered the "title page" within the meaning of this Act, rather than a subsequent page containing the title in smaller type but without volume, number, or date, and that the printing of such notice on the latter page only was not such a compliance with the express requirement of the statute as would sustain an action for infringement.

Subsequent editions of book.—There can be but one copyright for the same book for the first term of twenty-eight years, and notice of only a single entry for copyright is necessary therein. If there is a subsequent edition of the book, the notice of copyright in it must be either of the date of the original or of the date of the subsequent entry, depending upon whether or not such changes or additions have been made as to constitute the later edition a new book. *West Pub. Co. v. Edward Thompson Co.*, (C. C. A. 1910) 176 Fed. 833, *modifying* (1909) 169 Fed. 833.

Republication of copyrighted matter.—In *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156, it appeared that the plaintiff published weekly numbers of a real estate record relating to transfers of real estate in New York city, called the "Record and Guide," which numbers the complainant attempted to copyright under the name "Real Estate Record and Builders' Guide Company" under which the publisher, S., was doing business. Thereafter the same information published in the weekly numbers, combined and rearranged, but in other respects unchanged, was published in quarterly numbers during the year 1905, and the weeklies and quarterlies consolidated into an annual volume con-

taining the same information under the same arrangement, and this copyrighted by the Real Estate Record Association, claimed to be another name under which S. was doing business. It was held that the copyright on the weekly numbers was forfeited, since it could be protected only by repeating the original notice whenever the copyrighted matter was afterwards published, under this section, providing that no person shall maintain an action for the infringement of a copyright, unless he shall give notice thereof by inserting the copyright notice in the several copies of every edition published.

Waiver of copyright.—In *G. & C. Merriam Co. v. United Dictionary Co.*, (C. C. A. 1906) 146 Fed. 354, *affirmed* (1908) 208 U. S. 280, 28 S. Ct. 290, 52 U. S. (L. ed.) 478, it appeared that the plaintiff simultaneously published and copyrighted a dictionary in Great Britain and the United States, neither being intended to compete with the other; the English book containing no reference to the American copyright, but fully complying with the copyright laws of Great Britain, as did also the American book with the copyright laws of the United States. It was held that complainant's failure to insert a notice of the American copyright in the English work did not constitute a waiver of its American copyright.

Inadvertent omission of notice by licensee.—The owner of a copyrighted literary production does not lose the exclusive property therein given by the copyright because a licensee authorized to publish the article on the express condition that he print therewith the usual copyright notice inadvertently omits to do so, and any one who copies and republishes the article so published, though without actual knowledge of the copyright, does so at his peril. *American Press Assoc. v. Daily Story Pub. Co.*, (C. C. A. 1902) 120 Fed. 766.

Requirements as to notice.—"In determining whether a notice of copyright is misleading, we are not bound to look beyond the face

of the notice and inquire whether, under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled. With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person." *Per Brown, J.*, in *Miffin v. R. H. White Co.*, (1903) 190 U. S. 260, 23 S. Ct. 769, 771, 47 U. S. (L. ed.) 1040.

A copyright notice is not invalidated by the publication of the date of copyright in Roman instead of Arabic numerals. *Stern v. Remick*, (1910) 175 Fed. 282.

Inscribing the copyright notice upon the published copies without placing such inscription upon the original painting satisfies the requirement of this section. *American Tobacco Co. v. Werckmeister*, (1907) 207 U. S. 284, 28 S. Ct. 72, 52 U. S. (L. ed.) 208, *affirming* (1906) 146 Fed. 375, 76 C. C. A. 647.

Where a copyrighted picture was intended to be reproduced and used as a design for fancy paper to cover boxes and other articles for the holiday season, and twelve complete copies were lithographed and printed on one sheet, the picture having been so printed that each copy would join harmoniously with its neighbors and the repeated design would produce a pleasing decorative effect, it was held that each one of the reproductions should have been accompanied by a copyright notice in order to protect the design; and that a single notice on each sheet, to serve as a notice to the manufacturer of the boxes, was insufficient. *De Jonge v. Breuker, etc., Co.*, (1910) 182 Fed. 150.

Vol. II, p. 275, sec. 11.

Copyright of number protects all contents. — Under this section, which provides that "each number of a periodical shall be considered an independent publication subject to the form of copyrighting as above," the

Vol. II, p. 275, sec. 13.

The action of the President is a condition of the right of a foreign citizen to the benefits of this Act, giving the right of copyright to citizens of a foreign state when such state permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party, the existence of such condition to be determined by the President by proclamation, made from time to time, as the purposes of the Act may require. *Bong v. Alfred S.*

Vol. X, p. 66, sec. 1.

Books previously published here. — *Encyclopedia Britannica Co. v. American Newspaper Assoc.*, (C. C. A. 1906) 142 Fed. 966,

Publication abroad. — An American copyright is not lost by publishing a work abroad and selling it for use there without inserting the notice of copyright. *United Dictionary Co. v. G. & C. Merriam Co.*, (1908) 208 U. S. 260, 28 S. Ct. 290, 52 U. S. (L. ed.) 478, *affirming* (1906) 146 Fed. 354, 76 C. C. A. 470; *Harper v. Donohue*, (1905) 144 Fed. 491.

The following notices were held sufficient: "Copyrighted 1907 by C. W. Sweet." *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156.

"Copyright, 1902, Published by Hills & Co., Ltd., London, England." *Hills v. Austrich*, (1903) 120 Fed. 862.

The following were held insufficient: "The text of these pages are copyrighted. All rights reserved. Notice is hereby given that infringement will lead to prosecution." *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156.

In *Record, etc., Co. v. Bromley*, (1909) 175 Fed. 156, a copyright notice was in two lines:

"Copyright by The Real Estate Record and Builders' Guide Co.

Vol. LXXV. May 6, 1905. No. 1938."

A continuous black line was drawn completely across the column between the first and second lines separating them as if they were in different columns. It was held that the date, May 6, 1905, could not be regarded as a part of the copyright notice, which was therefore void for want of a date.

In *Record, etc., Co. v. Bromley*, *supra*, it was held that a copyright notice on the cover page of a periodical, above the title, "The entire contents of this paper covered by copyright," or "Contents covered by copyright" was insufficient.

copyrighting of a number of a periodical as a whole, with notice of such copyright given on the title page or the page following, covers and protects all the articles printed therein. *Harper v. Donohue*, (1905) 144 Fed. 491.

Campbell Art Co., (1909) 214 U. S. 226, 29 S. Ct. 628, 53 U. S. (L. ed.) 979, *affirming* (1907) 155 Fed. 116, 83 C. C. A. 576.

Transfer of right by alien. — An author of a painting, who, not being a citizen or subject of a foreign state with which the United States has copyright relations, is excluded by this section from the benefit of copyright, cannot convey such right to a person whose citizenship is such as to satisfy the provisions of the section. *Bong v. Alfred S. Campbell Art Co.*, (1909) 214 U. S. 236, 29 S. Ct. 628, 53 U. S. (L. ed.) 979, *affirming* (1907) 155 Fed. 116, 83 C. C. A. 576.

affirming (1905) 135 Fed. 841, set out in the original note.

1909 Supp., p. 81, sec. 1, cl. (d).

Song constituting part of dramatic sketch.—Under this clause, giving the holder of a copyright the exclusive right to perform or represent the copyrighted work publicly if a drama, and clause "e," giving the exclusive right to perform the copyrighted work pub-

licly for profit if it be a musical composition, the holder of the copyright of a song constituting a part of a dramatic sketch, and those claiming under him, have the exclusive right to publicly present it. *Green v. Luby*, (1909) 177 Fed. 287.

1909 Supp., p. 83, sec. 5, cl. (d).

"Dramatico-musical."—A sketch consisting of a series of recitations and songs, with a very little dialogue and action, and with scenery, and lights thrown upon the singer,

is a dramatico-musical composition within the provisions of the copyright law. *Green v. Luby*, (1909) 177 Fed. 287.

1909 Supp., p. 83, sec. 5. [Proviso.]

Errors in classification.—Under this section providing that an error in classification shall not invalidate a copyright, the classification of a dramatico-musical composition as

a dramatic composition does not affect the validity of the copyright. *Green v. Luby*, (1909) 177 Fed. 287.

1909 Supp., p. 83, sec. 8.

Renewal by assignee.—This section provides that the author or proprietor of any work made the subject of copyright by the Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in the Act. Section 24 of this Act provides that the copyright subsisting in any work when the Act goes into effect may at the expiration of the term provided for under existing law be renewed by the author if still living, or the widow, widower, or children of

the author if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will his next of kin. It has been held that the proprietor and assignee of the author of a copyrighted musical composition is not entitled to renewal of the original term of his copyright by force of section 8. *White-Smith Music Pub. Co. v. Goff*, (1910) 180 Fed. 256, *affirmed* (C. C. A. 1911) 187 Fed. 247.

COSTS.

Vol. II, p. 276, sec. 823.

Marshal's fees.—The prevailing party in a suit in a federal court is not entitled to tax against his opponent as a part of his costs the fees of the marshal for serving subpoenas on witnesses residing without the district and more than one hundred miles from the place of trial. *U. S. v. Southern Pac. Co.*, (1909) 172 Fed. 909.

Mileage of witnesses.—The prevailing party in a civil action in a federal court is entitled to tax as a part of his costs mileage for his witnesses for the distance necessarily traveled by them from any point to which a subpoena would run, viz., from any point within the district, and for not exceeding one hundred miles for witnesses coming from without the district. *U. S. v. Southern Pac. Co.*, (1909) 172 Fed. 909.

Costs for drawing pleadings, decrees, etc.—United States Supreme Court equity rule 25 provides that in order to promote brevity, etc., the regular taxable costs for every bill and answer shall in no case exceed the sum

which is allowed in the state court of chancery in the district, if any there be, otherwise it shall not exceed three dollars for every bill and answer. R. S. sec. 913, 4 Fed. Stat. Annot. 561, declares that the forms and modes of proceeding in suits of equity in the Circuit and District Courts shall be according to the principles, rules, and usages which belong to courts of equity, except when otherwise provided by statute or by rules of court in pursuance thereof. It was held that in the absence of an express rule of the Circuit Court dealing with the taxation of costs in equity, such court had power to allow costs for the drawing of the pleadings, decrees, and order of court in accordance with the established practice as authorized by a state statute, and that such allowance was not prohibited by section 823. *Matheson v. Hanna-Schoelkopf Co.*, (1904) 128 Fed. 162.

Partnership accounting.—The discretion of a court of equity in a suit for a partnership accounting in which a receiver is appointed

does not authorize an order requiring the defendant and the sureties on his cost bond to pay to complainant, under the name of costs, items paid from partnership assets for services and expenses in administering the fund, nor any other items not within this section

Vol. II, p. 278, sec. 824.

On a trial before a jury.—The phrase "on a trial before a jury," as used in this section, contemplates not only an examination and hearing of evidence before a jury, but a determination of the question at issue, or a final submission of the cause for such determination, so that, on a case on trial before a jury being settled pursuant to a stipulation before submission, no docket fee is allowable. *Howler v. Chicago, etc., R. Co.,* (1909) 166 Fed. 828.

Depositions.—The provision regarding depositions refers to depositions taken out of court to be used on the hearing of the cause, and has no application to evidence taken either in court or before a master on a reference. *Kissinger-Ison Co. v. Bradford Belt- ing Co.,* (C. C. A. 1903) 123 Fed. 91. *Compare Matheson v. Hanna-Schoelkopf Co.,* (1904) 128 Fed. 163.

Attorney's fees for taking depositions can be taxed in a federal court under this section only for such depositions as were "admitted in evidence" in the language of the statute. *U. S. v. Venable Constr. Co.,* (1904) 158 Fed. 833.

Counsel fees.—A federal court of equity has power to make an allowance for counsel fees to a complainant who, as a joint owner of a fund or property, has maintained a suit for its preservation or protection, where it has been brought within the custody or control of the court, such allowance to be charged thereon; but the power is discretionary, and will only be exercised where it is clear that a direct benefit has resulted to the property or those interested therein. *Cuyler*

and *R. S. sec. 983, 2 Fed. Stat. Annot. 291,* providing what shall be included as costs in and form a portion of a judgment or decree against the losing party. *McIntosh v. Ward, (C. C. A. 1907) 159 Fed. 66.*

v. Atlantic, etc., R. Co., (1904) 152 Fed. 570.

Construction of order dividing costs.—Where the libellant is the prevailing party in a suit in admiralty, but for equitable reasons the court directs that the costs be divided and paid by the parties in stated proportions, such order should be construed as including the statutory fee for libellant's proctor, which in ordinary course would be taxed as costs, but not a fee for respondent's proctor, which, if taxable under this section, is only so against his own client. *The L. F. Munson, (1904) 127 Fed. 767.*

Action for violation of "twenty-eight hour law."—On a recovery by the government in an action for violation of Act June 29, 1906, ch. 3594, 34 Stat. L. 607, 1909 Supp. Fed. Stat. Annot. 43, known as the "twenty-eight hour law," a docket or attorney's fee of forty dollars is taxable against the defendant, under the provisions of this section. *U. S. v. Southern Pac. Co.,* (1909) 172 Fed. 909.

"Discontinued."—Where, pending trial to a jury, the case was settled pursuant to stipulation before submission, it was not "discontinued" within the meaning of this section. *Howler v. Chicago, etc., R. Co.,* (1909) 166 Fed. 828.

Docket fees in consolidated suits.—Where two suits are brought in a federal court between the same parties which are consolidated for trial, but separate verdicts are returned, two attorney's docket fees of twenty dollars each are taxable against the losing party. *U. S. v. Venable Constr. Co.,* (1904) 158 Fed. 833.

Vol. II, p. 285, sec. 968.

Imposed as penalty for colorably invoking jurisdiction.—The right or duty of the Circuit Court to penalize a plaintiff recovering less than five hundred dollars by requiring the payment of defendant's costs, under this section, depends upon the same facts which authorize the court to dismiss the action under Judiciary Act of March 3, 1875, ch. 137, sec. 5, 18 Stat. L. 472, 4 Fed. Stat. Annot. 371, and such penalty should not be imposed unless it appears to the satisfaction of the

court, either from the declaration or on the trial, that the damages were laid in the declaration at a sum in excess of \$2,000 for the mere purpose of giving colorable jurisdiction to the court and without any expectation of recovering more than such sum. *McCarthy v. American Thread Co.,* (1906) 143 Fed. 678.

An action by a receiver of a national bank to recover assets is not within this section. *Murray v. Chamber, (1907) 151 Fed. 142.*

Vol. II, p. 287, sec. 970.

Construction.—This section is not inconsistent with *R. S. sec. 989, 3 Fed. Stat. Annot. 46,* which provides that "when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him . . . in the performance of his official duty, and the court certifies that

there was probable cause for the act, . . . or that he acted under the directions of the . . . proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall . . . be . . . paid . . . from the treasury," their effect being when construed together to

limit the claimant in such case to an action for loss or damage to his property while in the custody of the officer, and to convert the judgment recovered therefor into a claim against the government, where the court certifies that the officer acted either upon probable cause or under the directions of a superior officer. *Agnew v. Haymes*, (C. C. A. 1905) 141 Fed. 631.

Certificate of reasonable cause.—On judgment for claimant of property seized by

officers of the customs service for forfeiture on the ground that it was fraudulently imported, a certificate of reasonable cause should be entered by the court as provided by this section, although the verdict of the jury was clearly right, under the evidence, where it is affirmatively shown that the officers who instituted the proceedings acted in good faith and on reasonable ground of suspicion. *U. S. v. 83 Sacks Wool*, (1906) 147 Fed. 747.

Vol. II, p. 289, sec. 973.

One claim void, others valid.—Where one claim of a patent was adjudged void in a suit for infringement, the complainant was precluded by this section from recovering costs, although other claims were held to be valid and infringed, unless a proper disclaimer as to the void claim was entered before the suit was brought. *Fairbanks v. Stickney*, (1903) 123 Fed. 79, 59 C. C. A. 209.

Where disclaimer unnecessary.—This section applies only where a disclaimer is necessary to save the patent. *National Electric Signaling Co. v. De Forest Wireless Tel. Co.*, (1905) 140 Fed. 449.

Costs of appellate court.—The provision of this section and section 4922, Rev. Stat., 5 Fed. Stat. Annot. 598, that when judgment or decree is rendered for the plaintiff or

complainant in any suit at law or in equity for infringement of part of a patent, etc., no costs shall be recovered unless the proper disclaimer was entered in the Patent Office before the suit was brought, applies only to costs in the trial court, and not to costs on appeal, the allowance or refusal of which is to be determined by the appellate court in view of the special circumstances of the case. Thus, where the court below denied all relief and dismissed the bill, which action was reversed on appeal as to certain claims of the patent, complainant was awarded costs in the appellate court. *Kahn v. Starrels*, (1905) 136 Fed. 597, 69 C. C. A. 371. See also *Johnson v. Foos Mfg. Co.*, (1906) 141 Fed. 73, 72 C. C. A. 105.

Vol. II, p. 289, sec. 974.

Reversal of count carrying costs—affirmance of other counts.—Where a defendant was convicted in a criminal case in which the court had discretionary power to impose upon him the costs of prosecution, and the court imposed separate sentences on different counts of the indictment, under one of which he was required to pay the costs, on a reversal by the appellate court as to such count only, and the issuance of a mandate affirming the judgment as to the other counts, but directing the trial court to sustain the motion in arrest as to such count, that court had no power to modify the judgment as to any of

the other counts, by adding the imposition of costs. *Morris v. U. S.*, (C. C. A. 1911) 185 Fed. 73.

Action under "twenty-eight hour law."—The defendant is subject to the payment of costs by this section in an action by the United States to recover from a carrier the penalty imposed by the "twenty-eight hour law" (Act of June 29, 1906, ch. 3594, sec. 3, 34 Stat. L. 607, 1909 Supp. Fed. Stat. Annot. 45), for confining live stock more than twenty-eight consecutive hours. *U. S. v. Southern Pac. Co.*, (1909) 172 Fed. 909.

Vol. II, p. 291, sec. 983.

Default.—Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, it was held that he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by

default, except on payment of costs authorized by this section. *Naretti v. Scully*, (1904) 133 Fed. 828.

Partnership accounting.—See under this title, vol. 2, p. 276, sec. 823.

Vol. II, p. 294, sec. 1.

Appellate proceedings in forma pauperis.—The right to prosecute a writ of error from a Circuit Court of Appeals without giving security for costs is not given by this Act as the Act does not apply to appellate proceedings. A Circuit Court of Appeals cannot, without statutory authority, permit the prosecution in *forma pauperis* of a writ of

error sued out of that court. *Bradford v. Southern R. Co.*, (1904) 195 U. S. 243, 25 S. Ct. 55, 49 U. S. (L. ed.) 178; *Bristol v. U. S.*, (C. C. A. 1904) 129 Fed. 87; *In re Bradford*, (C. C. A. 1905) 139 Fed. 518; *Taylor v. Adams Express Co.*, (C. C. A. 1908) 164 Fed. 616.

Poverty of petitioner.—Where libellant, in

a proceeding in admiralty for collision resulting in the loss of libellant's sloop, tackle, apparel, and furniture, alleged that by reason of his poverty he was unable to defray the expense of litigation, and prayed that process might issue and be served *in forma pauperis*, as authorized by this section, and there was no proof that libellant's sworn statement as to his poverty was false, the fact that he purchased the sloop for \$500 was held to be insufficient to establish that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs. *The Our Friend*, (1904) 131 Fed. 395.

Creditor of bankrupt. — A creditor who ob-

jects to the discharge of a bankrupt may prosecute his objections *in forma pauperis* by virtue of this Act, which gives any citizen entitled to commence "any suit or action in any court of the United States," such right on making the required showing. *In re Guilbert*, (1907) 154 Fed. 676.

Attorney interested. — Where plaintiff's attorney was financially interested in the result of an action brought in the federal court, it was held that the plaintiff could not obtain an order permitting him to sue *in forma pauperis*, as authorized by this Act, without a showing that plaintiff's attorney was also unable because of poverty to give security. *Phillips v. Louisville, etc., R. Co.*, (1907) 153 Fed. 795.

Vol. II, p. 294, sec. 2.

Showing required. — A showing to obtain leave to maintain a suit in admiralty *in forma pauperis*, although made in conformity to rules of the court long in force, must also conform to the requirements of the Act; but when process has issued without such show-

ing, and a motion has been made to require security for costs, libellant may be permitted to supply the omission, as contemplated by this section. *Donovan v. Salem, etc., Nav. Co.*, (1904) 134 Fed. 316.

Vol. II, p. 294, sec. 4.

Construction. — The provision of this section authorizing the court to dismiss an action brought thereunder *in forma pauperis* if satisfied that the alleged cause of action is frivolous or malicious, applies to cases where the affidavit of poverty is filed simultaneously with the filing of the writ. *O'Connell v. Mason*, (1904) 132 Fed. 245, 65 C. C. A. 541, *affirming* (1903) 127 Fed. 435.

"Brought under." — An action is "brought under" this section when the filing of the writ, declaration, and affidavit is simultaneous. *O'Connell v. Mason*, (1903) 127 Fed. 435, *affirmed* (1904) 132 Fed. 245, 65 C. C. A. 541.

Assignment of attorney. — Where plaintiff had secured counsel under a contract for a contingent fee, who had commenced the suit, filed pleadings, and prosecuted the case through two mistrials, plaintiff was not thereafter entitled, on the making of an applica-

tion for security for costs, to an order rescinding his contract with his attorney and permitting him to sue *in forma pauperis* and to the assignment of counsel by the court. *Phillips v. Louisville, etc., R. Co.*, (1907) 153 Fed. 795.

Dismissal of action when plea of poverty found untrue. — Where, on a rule to give security for costs, a plaintiff has interposed an affidavit of poverty, the action will be subsequently dismissed, on a rule taken for that purpose, where it is shown by the proofs that the allegation of poverty is not true. The plaintiff, having invoked the provisions of the statute relieving from the requirement to give security for costs, is bound by its other provisions, which require the court to dismiss the action if the plea of poverty is found to be untrue, and cannot interpose the constitutional right to trial by jury thereto. *Woods v. Bailey*, (1903) 122 Fed. 967.

COUNTERFEITING AND FORGING.

Vol. II, p. 299, sec. 5415.

Intent.—In a prosecution under this section for passing false or forged national bank notes, knowledge that they were falsely made is an essential element of the offense, and there must be some evidence of such knowledge, circumstantial or otherwise, aside from proof merely that the spurious note was passed. *Gallagher v. U. S.*, (C. C. A. 1906) 144 Fed. 87.

Unauthorized signing of bank notes.—The unauthorized signing of names to notes of a national bank, purporting to be those of the president and cashier, constitutes the crime of forging such notes, under this section, whether the names so signed are in fact those

of the president and cashier or of fictitious persons. *Logan v. U. S.*, (C. C. A. 1903) 123 Fed. 291.

Effect of statute making forged notes redeemable.—The fact that national bank notes to which the signatures have been forged, and which have been put in circulation, are made redeemable by statute, Act July 28, 1892, 27 Stat. L. 322, ch. 317, 5 Fed. Stat. Annot. 129, does not relieve one who forges the names of the president and cashier of a national bank to genuine but unsigned notes from the crime of forging such notes, as defined in section 5415. *Logan v. U. S.*, (C. C. A. 1903) 123 Fed. 291.

Vol. II, p. 300, sec. 5418.

Offense against civil service.—An actual financial or property loss need not be charged or proved in order to make out a cause under this section of forging vouchers required upon examination by the Civil Service Commission of the United States, certifying to the character, physical capacity, etc., of the applicant, and presenting the same to the commission. *U. S. v. Plyler*, (1911) 222 U. S. 15, 32 S. Ct. 6. See also *U. S. v. Curley*, (1903) 122 Fed. 738, *affirmed* (C. C. A. 1904) 130 Fed. 1.

Sufficiency of instruments to form basis of charge.—When a false instrument or affidavit is so palpably and absolutely invalid that it cannot defraud or inflict loss or injury under any circumstances, it may not form the basis of a charge of forging it, or of uttering it, or of transmitting it to the officer to defraud the United States. But if under any contingency it may have the effect to deceive and defraud, it is sufficient to found a conviction of such an offense upon. Such an instrument or affidavit is sufficient if it is apparently valid on its face, although extrinsic facts may exist that would render it void or ineffective if genuine. It is not indispensable to a conviction for transmitting a forged affidavit to an officer to defraud the United States, or to a conviction of forgery, or of uttering a forged instrument, that the affidavit, the forgery, or the uttering shall be sufficient in itself, without other evidence or acts, to win the controversy or to accomplish the object of the wrongful act. It is enough that it may under some contingency aid to bring about that result. *Neff v. U. S.*, (C. C. A. 1908) 165 Fed. 273.

Homestead application.—In *U. S. v. McKinley*, (1903) 127 Fed. 166, it was held that the forgery of homestead applications and affidavits, with intent to thereby obtain title to public lands of the United States, constituted an offense, under this section, although the land was described as "in township 24 south of range 1 east," without naming the meridian, where in fact all the townships in the state were numbered from the same meridian, and the description was therefore sufficient to identify the lands to the officers acting on the papers, and such papers were capable of effecting the intended fraud.

Forged instruments erroneously received in evidence.—A forged instrument or affidavit regarding a material fact erroneously received in evidence by the officers of a local land office in the trial of a claim to land within their jurisdiction may deceive them and defraud the United States, and hence may form the basis of a conviction under section 5418, because a patent issued upon it by the land department would be impervious to collateral attack, and the United States would be estopped from avoiding it and from recovering the land even by a direct attack after the title to it passed to an innocent purchaser. If the land and the claim were beyond the jurisdiction of the land department, the transmission of such an affidavit to its officers could not defraud the United States nor form the basis of a conviction under that section. *Neff v. U. S.*, (C. C. A. 1908) 165 Fed. 273.

Vol. II, p. 303, sec. 5421.

Separate offenses.—This section covers three offenses: First, the making of any forged or counterfeit deed or other writing for the purpose of obtaining any sum of money from the United States or any of its officers; second, the uttering of any such forged or counterfeit paper with intent to defraud the United States, knowing it to have been so forged; third, the transmitting or presenting to any office or officer of the government any such writing, with knowledge that it is false or forged, with intent to defraud the United States. Such offenses are separate and distinct, and proof that a defendant forged papers purporting to transfer the right to an additional homestead, which is a vendible right, and sold and delivered the same to another for a considera-

tion paid to him and without any agreement or understanding with the purchaser with respect to the use to be made of them will not support an indictment under the third subdivision of the section, for transmitting such papers or procuring them to be transmitted to a land office with intent to defraud the United States. *U. S. v. Fout*, (1903) 123 Fed. 625.

Forging of affidavit by pensioner contesting wife's claim to half of pension.—The forgery of an affidavit by a pensioner, to be used in contesting his deserted wife's claim for one-half of his pension, as authorized by statute (Act March 3, 1899, ch. 460, sec. 1, 30 Stat. L. 1379, 5 Fed. Stat. Annot. 673), is not an offense within this section. *U. S. v. Swan*, (1904) 131 Fed. 140.

Vol. II, p. 305, sec. 5430.

Construction.—The provision of this section making it a criminal offense for any person to have or retain in his control or possession "after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States," includes the having in possession without

authority of the distinctive paper itself and of similar paper adapted to the making of government obligations and securities; and it is not sufficient to warrant a conviction thereunder to prove that defendant has in possession paper which might be used to make counterfeit obligations or securities, although it might not be adapted to the making of government obligations or securities. *Krakowski v. U. S.*, (1908) 161 Fed. 88, 88 C. C. A. 252.

Vol. II, p. 307, sec. 5431.

Construction.—In *U. S. v. Provenzano*, (1909) 171 Fed. 675, it was held that it is a crime under this section either to pass, utter, publish, or sell any counterfeit obligation of the United States, if done with intent to defraud, or to attempt to do so with like intent, or to bring such a counterfeited obligation into the United States, with intent to pass, publish, utter, or sell it, irrespective of an intent to defraud, and also to keep in possession or to conceal any counterfeit obligation or other security of the United States with like intent.

Separate offenses.—Under this section a person may be convicted of a separate offense for each one of the obligations therein described which he keeps in possession with intent to pass. *Logan v. U. S.*, (C. C. A. 1903) 123 Fed. 291.

Note of state bank.—In *U. S. v. Beebe*, (1906) 149 Fed. 618, it was held that a person could not be convicted of passing a counterfeit United States note under this section where the note passed was a genuine note issued by a state bank, unaltered, although it may have been worthless and may have

had some resemblance by reason of its color to a United States note.

The words "intent to pass, utter, or sell," in this section prohibiting the bringing into the United States, with intent to pass, publish, utter, or sell, any forged obligation of the United States, means to dispose of the same as genuine, and thus defraud the taker or takers. *U. S. v. Provenzano*, (1909) 171 Fed. 675.

The words "with like intent," as used in the part of this section prohibiting the bringing into the United States, with intent to pass, publish, utter, or sell, or keep in possession or conceal, any falsely made, forged, counterfeited, or altered obligation of the United States, refers only to the intent to defraud, and not to the intent to pass, publish, utter, or sell, so that an indictment charging possession with knowledge of the counterfeit character of the obligation was not defective for failure to charge an intent to pass, publish, utter, or sell the same, in addition to an intent to defraud. *U. S. v. Provenzano*, (1909) 171 Fed. 675.

Vol. II, p. 310, sec. 5457.

"Falsely."—In *Kaye v. U. S.*, (C. C. A. 1910) 177 Fed. 147, it was held that the adverb "falsely" in the opening line of the section qualifies only the verb "makes," since the verbs "forges" and "counterfeits" carry

in themselves the idea of falsity, and hence the intent to defraud is only an element of the offense of having possession with intent to use, etc.

Vol. II, p. 314, sec. 1.

Intent.—In *Kaye v. U. S.*, (C. C. A. 1910) 177 Fed. 147, it was held that this section establishes two offenses, to wit, the making and having in possession any mold, etc., and that the intent is material only with reference to the having of such things in possession, and not as to the making thereof.

Indictment.—An indictment under the first clause of this section which makes it a criminal offense to make any die, hub, or mold in

the likeness of any die, hub, or mold designed for the coining of any of the coins of the United States "without authority from the Secretary of the Treasury," must aver the want of such authority, and a general averment that the die, hub, or mold was "unlawfully and feloniously" made by defendant is not sufficient. *Wroclawsky v. U. S.*, (C. C. A. 1910) 183 Fed. 312.

CRIMES AND OFFENSES.

Vol. II, p. 321, sec. 1014.

Prosecution by information.—This section relates to preliminary examinations and has no application to prosecutions by information. *U. S. v. Baumert*, (1910) 179 Fed. 735.

Issuance of subpoenas.—Under R. S. sec. 1014, which authorizes United States commissioners to act as examining and committing magistrates in criminal cases in any state "agreeably to the usual mode of process against offenders in such state," a commissioner in New York, sitting as a magistrate, has power to issue subpoenas for witnesses, criminal magistrates of the state being given such power by statute; but under Code Crim. Proc. N. Y., sec. 618, which in effect provides that no person shall be obliged to attend as a witness out of the county of his residence upon a subpoena issued by a magistrate unless on an order indorsed thereon by a court or judge on a showing made, a commissioner has no power to compel the attendance of a witness by a subpoena issued by him at the instance of a defendant, and served outside of the county where the hearing takes place, unless an order therefor is obtained from a federal court or judge in conformity to the state practice. *U. S. v. Beavers*, (1903) 125 Fed. 778.

Justice of peace.—A justice of the peace in a state has power, and it is his duty, upon complaint being made to him of the commission of a crime in the Indian Territory, to issue a warrant for the apprehension of the offender. *Roberts v. Brown*, (1906) 43 Tex. Civ. App. 206, 94 S. W. 388.

Validity of bond.—Under this section all proceedings for holding an accused person to answer to a criminal charge before a court of the United States are assimilated to those

under the laws of the state in which the proceedings take place, and the sufficiency of a bail bond taken in such proceedings is to be determined by the law of the state. *U. S. v. Zarafonitis*, (C. C. A. 1907) 150 Fed. 97, 10 Ann. Cas. 290.

Review by habeas corpus.—In a habeas corpus proceeding for the discharge of a prisoner committed by a commissioner under this section, to be held for trial for an offense against the United States, the court will not review the finding of the commissioner where the evidence is conflicting, but if it finds that all the evidence taken together does not support a finding of probable cause the commissioner's ruling may be disregarded and the defendant discharged. *Pereles v. Weil*, (1907) 157 Fed. 419.

Indian Territory.—In *Simon v. U. S.*, (1903) 4 Ind. Ter. 688, 76 S. W. 280, it was held that this section relative to bail in criminal cases had no force in Indian Territory, it being inconsistent with Mansf. Dig., ch. 46, Ind. Ter. Ann. Stat. 1899, ch. 20, and where one was arrested and committed in the central district of the Indian Territory, and gave bail for appearance in the United States court for the southern district, it was held to be proper that an action on the bail should be commenced in the southern district, and summons therein served in the central district.

In *Douglass v. Stahl*, (1903) 71 Ark. 236, 72 S. W. 568, it was held that the United States courts for the districts of Indian Territory were courts of the United States within this section.

Not applicable to Porto Rico.—*In re Kopel*, (1906) 148 Fed. 505.

REMOVAL OF ACCUSED TO TRIAL DISTRICT.

"Offense against the United States."—A conspiracy to violate the "bucket shop" law, Act March 1, 1909, ch. 233, 35 Stat. 670, of the District of Columbia, is an offense against the United States within the

meaning of this section. *U. S. v. Campbell*, (1910) 179 Fed. 762.

The District of Columbia is a district of the United States within the meaning of R. S. section 1014, authorizing the removal

for trial of a person charged with an offense against the United States to the federal district where the trial is to be had, although this section was taken from the Judiciary Act of 1879, when the District of Columbia was not in existence. *Benson v. Henkel*, (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919; *U. S. v. Hyde*, (1904) 132 Fed. 545, *affirmed* (1905) 199 U. S. 62, 25 S. Ct. 760, 50 U. S. (L. ed.) 90.

The Supreme Court of the District of Columbia must be deemed a "court of the United States" within the meaning of this section, authorizing the removal of a person charged with an offense against the United States cognizably by a court of the United States to the federal district where the trial is to be, in view of the Act of June 22, 1873, 18 Stat. at L. 193, ch. 396, making applicable to the court of the district the sections of the original Judiciary Act from which section 1014 was taken, and of the powers given to that court as a court of the United States by D. C. Code, 31 Stat. at L. 1189, ch. 854, making applicable to the district all general Acts of Congress "not locally inapplicable." *Benson v. Henkel*, (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919.

Preliminary hearing.—Though numerous officers are given authority by this section to hold the preliminary hearing of one arrested for removal to another district for trial, it is preferable that he should be taken before the nearest United States commissioner, who should first be reasonably satisfied as to the identity of accused, and should then fix his bail, or if he is charged with a nonbailable offense, or cannot or refuses to give bail, should commit him to await the action of the judge of the district as to awarding a warrant of removal. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

In an examination before a commissioner under this section of a person charged with an offense against the United States in another district, it is necessary to determine whether such an offense has been committed, and whether there is probable cause to believe the defendant guilty. *Pereles v. Weil*, (1907) 157 Fed. 419.

Indictment.—In *Price v. Henkel*, (1910) 216 U. S. 488, 30 S. Ct. 257, 54 U. S. (L. ed.) 581, it was held that allegations charging a conspiracy by which an employee in the bureau of statistics in the department of agriculture was to give his co-conspirators advance information of the official cotton crop reports, and a conspiracy to bribe such employee for the same purpose, sufficiently show, for the purposes of a removal, under this section, to the District of Columbia for trial, the commission within the district of offenses against the United States. To the same effect, see *Haas v. Henkel*, (1910) 216 U. S. 462, 30 S. Ct. 250, 54 U. S. (L. ed.) 569.

One good count in an indictment under which a trial might be held in the federal district to which a removal is sought is enough to support an order for such removal in a habeas corpus proceeding. *Price v. Henkel*, (1910) 216 U. S. 488, 30 S. Ct. 257, 54 U. S. (L. ed.) 581.

Indictment prima facie.—In proceedings to remove a federal prisoner for trial to the district where the offense charged was alleged to have been committed, the indictment is *prima facie* evidence of the commission of the offense. *Beavers v. Henkel*, (1904) 194 U. S. 73, 24 S. Ct. 605, 48 U. S. (L. ed.) 882; *In re Runkle*, (1903) 125 Fed. 996; *In re Benson*, (1904) 130 Fed. 486, *affirmed* (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919; *Pereles v. Weil*, (1907) 157 Fed. 419; *U. S. v. Barber*, (1907) 157 Fed. 889. It is not overcome by a bare denial under oath by the accused that he committed the offense charged. *Mexican Nat. Coal, etc., Co. v. Frank*, (1907) 154 Fed. 217; *U. S. v. Campbell*, (1910) 179 Fed. 762.

In proceedings to remove a federal prisoner for trial to the district where the alleged crime was committed, it was held that the fact that evidence introduced failed to establish facts sufficient to constitute the offense charged did not impair the credit of the indictment, nor entitle accused to a discharge, since there may have been other and more persuasive evidence before the grand jury than was offered in such proceeding. *In re Benson*, (1904) 130 Fed. 486, *affirmed* (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919.

Indictment not conclusive.—Evidence tending to show that no offense triable in the federal District Court to which the accused is sought to be removed has been committed by him in that district, cannot be excluded in the removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnish conclusive evidence of probable cause. *Tinsley v. Treat*, (1907) 205 U. S. 20, 27 S. Ct. 430, 51 U. S. (L. ed.) 639.

Sufficiency of indictment.—The commissioner holding the preliminary hearing of one arrested for removal to another district for trial should consider whether the indictment or complaint, in substance, alleges an offense against the United States, resolving doubts in favor of the government, but should leave to the judges of the district questions as to the jurisdiction of the tribunal to which removal is sought. *U. S. v. Yarborough*, (1903) 122 Fed. 293. Of similar effect is *In re Benson*, (1904) 130 Fed. 486, *affirmed* (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919.

Technical objections.—So far as respects technical objections, the sufficiency of an indictment is not a matter of inquiry in proceedings for the removal, under Rev. Stat., sec. 1014, to another federal district for trial, of a person there charged with an offense against the United States, but is to be determined by the court in which the indictment was found. *Beavers v. Henkel*, (1904) 194 U. S. 73, 24 S. Ct. 605, 48 U. S. (L. ed.) 882; *In re Benson*, (1904) 131 Fed. 968.

Impeachment of indictment.—The sufficiency of the indictment as evidence of probable cause in proceedings for the removal to another federal district for trial, of a person there charged with an offense against the United States, cannot be impeached (if im-

peachable at all) by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action. *Beavers v. Henkel*, (1904) 194 U. S. 73, 24 S. Ct. 605, 48 U. S. (L. ed.) 882.

Different counts charging offenses in different places.—Where, in proceedings to remove a federal prisoner to the District of Columbia for trial, certain counts of the indictment alleged offenses committed there, it was held to be immaterial that other counts and the evidence in such proceeding disclosed offenses committed in another state. *In re Benson*, (1904) 130 Fed. 486, *affirmed* (1905) 198 U. S. 1, 25 S. Ct. 569, 49 U. S. (L. ed.) 919.

Application for warrant.—It is preferable that application for warrant of arrest of one for removal to another district for trial should be made to the nearest United States commissioner. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Arrest.—A person found in one district, wanted for trial in another district for an offense against the United States, should, on a warrant issued in the district where he is found, be arrested (1) where an indictment has been found against him in the other district; (2) where on examining trial he has been held over by the committing magistrate in the other district to stand trial; (3) where a bench warrant has been issued for his arrest by a federal court of another district; (4) where a verified complaint of an offense committed by him in another district has been made before a judge or committing magistrate in such other district; and (5) where such verified complaint is made before such officer in the district where accused is found. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Probable cause.—A commissioner on the preliminary examination of one arrested for removal to another district for trial may not require evidence of probable cause of guilt, where accused has been previously indicted in the district in which he is wanted, or has had a previous preliminary examination there or in the district from which he has fled, or a bench warrant without an indictment has issued for him, but, where there has been merely a complaint made against him before a committing magistrate, he, on offering evidence creating a substantial doubt as to the existence of probable cause to believe him guilty, is entitled to have the government required to furnish further evidence. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Evidence of probable cause, in proceedings to remove a person to another federal district for trial, afforded by an indictment charging him with an offense against the United States, is not rebutted, even if subject to rebuttal, where the rebuttal testimony is negative and for the most part confined to general statements, and the accused claims his privilege, under the state practice, of exemption from cross-examination. *Beavers v. Haubert*, (1905) 198 U. S. 77, 25 S. Ct. 573, 49 U. S. (L. ed.) 950.

The *prima facie* case for the removal to another federal district for trial, of a person there charged with an offense against the

United States, which is made by the production of certified copies of indictments for conspiring against the United States, is not overcome by the introduction of copies of indictments found by a court of the district where the accused resides, which lay the *locus* of the conspiracy in that district. *Haas v. Henkel*, (1910) 216 U. S. 462, 30 S. Ct. 250, 54 U. S. (L. ed.) 569.

In *U. S. v. Campbell*, (1910) 179 Fed. 762, it was held that probable cause for a finding that persons accused of conspiracy to violate the "bucket shop" law, Act March 1, 1909, ch. 233, 35 Stat. 670, in the District of Columbia, participated in the overt acts committed there, warranted their removal.

Return by commissioner.—The commissioner holding the preliminary examination of one arrested for removal to another district for the trial should transmit to the judge hearing the application for warrant of removal a statement of the proceedings had before him certifying the fact, if it is a fact, that accused admitted his identity, otherwise giving in narrative form the evidence on that subject, certified with the rest of the record, which should include all evidence heard, all papers considered, and a statement of the decision of the commissioner. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Issue of warrant.—Under this section authorizing a warrant of removal only where an offender has been committed in a district other than that where the offense is to be tried, a warrant for removal may not be issued before commitment of accused. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Removal from district of residence.—A person indicted for the same offense in two federal districts, one of which is the district where he resides, may—at least, with the consent of the court of the latter district—be removed, under this section, to the other district for the trial of the offense committed there. *Haas v. Henkel*, (1910) 216 U. S. 462, 30 S. Ct. 250, 54 U. S. (L. ed.) 569; *Price v. Henkel*, (1910) 216 U. S. 488, 30 S. Ct. 257, 54 U. S. (L. ed.) 581.

Notice of application for warrant of removal.—One arrested for removal to another district for trial should be given seasonable notice of the time and place when application will be made for the warrant of removal, and apprised of his right to be present before the judge and to resist the application, and with the papers laid before the judge should be a return by the marshal showing when and how the notice was given. *U. S. v. Yarborough*, (1903) 122 Fed. 293.

Successive applications for removal.—The decision of a United States commissioner refusing to commit a prisoner for removal to another federal district for trial on a criminal charge does not render the question of the right to such removal *res judicata*, but ordinarily, in the absence of special circumstances, it should be held to be conclusive on the same facts. *U. S. v. Haas*, (1906) 167 Fed. 211.

Local practice not controlling.—Local practice under which one indicted for a crime is not entitled to a preliminary examination prior to the trial on the merits has no appli-

cation to the proceedings under this section, for the arrest and removal to another federal district for trial of a person there charged with an offense against the United States. *Tinsley v. Treat*, (1907) 205 U. S. 20, 27 S. Ct. 430, 51 U. S. (L. ed.) 689.

Right to speedy trial.—Constitutional rights of the accused to a speedy trial of the indictments pending against him in a federal Circuit Court are not violated by the prosecution, with the consent of that court, of proceedings to remove the accused to another federal district for the trial of an indictment there found against him. *Beavers v. Haubert*, (1905) 198 U. S. 77, 25 S. Ct. 573, 49 U. S. (L. ed.) 950.

Effect of pending indictment in district from which removal is sought.—The prosecution of proceedings to remove to another federal district for trial a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of the federal Circuit Court in whose custody the accused is then held to await the trial of indictments pending against him in that court, where such proceedings are had with the consent of that court. *Beavers v. Haubert*, (1905) 198 U. S. 77, 25 S. Ct. 573, 49 U. S. (L. ed.) 950.

Statute not applicable to corporations.—*U. S. v. Standard Oil Co.*, (1907) 154 Fed. 728.

Vol. II, p. 334. [*Marshal to take prisoner to nearest officer.*]

Extradition proceedings.—Under this Act a person arrested for extradition must be brought before the nearest court commissioner or the nearest judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial, notwithstanding those parts of the Act of Aug. 12, 1848, ch. 167, 9

Stat. L. 302, and of R. S. sec. 5270. 2 Fed. Stat. Annot. 68, which provide for bringing the accused in extradition proceedings before the justice, judge, or commissioner who issued the warrant of arrest. *Pettit v. Walabe*, (1904) 194 U. S. 205, 24 S. Ct. 658, 48 U. S. (L. ed.) 938.

Vol. II, p. 337, sec. 1024.

Election of counts.—Where the different counts of an indictment, while charging different offenses, all relate to the same transaction, so that the evidence offered to sustain one is also admissible under the others, the court may properly refuse to require the government to elect between them. *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187.

Election of counts.—The government cannot be required to elect between counts of an indictment which charge misdemeanors of the same class, although under some of the counts the punishment may be imprisonment in the penitentiary; but under this section such counts may be joined and tried together. *Hartman v. U. S.*, (C. C. A. 1909) 168 Fed. 30.

"Which may be properly joined."—It is not intended by the phrase "which may be properly joined" to limit the joinder or consolidation to charges which might have been joined at common law, but merely to vest the trial court with discretion to refuse to permit a joinder or consolidation where it would prevent a fair trial or be unjust to the defendant. *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440.

Offenses held to have been properly joined.—Separate indictments against the same defendants, charging severally conspiracy to defraud the United States, embezzlement from the United States, and presenting false claims against the United States, where the alleged object of all of the acts charged was the misappropriation of a fund appropriated by Congress to be expended in a specified way, relate to the same transaction, within the meaning of this section, and may properly be consolidated for trial thereunder, where it will facilitate the trial and will not be to the prejudice of defendants. *U. S. v. Greene*, (1906) 146 Fed. 781.

In *Dillard v. U. S.*, (C. C. A. 1905) 141 Fed. 303, it was held that counts charging a defendant with the forgery of Chinese duplicate certificates, with the uttering of such forged certificates, and with violating R. S. sec. 3169, 3 Fed. Stat. Annot. 594, as an officer in the revenue service, by negligently and designedly permitting the commission of such offenses, may properly be joined in the same indictment, since they cover "acts or transactions connected together."

Charges against the same defendants for conspiracy to defraud the United States, based on R. S. sec. 5440, 2 Fed. Stat. Annot. 247, and for receiving money from their alleged co-conspirator for aiding to procure a contract from the government, and for services rendered in relation to the same, based on sections 1781, 1782, 1 Fed. Stat. Annot. 712, 6 Fed. Stat. Annot. 606, defendants being clerks in a department, and such charges all relating to the same transaction, were held to have been properly joined in different counts in the same indictment under section 1024. *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187.

Under this section counts for using the mails to defraud in violation of section 5480, 5 Fed. Stat. Annot. 973, and for conspiracy to commit such offense, under section 5440, 2 Fed. Stat. Annot. 247, where based upon the same transaction, may be joined in one indictment. *U. S. v. Clark*, (1903) 125 Fed. 92.

In *U. S. v. Cardish*, (1906) 145 Fed. 242, it was held that two counts, each charging the same defendants with the burning of a different building, may be joined in an indictment for arson.

Indictments held to have been properly consolidated.—Indictments charging offenses of the same nature and degree and based on the

same statute may be consolidated for trial under this section. *Krause v. U. S.*, (C. C. A. 1906) 147 Fed. 442.

Indictments against the same person for conspiracy to defraud the United States by means of illegal entries of public lands by different persons are for the same class of offenses and may properly be consolidated for trial. *Olson v. U. S.*, (C. C. A. 1904) 133 Fed. 849.

In *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440, it was held that separate indictments against the same persons under R. S. sec. 5427, 5 Fed. Stat. Annot. 213, each charging them with having aided and abetted a different person in using a false certificate of citizenship as evidence of a right to vote, the acts charged being the furnishing of such false certificates for the use of such persons by the defendants, all of which were made by them at the same time, charge acts or transactions connected together, and may properly be consolidated under this section.

This section authorizes the consolidation for trial of indictments for using the mails to defraud under section 5480, 5 Fed. Stat. Annot. 973, notwithstanding the fact that

such indictments charge offenses not committed within the same six months and which could not be joined in one indictment under the latter section, and in the aggregate more than the three offenses which may be so joined. *Booth v. U. S.*, (C. C. A. 1907) 154 Fed. 836.

Peremptory challenges when indictments consolidated.—When a number of indictments against the same defendants charge similar offenses of the same degree, based on the same statute, and which might have been charged in separate counts of the same indictments, their consolidation for trial places them in the same category as if they were separate counts of one indictment, and the defendants are entitled to only the same number of peremptory challenges. *Krause v. U. S.*, (C. C. A. 1906) 147 Fed. 442.

Discretion of court.—The question of the propriety of joinder in a given case is left to the discretion of the court. *U. S. v. Eastman*, (1904) 132 Fed. 551.

For other cases under this section, see *U. S. v. Eddy*, (1905) 134 Fed. 114; *Ex p. Peeke*, (1906) 144 Fed. 1016.

Vol. II, p. 340, sec. 1025.

Immateriality in form of averment.—This section precludes the necessity that any one of the essential averments in an indictment shall be made in any particular form, no matter how that form may be sanctioned by precedent and long usage. If the averment appears in any form, or may by fair construction be found anywhere within the text of the indictment, it is sufficient. *U. S. v. Howard*, (1904) 132 Fed. 325.

Omission of date.—In *U. S. v. Howard*, (1904) 132 Fed. 325, it was held that an indictment for subornation of perjury under R. S. sec. 5393, 5 Fed. Stat. Annot. 705, which charged that the offense was committed "on the — day of December, 1893," was defective, but, the date not being of the essence of the offense, the defect was one of form only, and was cured by section 1025.

Grand jurors not qualified.—Statutory disqualifications of grand jurors cannot be regarded as a mere defect or imperfection in form within the meaning of this section. *Crowley v. U. S.*, (1904) 194 U. S. 461, 24 S. Ct. 731, 48 U. S. (L. ed.) 1075.

Negative pregnant.—In *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721, it was held that the fact that denials of the truth of alleged false representations in an indictment were in the form of negative pregnant did not render the indictment fatally defective under this section.

Repugnancy.—An indictment for conspiracy to defraud by the use of the mails, in violation of R. S. sec. 5480, 5 Fed. Stat. Annot. 973, as amended is not bad for repugnancy because it charges in the same count that the defendant conspired to defraud "by dealing and pretending to deal" in what is commonly called "green articles" and "spurious Treasury notes." *Lehman v. U. S.*, (C. C. A. 1903) 127 Fed. 41.

Duplicity.—Where in a prosecution for cutting timber from the public domain, defendant was not prejudiced by the fact that the indictment charged that he cut the timber with intent unlawfully to export and with intent to dispose of the same, it was held that the conviction could not be set aside because of such duplicity. *Morgan v. U. S.*, (C. C. A. 1906) 148 Fed. 189.

Averment of time.—The averment of time in an indictment is a matter of form, not generally material, and in view of this section as well as under the Oregon statute (adopted by rule in the federal courts in that state), which provides that the precise time need not be stated, it has been held that an indictment alleging the time of commission of the offense as "on or about" a day named is sufficient, except in cases where the time is an ingredient of the offense. *U. S. v. McKinley*, (1903) 127 Fed. 168.

Sufficiency of pleas.—It is not essential that a plea to an indictment in a federal court for irregularities in the procedure should aver that the matters therein set forth were prejudicial to defendant, which is merely a legal conclusion; but facts showing such prejudice must be averred and proved under this section, which applies as well to irregularities in procedure as to defects of form in the indictment. *U. S. v. Cobban*, (1904) 127 Fed. 713.

Following language of statute.—Where an indictment for combination or conspiracy in restraint of trade in violation of the Sherman anti-trust law (Act July 2, 1890, ch. 647, sec. 3, 26 Stat. 209, 7 Fed. Stat. Annot. 344), was uncertain as to some of its allegations, owing to the fact that the offense was first charged in the language of the statute, and the purposes and objects of the conspiracy were not fully stated until after the overt

acts were described, it was held that the defect was one of form, and not of substance, not prejudicial to defendant, and therefore immaterial under this section. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85.

Indictment not duly found and presented.—This section has no application to an indictment not duly found and presented; the defect in such case not being one of form, but of substance. *Renigar v. U. S.*, (C. C. A. 1909) 172 *Fed.* 646.

Particularity.—A want of particularity in describing the offense intended to be charged by an indictment cannot successfully be urged as a ground for reversing a conviction, where such indictment specifically states the elements of the offense with sufficient particularity fully to advise the defendant of the crime charged, and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense, in view of this section. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 *U. S.* 481, 29 *S. Ct.* 304, 53 *U. S.* (L. ed.) 613.

Indictments held sufficient.—Under this section, providing that, so far as possible, consistent with assuring accused a fair and impartial trial, the court shall disregard form, imperfection of statement, and unimportant defects which do not reasonably tend to prejudice accused, an indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense, and to plead the judgment in bar of any further prosecution for the same offense. *Clement v. U. S.*, (C. C. A. 1906) 149 *Fed.* 305.

An indictment charged that defendants, with others, conspired to obtain from the government certain specified tracts of land open to homestead entry by procuring certain named persons to enter the same by means of false proof in respect to their residence on

and improvement of the land, and with respect to the intent with which and the purpose for which the entries were made, and in pursuance of such conspiracy and to effect the object thereof defendants caused and procured C. to make the homestead proof in respect to the land entered by him, and the final affidavit required by homestead claimants, including a statement that his family consisted of himself and wife, and that they had resided continuously on the land since first establishing residence thereon, which proof was subscribed by C. and certified by defendant W., and that each of the defendants knew that the proof was false, etc. It was held that the indictment was sufficient. *Jones v. U. S.*, (C. C. A. 1908) 162 *Fed.* 418.

In *Rinker v. U. S.*, (C. C. A. 1907) 151 *Fed.* 755, it was held that an indictment, under R. S. sec. 3893, 5 *Fed. Stat. Annot.* 839, as amended by Act of Sept. 26, 1888, ch. 1039, sec. 2, 25 *Stat.* 496, for depositing an obscene, lewd, and lascivious letter in the mails, was not bad because it alleged that the offense was committed "on or about" a given date, where it showed that but a short time elapsed between the writing of the letter and the finding of the indictment; the defect being one of form only, by which the defendant was not prejudiced.

For other cases under this section, see *Pooler v. U. S.*, (C. C. A. 1904) 127 *Fed.* 509; *O'Hara v. U. S.*, (C. C. A. 1904) 129 *Fed.* 551; *Brown v. U. S.*, (C. C. A. 1906) 143 *Fed.* 60; *Jones v. U. S.*, (C. C. A. 1908) 162 *Fed.* 417; *Nickell v. U. S.*, (C. C. A. 1909) 167 *Fed.* 741; *Rogers v. U. S.*, (C. C. A. 1910) 180 *Fed.* 54; *U. S. v. Eccles*, (1910) 181 *Fed.* 906; *Hillegass v. U. S.*, (C. C. A. 1910) 183 *Fed.* 189; *Hogue v. U. S.*, (C. C. A. 1910) 184 *Fed.* 245.

Vol. II, p. 344, sec. 1033.

Cases not capital.—Since this section providing that a person indicted for treason or a capital offense shall be furnished with a list of witnesses, to be produced three days before the trial on the indictment for treason and two days before the trial of any other capital cases, limits such right to trials for treason and capital offenses, it impliedly authorizes the examination of witnesses in trials in the federal courts for lesser crimes without such witnesses being previously disclosed to accused. *Balliet v. U. S.*, (C. C. A. 1904) 129

Fed. 689; *Jones v. U. S.*, (C. C. A. 1908) 162 *Fed.* 417.

Prosecutions in Alaska.—This section applies only to treason and capital cases tried in the courts of the United States, and not to felonies for which prosecutions are had in a territorial court of Alaska, under the Alaska Code of Criminal Procedure. *Ball v. U. S.*, (C. C. A. 1906) 147 *Fed.* 32.

Not in force in Indian Territory.—See *Binyon v. U. S.*, (1903) 4 *Ind. Ter.* 642, 76 *S. W.* 265; *Leftridge v. U. S.*, (1906) 6 *Ind. Ter.* 305, 97 *S. W.* 1018.

Vol. 2, p. 345, sec. 730.

Jurisdiction of state.—A state may extend its orders for the distance of one marine league from low-water mark, and make the region so annexed as much a portion of the state as any other part of its territory. *U. S. v. Newark Meadows Imp. Co.*, (1909) 173 *Fed.* 426.

District of jurisdiction.—In *U. S. v. Newth*, (1906) 149 *Fed.* 302, it was held that a District Court of the United States was not deprived of jurisdiction to try a defendant, ar-

rested within the district, charged with the commission of an offense on board an American vessel on the high seas, under this section, which provides that such offenses shall be cognizable in the district where the offender is found or into which he is first brought, because such defendant was first arrested in Alaska, the courts of which are not vested with jurisdiction to try offenses not committed within their territorial jurisdiction.

Place of apprehension.—Under this sec-

tion providing that the trial of all offenses committed upon the high seas shall be in the district where the offender is found or into which he is first brought, an offender is to be tried in the district where he is apprehended, unless he is taken into custody while at sea, in which case he is to be tried in the district into which he is first brought. But to be "brought" into a district within the meaning of the statute, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas and

the offender was not taken into custody until he was found and apprehended in one of the districts of California, it was held that he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest—which was returned unexecuted because of the offender's departure from the district of Hawaii before its attempted service—was issued there. *Kerr v. Shine*, (C. C. A. 1905) 136 Fed. 61.

Vol. II, p. 347, sec. 731.

Offense committed in several districts.—An offense against the United States committed in more than one district is, under this section, cognizable in either district. *Haas v. Henkel*, (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569.

Where a false claim and voucher against the United States are made in one state and transmitted from there to the appropriate

department in the city of Washington for approval and allowance, the offense of presenting the false claim may be prosecuted in the state where the papers were made. *Bridgeman v. U. S.*, (C. C. A. 1905) 140 Fed. 577.

Violation of immigration laws.—See U. S. v. *Capella*, (1909) 169 Fed. 890.

Vol. II, p. 349, sec. 1038.

The word "session" is used in this section as meaning an actual sitting of the court for the transaction of business, and not in the

sense of "term." *U. S. v. Dietrich*, (1904) 126 Fed. 659.

Vol. II, p. 350, sec. 5328.

Burglary of post office.—See *People v. Burke*, (1910) 161 Mich. 397, 126 N. W. 446.

Vol. II, p. 352, sec. 1035.

Murder and manslaughter.—Under this section a defendant charged with murder in the first degree may be found guilty of man-

slaughter, provided there is evidence in the case to sustain such a verdict. *U. S. v. Densmore*, (1904) 12 N. M. 99, 75 Pac. 31.

Vol. II, p. 355, sec. 5391.

Construction.—This section is not referable, for the purpose of ascertaining the state laws applicable, to the date when it was first enacted, in 1825, but to the date of the adoption of the Revised Statutes, in 1878, by sections 5595 and 5596, 7 Fed. Stat. Annot. 140-142, of which the prior act was superseded and repealed. In no event could such section relate back to an earlier date than April 5, 1866, when the old act was substantially re-enacted. *U. S. v. Tucker*, (1903) 122 Fed. 518.

This section and Act July 7, 1898, ch. 576, 30 Stat. 71, the former of which provides that in case of any offense committed in any places ceded to and under the jurisdiction of the United States, "which offense is not prohibited or the punishment thereof is not

specially provided for by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the state in which such place is situated now in force provide for the like offense," and the latter of which contains similar provisions respecting offenses committed in any place jurisdiction over which has been retained by the United States or ceded to it, etc., "the punishment for which offense is not provided for by any law of the United States," are neither of them limited to the fixing of punishment for offenses expressly created by the federal laws, but they apply to and make punishable any act committed in such places not so provided for, but which is an offense under the laws of the state. *U. S. v. Franklin*, (1909) 174 Fed. 163.

Vol. II, p. 356, sec. 2.

Construction.—Punishment in the federal courts as an offense against the United States, but only in the way and to the extent that such offense would have been punishable if

the territory embraced by the government reservation where the crime was committed had remained subject to the jurisdiction of the state, is what was intended by this sec-

tion adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated now provide for a like offense, the punishment therefor not being otherwise provided for by any law of the United States. *U. S. v. Press Pub. Co.*, (1911) 219 U. S. 1, 31 S. Ct. 212, 55 U. S. (L. ed.) 65. See also under this title, vol. 2, p. 355, sec. 5391.

Delegation of power by Congress.—In *Franklin v. U. S.*, (1910) 216 U. S. 559, 30 S. Ct. 434, 54 U. S. (L. ed.) 615, it was held that the claim that power of legislation is unconstitutionally delegated to the state legislatures by the act adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the United States, is too clearly unfounded to serve as the basis of a writ of error from a federal Supreme Court to a Circuit Court.

Crime committed in federal building.—Under this act a federal court has jurisdiction to prosecute and punish for a crime denounced by the state law, committed in a post-office building owned and occupied by the United

States within a state over which legislative jurisdiction has been ceded by the state. *U. S. v. Andem*, (1908) 158 Fed. 996.

Limitation.—This section does not incorporate into the federal law the general statute of limitations of the state relating to crimes, but a prosecution thereunder is governed as to limitation by the federal statute. *U. S. v. Andem*, (1908) 158 Fed. 996.

Criminal libel in government reservation.—In *U. S. v. Press Pub. Co.*, (1911) 219 U. S. 1, 31 S. Ct. 212, 55 U. S. (L. ed.) 65, it was held that the circulation in the government reservation at West Point and in the post-office building in New York city of copies of a newspaper containing a criminal libel printed and primarily published in such city, could not be punished in the federal courts under the Act of July 7, 1898, sec. 2, providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the state in which such places are situated, since the state laws afforded adequate punishment for the offenses, without resorting to the federal courts, and their plain purpose was that there should be but a single prosecution and conviction for a criminal libel.

Vol. II, p. 356, sec. 1.

Necessity for mitigating circumstances.—A verdict of guilty "without capital punishment" may be rendered in a rape case even

if there are no mitigating or palliating circumstances. *Vickers v. U. S.*, (1908) 1 Okla. Crim. 452, 98 Pac. 467.

Vol. II, p. 358, sec. 1044.

Plea of limitation by demurrer.—A defendant indicted for an offense against the United States, not capital, cannot avail himself of the defense of the three-year limitation by demurrer, where the indictment does not show on its face that defendant is not within the exception of persons fleeing from justice created by section 1045. In such case the proper practice is for defendant to file a special plea in the nature of a plea in abatement, or to avail himself of the defense by evidence under the general issue. *U. S. v. Brace*, (1906) 143 Fed. 703.

Offenses subsequently created.—This section applies to all misdemeanors constituting offenses against the United States, whenever added by Congress to the list of statutory crimes. *U. S. v. Central Vermont R. Co.*, (1907) 157 Fed. 291.

Law limiting time in which grand jury must act.—In *U. S. v. Cadarr*, (1905) 197 U. S. 475, 25 S. Ct. 487, 49 U. S. (L. ed.) 842, it was held that the further prosecution of a criminal offense was not barred by the failure of the grand jury to act within nine months from the date when the accused were held to bail to await such action, although it was provided by Dist. of Col. Code, sec. 939, that under such circumstances, unless the court enlarged the time, "the prosecution of such charges shall be deemed to have been abandoned, and the accused shall be set free

or his bail discharged, as the case may be," but that this section must be deemed to operate merely as ending the pending prosecution, and not as repealing *pro tanto* the general statute of limitations contained in section 1044.

Conspiracy.—A special plea of the statute of limitations is not good as against an indictment charging conspiracy to restrain or monopolize trade, in violation of the Sherman Act of July 2, 1890, 7 Fed. Stat. Annot. 336, by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a special date, which was more than three years before the finding of the indictment where such indictment, consistently with the other facts, alleges that the conspiracy continued to the date of its presentment. *U. S. v. Kissel*, (1910) 218 U. S. 601, 31 S. Ct. 124, 54 U. S. (L. ed.) 1168.

Under an indictment charging a violation of R. S. sec. 5440, 2 Fed. Stat. Annot. 247, providing a penalty where persons conspire to defraud the United States, and one of them does any act to effect the object of the conspiracy, by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act of June 3, 1878, ch. 151, sec. 1. 20 Stat. 89, 7 Fed. Stat. Annot. 300, an averment of payment, on certain dates within three years of the filing of the indictment to procure false application, final proof

and entry for the lands, does not charge overt acts within section 1044, limiting certain federal prosecutions to three years from the commission of the offense. *U. S. v. Black,*

(1908) 160 Fed. 431, 87 C. C. A. 383. See also under the title Conspiracy, vol. 2, p. 247, sec. 5440.

Vol. II, p. 360, sec. 1045.

"Fleeing from justice."—Where a person charged with crime against the United States in the courts of one federal district, when found elsewhere, resists removal to such district, with intent to avoid the jurisdiction and process of the court therein, such action constitutes a fleeing from justice, which, under this section, takes away from him the privilege of pleading the statute of limitations, and, until he submits himself to such jurisdiction, the statute does not run in his favor as against prosecution for any offense charged to have been previously committed in said district. *U. S. v. Greene,* (1906) 146 Fed. 803, *affirmed* (C. C. A. 1907) 154 Fed. 401.

Person resisting extradition.—Although, under the extradition treaty of 1890 between Great Britain and the United States and the laws of Canada, a person whose extradition is sought by the United States from the

Dominion of Canada has the right to oppose his extradition by legal proceedings, he is nevertheless, during the pendency of such proceedings, a person fleeing from justice, within the meaning of this section. *U. S. v. Greene,* (1906) 146 Fed. 803, *affirmed* (C. C. A. 1907) 154 Fed. 401.

To constitute one a "person fleeing from justice," so as to prevent the running of the statute of limitations against a prosecution for a criminal offense against the United States under this section, it is not necessary that he should have left the United States, but it is sufficient that he had left the district in which the offense was committed when it was sought to apprehend him therefor, and was found in another district, in which he did not reside, under circumstances indicating a purpose to evade the authority of the courts having jurisdiction. *Greene v. U. S.,* (1907) 154 Fed. 401, 85 C. C. A. 251.

E. J. M.
1/26/12







